

exposure to lung irritants consisting of cold air temperatures and internal air conditioning airflow currents. He stopped work on January 17, 2006 and returned to work on February 16, 2006. The employing establishment controverted the claim.

In a February 16, 2006 statement, appellant noted that, 11 days before the date of injury, he had conjunctivitis and a flu viral infection, for which he took sick leave to avoid the extreme cold temperatures and changing weather conditions at work. He further noted returning to work on January 13, 2006 with no flu symptoms. Appellant indicated that on January 17, 2006 he worked in an interior and exterior area with cold temperatures. His supervisor advised that he remove his jacket as it violated the uniform regulation. Appellant reported subsequently feeling cold in his chest whereby he sustained “bronchospasms” and began coughing, choking and had difficulty breathing. He reported being taken to the hospital where he was diagnosed with lung failure from taking off his jacket and exposure to cold air at work. Appellant also submitted several witness statements verifying the January 17, 2006 work incident and supporting that he experienced cold working conditions.

Hospital reports dated January 17, 20 and 24, 2006 noted appellant’s complaint of chest congestion and chest pain. The reports also found bronchopulmonary infection, fever and bronchio spasm. In a January 18, 2006 report, Dr. Teresa Alfonso, an internist, noted appellant’s complaint of chest pressure and burning while in a cold area at work. She diagnosed chest pain syndrome possibly related to respiratory issues, hypertension, hyperlipidemia, obesity and seizure disorder.

The Office advised appellant of the factual and medical evidence necessary to establish his claim and allowed him 30 days to submit additional evidence. In an undated statement, appellant noted that the employing establishment and the Office mishandled his claim and violated the Federal Employees’ Compensation Act and its implementing regulations. He also submitted diagnostic test results and several treatment notes dated between January 19 and 27, 2006 from Dr. Jose M. Birriel, a pulmonary specialist, who diagnosed asthmatic bronchitis, bronchopulmonary infection, high blood pressure and obesity.

In a June 21, 2006 decision, the Office denied appellant’s claim finding that he did not demonstrate that the claimed medical condition related to established work-related events.

In a July 19, 2006 statement, appellant requested a review of the written record. He also noted that he had been approved for continuation of pay but had not been paid or informed about it. Appellant reiterated his belief that the Office mishandled his claim. He stated that other coworkers had documented claims of having the flu from working in extremely cold temperatures. Appellant further reiterated that exposure to cold caused his claimed lung condition and that the medical evidence sufficiently established causal relationship.

In an October 23, 2006 decision, an Office hearing representative affirmed the June 21, 2006 decision finding the medical evidence insufficient to establish causal relationship between appellant’s employment environment and his diagnosis.

In January 2007, appellant submitted several medical reports pertaining to a 2003 head injury and seizure disorder.

On October 31, 2007 the Office received an undated reconsideration request from appellant, who listed medical documents he was attaching. No envelope bearing a postmark for the request is in the record. With this request, appellant submitted an October 31, 2006 report from Dr. Birriel who noted treating appellant since January 20, 2006 for acute bronchial asthma secondary to exposure to 40-degree weather temperatures without a jacket. Dr. Birriel opined that it was medically proven that changing weather conditions could trigger asthma attacks. Appellant also submitted work restriction notes dated October 20 and November 7, 2006.

In subsequent telephone conversation memoranda, the Office noted that appellant indicated that he had requested reconsideration in October 2007. It notified him through both letter and telephone that there was no reconsideration request of record.

In a letter dated October 24, 2007 and received by the Office on October 2, 2008, appellant requested reconsideration. He also indicated that previous denials of his claim were an abuse of discretion as there was “more than enough medical evidence” to establish causal relationship. Appellant further indicated that exposure to cold temperatures at work without a jacket caused his lung failure. He reiterated that the Office mishandled his claim and violated the Act and U.S. laws. Appellant also noted that, due to the stress of the claim, he decided to forget about it and allow it to go inactive. He further noted that, days before the one-year time limitation elapsed, he decided to file for reconsideration. Appellant stated that the claims examiner demonstrated bias against him and increased his burden of proof for submission of evidence. He also asserted that he had previously submitted a reconsideration request and supported his assertion by attaching a return receipt showing that the Office received a mailing from him on October 30, 2007. Appellant also submitted a certified mail receipt addressed to the Office’s address for reconsideration requests with an October 24, 2007 postmark.

