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G.S., Appellant)	
)	
and)	Docket No. 12-1243
)	Issued: November 26, 2012
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PATROL, Del Rio, TX,)	
Employer)	
)	

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On May 17, 2012 appellant filed a timely appeal from the April 10, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed between the last merit decision of OWCP, dated February 4, 2011, and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit case.

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 22, 2010 appellant, then a 32-year-old border patrol agent, filed a traumatic injury claim alleging that he sustained injury to his right shoulder and arm on December 22, 2010 when he was thrown off a snowmobile while performing patrol duties.

The record contains an Authorization for Examination and/or Treatment form (Form CA-16) signed on December 22, 2010 by appellant's supervisor. The form also was signed on December 22, 2010 by Shelly Barton, an attending nurse practitioner, who checked a "yes" box to indicate that the diagnosis of right shoulder tendinitis was caused or aggravated by the reported injury, falling off a snowmobile.

Appellant submitted the findings of magnetic resonance imaging (MRI) scan performed on his right shoulder on January 4, 2011. In a January 27, 2011 report received by OWCP on February 4, 2011, Dr. Ivan Tsutskiridze, an attending Board-certified internist, discussed appellant's reported accident on December 22, 2010 and stated, "[Appellant] has no history of any other right shoulder injury or pain. It is believed that his acute pain is a result of this recent injury."

In a February 4, 2011 decision, OWCP denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an injury in the performance of duty on December 22, 2010.²

Appellant submitted a February 16, 2011 report, in which Dr. Jesse Sabiiti, an attending Board-certified internist, noted that appellant reported being involved in a snowmobile accident on December 22, 2010. Dr. Sabiiti diagnosed right shoulder supraspinatus tendinopathy and chest wall pain and stated, "This seems to be related to recent trauma."

In a February 23, 2011 report, Dr. Dawn D. Mattern, an attending Board-certified family practitioner, noted that appellant reported his December 22, 2010 snowmobile accident. He indicated that examination revealed deformity at the right pectoralis major. In a December 1, 2011 report, Dr. Mattern discussed appellant's medical history and stated, "In my opinion his pectoralis major tear was due to his trauma of the snowmobile accident and in no way, shape or form was caused by any other activities."

In a March 20, 2012 letter, appellant requested reconsideration of OWCP's February 4, 2011 decision. He asserted that in November 2011 he made an inquiry to OWCP as he "had not heard anything since January 2011." Appellant indicated that, at the time, he was made aware that his claim had been denied and that he should provide evidence in support of his claim within a year. He stated that in December 2011 he requested a letter from his physician in support of his claim and noted that he submitted this letter in December 2011 to OWCP. Appellant indicated that, from the very beginning of the claims process, he was receiving correspondence from OWCP on a regular basis, but had not been notified that his claim had been denied. On the date that OWCP received his March 20, 2012 statement, it also received two form reports, a

² OWCP mentioned receiving the Form CA-16 and the MRI scan report, but did not mention receiving the January 27, 2011 report of Dr. Tsutskiridze.

December 22, 2010 First Report of Injury and a December 27, 2012 Doctor's Report of Injury, as well as copies of previously submitted medical reports.

In an April 10, 2012 decision, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error in OWCP's February 4, 2011 decision. It found that his reconsideration claim was untimely filed. OWCP found appellant's claim, that he did not receive its February 4, 2011 decision, was not established by the evidence of record. It found that the medical evidence did not show clear evidence of error in OWCP's February 4, 2011 decision. An OWCP claims examiner noted:

"I also reviewed the case to determine if clear evidence of error on the part of [OWCP], the information reviewed was medical evidence which was submitted after the decision was made and not a part of the case record at the time of the decision; therefore, I found that [OWCP] did not error in the prior determination and the evidence submitted after the fact does not represent clear evidence of error on the part of [OWCP]."

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁵ OWCP regulations and procedure provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ This entails a limited review by OWCP of

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Id.* at 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedure further provides that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated).

⁷ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁹

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹⁰

In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulation to make findings of fact.¹¹ OWCP's procedure further specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."¹² These requirements are supported by Board precedent.¹³

ANALYSIS

In its April 10, 2012 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on March 20, 2012, more than one year after OWCP's February 4, 2011 decision denying his claim for a December 22, 2010 work injury.¹⁴

Appellant alleged in his March 20, 2012 reconsideration request that he did not receive a copy of OWCP's February 4, 2011 decision. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. The Board notes that this presumption arises in the present case because OWCP's February 4, 2011 decision was properly addressed and duly mailed to the address of record.¹⁵ Appellant has not submitted any evidence rebutting this presumption and thus it is presumed that he received the decision. Because the March 20, 2012 reconsideration request was filed more than one year after OWCP issued its February 4, 2011 decision, it is untimely and to obtain a merit review he must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

In its April 10, 2012 decision, OWCP also found the medical evidence that appellant submitted in connection with his March 20, 2012 reconsideration request did not show clear

⁹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁰ *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

¹¹ 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

¹² See Federal (FECA) Procedure Manual, *supra* note 6, *Disallowances*, Chapter 2.1400.4 (March 1997).

¹³ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁴ OWCP denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an injury in the performance of duty on December 22, 2010.

¹⁵ See *supra* note 10.

evidence of error in its February 4, 2011 decision. Appellant submitted a number of medical reports in support of his reconsideration request, but OWCP did not provide any discussion of these reports. OWCP did not provide any explanation of why it determined that these medical reports did not show clear evidence of error in its February 4, 2012 decision. Given this circumstance, appellant would not understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁶ Therefore, OWCP did not provide adequate facts, findings and reasoning in denying appellant's reconsideration request.

For these reasons, the case shall be remanded to OWCP in order for it to evaluate the evidence submitted by appellant and to provide facts and findings, with reasoning, regarding whether the evidence shows clear evidence of error in OWCP's February 4, 2012 decision denying appellant's claim for a December 22, 2010 work injury. After such development that it deems necessary, OWCP shall issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. The case is remanded to OWCP for further development of this matter.

¹⁶ See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: November 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board