

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

J.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kissimmee, FL, Employer**

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**Docket No. 09-2178
Issued: April 15, 2010**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2009 appellant filed a timely appeal of a July 28, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year has elapsed from the last merit decision dated April 11, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On April 19, 2007 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim. On April 12, 2007 he experienced a twinge in his back when he stood up, lifting empty mail tubs after squatting to transfer mail to his hand cart. Appellant's supervisor noted on the claim form that he did not work on April 12, 2007.

By decisions dated June 5 and September 5, 2007 and April 11, 2008, the Office denied appellant's claim for a back injury on April 12, 2007 finding that he did not establish fact of injury. It found that there were inconsistencies in the evidence which cast serious doubt on whether he sustained a work-related back injury at the time, place and in the manner alleged.¹

On May 12, 2009 appellant requested reconsideration. He asked the Office to combine his claim for a back injury on April 12, 2007 with his previous claim for a herniated disc under OWCP File No. xxxxxx783 and to accept his herniated disc as work related. Appellant contended that his back condition was a progression of his January 28, 2005 herniated disc.² He submitted an April 25, 2009 report in which Dr. Michael G. Degnan, an attending family practitioner, opined that appellant's January 28, 2005 back injury caused a herniated disc.³

By decision dated July 28, 2009, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error in the April 11, 2008 decision.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴ 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.⁵

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated May 12, 2009, more than one year after the Office's April 11, 2008 merit decision and, therefore, is not timely. The issue to be determined is whether appellant demonstrated clear evidence of error in the Office's April 11, 2008 decision.

¹ The Office noted that appellant had a separate claim accepted for a lumbar sprain on January 28, 2005 under OWCP File No. xxxxxx783. On July 10, 2006 he filed an occupational disease claim, alleging that he sustained a herniated disc as a result of the January 28, 2005 accepted lumbar sprain. His claim was denied by the Office on November 29, 2006 and August 22, 2007.

² As noted, the Office did not accept a herniated disc in the previous claim. The only accepted condition was a back sprain.

³ Appellant indicated in his May 12, 2009 reconsideration request that he was enclosing a December 6, 2008 statement. However, this statement is not of record.

⁴ 20 C.F.R. § 10.607.

⁵ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

The Office's merit decision of April 11, 2008 denied appellant's claim for a back injury on April 12, 2007. On May 12, 2009 appellant submitted an April 25, 2009 report in which Dr. Degnan opined that appellant's January 28, 2005 back injury caused a herniated disc. Dr. Degnan did not address the issue of whether appellant met his burden of proof to establish fact of injury on April 12, 2007 at the time, place and in the manner alleged. Therefore, his report does not raise a substantial question as to the correctness of the Office's April 11, 2008 merit decision or establish clear evidence of error.

Appellant also noted that his 2007 claim should be combined with his 2005 claim. He filed his April 12, 2007 claim as a new traumatic injury based on lifting activities that date. Appellant's request for combining his case files does not establish clear evidence of error in the Office's denial of appellant's April 12, 2007 traumatic injury claim.

Because appellant's untimely request for reconsideration did not demonstrate clear evidence of error in the April 11, 2008 merit decision, the Office properly denied his untimely request for reconsideration.

On appeal, appellant contends that he established fact of injury through Dr. Degnan's April 25, 2009 report and a statement by appellant referred to in Dr. Degnan's report. His statement to Dr. Degnan is not of record and Dr. Degnan's report does not otherwise address the claimed April 12, 2007 incident. Appellant has not established clear evidence of error in the Office's April 11, 2008 decision. The Office properly denied his untimely reconsideration request in its July 28, 2009 decision.

CONCLUSION

The Board finds that the Office properly denied his request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the April 11, 2008 merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2009 is affirmed.

Issued: April 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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