In an October 27, 2008 decision, the Office denied appellant’s reconsideration request as untimely filed. It further found that there was no evidence or arguments submitted that showed clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.¹ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.² 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.³

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607; *see also D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

³ *Veletta C. Coleman*, 48 ECAB 367 (1997).

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ Its procedures state that the Office 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 the Office.⁵ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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 raise a substantial question as to the correctness of the Office's decision. 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.⁷

ANALYSIS

The Board finds that the Office properly found that appellant filed an untimely request for reconsideration. The one-year period for requesting reconsideration begins on the date of the original decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.⁸ The Board notes that the Office's procedures, at Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. The Office's procedures provide that timeliness is determined by

⁴ *A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

⁵ *E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009).

⁶ *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008).

⁷ *Id.*

⁸ *Leon D. Faidley*, 41 ECAB 104, 111 (1989). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004).

the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.⁹

The envelope containing appellant's initial reconsideration request was not retained in the record. Also, the initial request was undated and not received by the Office until October 31, 2007. This is more than one year after the October 23, 2006 decision. Appellant contacted the Office about the status of his reconsideration request when the Office did not acknowledge the request. In documents received by the Office on October 2, 2008, he submitted what appears to be a more complete version of the reconsideration request that the Office previously received on October 31, 2007. This request was dated October 24, 2007 and appellant submitted a certified mail receipt with an October 24, 2007 postmark for a document mailed to the Office to support the date of mailing of his request. While his submissions that were received by the Office on October 2, 2008 are consistent with mailing his reconsideration request on October 24, 2007 and are consistent with the reconsideration request received on October 31, 2007, they are insufficient to establish that the reconsideration was timely filed. Even assuming, consistent with the evidence submitted by appellant, that his reconsideration request was dated and postmarked on October 24, 2007, his request was untimely as it was not submitted within one year of the October 23, 2006 decision.¹⁰

In computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.¹¹ Therefore, the one-year time period following the October 23, 2006 decision began to run on the day after the decision, on October 24, 2006 and ran through October 23, 2007.¹² Consequently, appellant's October 24, 2007 reconsideration request was not submitted within one year of the October 23, 2006 decision.

The Board also finds that appellant did not submit any evidence with his reconsideration request that raises a substantial question concerning the correctness of the Office's October 27, 2008 decision and establishes clear evidence of error. In an October 24, 2007 statement, appellant noted that working in cold temperatures caused his diagnosed condition and that he submitted "more than enough" medical evidence to establish causal relationship. Additionally, he asserted that the Office mishandled his claim and that the claims examiner demonstrated bias against him and increased his burden of proof. However, these are broad and general statements that do not specifically address the relevant issue, which is medical in nature, regarding whether appellant sustained a traumatic injury on January 17, 2006 due to exposure to cold temperatures.

⁹ 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, *supra* note 8.

¹⁰ An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date. 20 C.F.R. § 10.607(a).

¹¹ *John B. Montoya*, 43 ECAB 1148 (1992).

¹² October 23, 2007 fell on a Tuesday and was not a legal holiday.

Moreover, appellant's arguments are not supported by any additional evidence submitted to the record. Thus, his statement does not raise a substantial question as to the correctness of the Office's decision

In an October 31, 2006 report, Dr. Birriel diagnosed acute bronchial asthma secondary to exposure to 40-degree weather temperatures without a jacket. He opined that it was medically proven that changing weather conditions could trigger asthma attacks. Although Dr. Birriel's October 31, 2006 report supports causal relationship, it does not establish clear evidence of error as the physician's opinion generally relating asthma to changing weather conditions did not explain how this specifically applied to appellant's asthma condition. The Board notes that the term clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ Additionally, the work restriction forms dated October 20 and November 7, 2006 as well as the treatment notes pertaining to appellant's 2003 head injury do not raise any substantial questions as to the correctness of the October 23, 2006 merit decision as none address the issue of causal relationship for the claimed January 17, 2006 injury.

On appeal, appellant asserts that the Office's October 27, 2008 decision is an abuse of discretion and error of law as he had timely filed his reconsideration request. As noted, the evidence demonstrates that his reconsideration request was filed after the one-year time period had elapsed. Appellant also asserted that, due to his health problems, he required additional time to file all required documents and exhibits to the Board for the current appeal. However, the Board may only review evidence that was in the record at the time the Office issued its final decision.¹⁴

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

¹³ *Supra* note 4.

¹⁴ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated October 27, 2008 is affirmed.

Issued: December 1, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board