

**United States Department of Labor
Employees' Compensation Appeals Board**

WILLIAM SPEARS, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Hazelwood, MO, Employer**

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**Docket No. 05-1359
Issued: November 17, 2005**

Appearances:
William Spears, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 13, 2005 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated March 9, 2005, denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated October 1, 1998 and the filing of this appeal on June 13, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2) but has jurisdiction over the nonmerit issue.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal before the Board on three occasions. In an October 18, 2002 decision, the Board affirmed the Office's April 25 and December 11, 2001 decisions which denied appellant's untimely January 20 and September 7, 2001 requests for

reconsideration and found that they failed to present clear evidence of error.¹ On October 30, 2003 the Board issued an order remanding case to the Office for reconstruction and proper assemblage of the case record as it did not contain a complete copy of an Office decision dated July 9, 2003 which denied appellant's June 19, 2003 request for reconsideration. The Board ordered the Office to issue a *de novo* decision on appellant's claim to preserve his right of appeal to the Board.² In a January 26, 2005 order, the Board granted the Office's motion to set aside a November 20, 2003 decision which denied appellant's June 19, 2003 request for reconsideration. The Board remanded the case to the Office to determine whether appellant's untimely request for reconsideration presented clear evidence of error.³ The Board also granted the Office's motion to cancel a scheduled oral argument.⁴ The facts and the history relevant to the present issue are hereafter set forth.

On February 19, 1998 appellant, then a 43-year-old machine distribution clerk,⁵ filed an occupational disease claim alleging that his left wrist carpal tunnel syndrome was caused by factors of his federal employment.⁶ By decision dated October 1, 1998, the Office found the evidence of record insufficient to establish that appellant sustained an injury causally related to factors of his federal employment. In letters dated January 20 and September 7, 2001, appellant requested reconsideration. By decisions dated April 25 and December 11, 2001, respectively, the Office denied appellant's requests for reconsideration on the grounds that they were untimely filed and failed to present clear evidence of error.

¹ Docket No. 02-1052 (issued October 18, 2002).

² Docket No. 03-2007 (issued October 30, 2003).

³ In the November 20, 2003 decision, the Office denied appellant's June 19, 2003 request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence not previously considered by the Office. On appeal the Director of the Office contended that the standard of review should have been whether appellant's untimely request for reconsideration presented clear evidence of error as the last merit decision in the case was issued on October 1, 1998.

⁴ Docket No. 04-592 (issued January 26, 2005).

⁵ The record reflects that appellant's employment was terminated by the employing establishment on March 14, 1995.

⁶ Prior to the instant claim, appellant filed a traumatic injury claim on September 27, 1992 alleging that on that date he hurt his right hand when a bundle of mail fell on it. By letter dated July 8, 1993, the Office accepted his claim for a volar plate avulsion fracture of the right index finger. On December 6, 1992 appellant filed an occupational disease claim alleging that he developed carpal tunnel syndrome and a scapholunate ligament tear of the right wrist due to use of his right upper extremity at work. On June 10, 1993 the Office accepted his claim for carpal tunnel syndrome and a scapholunate ligament tear of the right wrist. By decision dated February 2, 1995, the Office granted appellant a schedule award for a 56 percent permanent impairment of the right upper extremity. In a January 6, 1998 decision, the Office denied appellant's claim for a schedule award for additional permanent impairment of the right upper extremity. By decisions dated January 15, 1999 and February 5, 2001, an Office hearing representative affirmed the January 6, 1998 decision. The Office denied appellant's February 5, 2001 request for reconsideration by decision dated December 11, 2001. In a July 30, 2002 decision, the Office found that appellant did not have more than a 56 percent permanent impairment of the right upper extremity. On September 12, 2003 a hearing representative issued a decision which affirmed the Office's July 30, 2002 decision.

Following the Board's October 18, 2002 decision, appellant, in a June 19, 2003 letter, requested reconsideration of the Office's October 1, 1998 decision. He contended that he was confused about the date of injury for his claim. Appellant stated that contrary to the Office's statement that there was no evidence of him reporting his left wrist condition, his condition was reported to the Office while working for the employing establishment by Dr. Donald L. Pruitt, his attending Board-certified orthopedic surgeon, who submitted a January 21, 1994 medical report.⁷ He noted that Dr. Pruitt's report accompanied his request.

After the Board's January 26, 2005 order remanding case, the Office issued a March 9, 2005 decision. In this decision, the Office denied appellant's June 19, 2003 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. The Office reviewed appellant's case files regarding his alleged left wrist injury and employment-related right upper extremity injuries and found no evidence establishing that he sustained a left wrist condition causally related to his federal employment.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁸ does not entitle a claimant to a review of an Office decision as a matter of right.⁹ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹⁰

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹² The evidence must be positive, precise and explicit

⁷ In the January 21, 1994 report, Dr. Pruitt opined that appellant probably suffered from impingement syndrome of the left shoulder and mild tendinitis of the left lateral epicondyle. He stated that, since this was the first time he had been consulted about appellant's left shoulder, it was difficult to relate his problems to the accepted employment-related right shoulder injuries. Dr. Pruitt noted that appellant's left shoulder problems had been previously treated by Dr. Michael J. Spezia, an orthopedic surgeon, and stated that he wished to review Dr. Spezia's findings before making a determination regarding causal relation. He found that appellant's employment-related right wrist condition had healed following surgery and he released him to return to light-duty work, but appellant disagreed due to pain in his right wrist and left shoulder.

⁸ 5 U.S.C. § 8128(a).

⁹ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ 20 C.F.R. § 10.607(b).

¹² *Nancy Marcano*, 50 ECAB 110, 114 (1998).

and must be manifest on its face that the Office committed an error.¹³ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by the Office of 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 the Office.¹⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁸

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁹

The last merit decision in this case was issued by the Office on October 1, 1998 which found that appellant failed to establish that his left wrist condition was caused by factors of his federal employment. As his June 19, 2003 letter requesting reconsideration was made more than one year after the Office's October 1, 1998 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's finding that he failed to establish that he sustained a left wrist injury causally related to factors of his federal employment. The Board notes that this issue is medical in nature.

¹³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁴ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁹ *Larry L. Litton*, 44 ECAB 243 (1992).

In support of his request for reconsideration, appellant submitted a letter in which he contended that he was confused about the date of his alleged left wrist injury. The Board finds that appellant's contention does not demonstrate clear evidence of error as it does not specifically address whether he sustained an injury causally related to factors of his employment.

Appellant also contended that the Office was informed about his left wrist injury by Dr. Pruitt's January 21, 1994 medical report. He discussed his opinion that Dr. Pruitt's report was sufficient to establish his claim. The Board has held that evidence of the nature of any disabling condition and its relationship to a particular employee's work can only be given by a physician fully acquainted with the relevant facts and circumstances of the employment injury and the medical findings.²⁰ As a lay person, appellant is not competent to render a medical opinion and, therefore, his opinion has no probative value on a medical issue.²¹ Moreover, it does not appear that appellant submitted Dr. Pruitt's report in support of his June 19, 2003 reconsideration request.

As the arguments submitted by appellant on reconsideration do not raise a substantial question as to the correctness of the Office's denial of his claim for his left wrist condition, the Board finds that he has failed to meet his burden of proof.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

²⁰ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

²¹ See *James A. Long*, 40 ECAB 538 (1989).

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 17, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board