

FACTUAL HISTORY

On May 14, 2007 appellant, then a 38-year-old mail carrier, filed an occupational disease claim alleging that his neck, back, knees, ankles, shoulders and hand pain conditions were employment related. He stated that he first became aware of his condition and that it was not until April 17, 2007 that he realized it was employment related.

In a letter dated June 8, 2007, the Office informed appellant that the evidence of record was insufficient to support his claim and advised him of the medical and factual evidence required to support his claim. Appellant was given 30 days to provide the requested information. No information was received by the Office within the allotted time.

By decision dated July 12, 2007, the Office denied appellant's claim on the grounds that he failed to establish fact of injury in his occupational disease claim.

Subsequent to the decision, the Office received medical and factual information including an April 25, 2007 magnetic resonance imaging (MRI) scan of his left knee; reports dated April 18 and May 2, 2007 from Dr. Ian J. Reynolds, an examining Board-certified orthopedic surgeon; information regarding carrier's work duties and responsibility; and appellant's undated statement attributing his conditions to the repetitive duties of his work. Dr. Reynolds, in an April 18, 2007 report, diagnosed multiple pains of unknown etiology. In his May 2, 2007 report, Dr. Reynolds diagnosed degenerative changes as a result of ordinary life and recommended that appellant remain off work until his left knee surgery was performed.

On July 23, 2007 appellant requested reconsideration. In support of his request, he submitted a July 19, 2007 report from Dr. Andrew K. Lee, an examining Board-certified orthopedic surgeon with a subspecialty of hand surgery. Dr. Lee, based on a review of objective evidence and a physical examination, noted that appellant worked as a mail carrier and diagnosed bilateral carpal tunnel syndrome, resolving bilateral hand tenosynovitis, bilateral pronator syndrome, right shoulder impingement syndrome, bilateral wrist degenerative joint disease and bilateral meniscal knee tears. He concluded that these conditions were due to appellant's work activities.

By decision dated September 24, 2007, the Office denied modification of the July 12, 2007 decision.

Following the issuance of the September 24, 2007 decision, the Office received April 24, 2007 MRI scans of the both elbows and lumbar spine; April 23, 2007 MRI scans of the cervical spine and both shoulders; April 25, 2007 MRI scans of the both wrists and both knees; a July 5, 2007 report from Dr. Joseph Dang, an examining Board-certified physiatrist, diagnosing right carpal tunnel syndrome; and reports dated July 19 and October 23, 2007 from Dr. Lee. In his October 23, 2007 report, Dr. Lee noted appellant's occupation as a mail carrier and diagnosed bilateral carpal tunnel syndrome, bilateral pronator syndrome, right shoulder impingement syndrome, bilateral wrist osteoarthritis and right knee lateral and medial meniscal tear. He again opined that these conditions were employment related.

On October 23, 2007 appellant requested reconsideration and submitted an April 30, 2007 bone scan from Dr. Javier Villanueva Meyer, an examining physician, in support of his request. Dr. Meyer diagnosed mild arthritic changes in the shoulder joints and patellofemoral knee joints.

By decision dated May 18, 2008, the Office found the medical evidence established the conditions of bilateral carpal tunnel syndrome and right knee meniscus tear, but insufficient to establish a causal relationship between the diagnosed conditions and appellant's employment. Thus, it modified the denial of the claim to reflect that appellant failed to establish that the diagnosed conditions were employment related. In an attached statement of appeal rights, the Office notified appellant that, if he had any additional evidence or legal argument that he believed would establish his claim, he could request in writing that the Office reconsider its decision. It advised that any such request must be made within one calendar year of the date of the decision and must be accompanied by relevant evidence not previously submitted. The Office attached an appeal request form which instructed appellant how to make an application for reconsideration and where to send it.

Appellant requested assistance from a Congressman with his compensation claim and signed an authorization form. In a November 13, 2008 letter, a congressional representative stated that appellant had contacted his office "concerning his plight with Workers' Compensation." He requested the Office to review appellant's claim "and provide information that will help resolve his concerns." In a reply dated November 28, 2008, the Office summarized appellant's case history and noted that on May 18, 2008, the Office modified the denial of appellant's claim to reflect that causal relationship had not been established. It noted that appellant would have to exercise the appeal rights mentioned in that decision if he believed that he had met his burden of proof.

On June 5, 2009 the Office received appellant's written June 2, 2009 reconsideration request and a June 27, 2008 report from Dr. Lee, who provided an employment history, physical findings and noted that he reviewed MRI scans. Dr. Lee diagnosed bilateral carpal tunnel syndrome and bilateral pronator syndrome. He concluded by stating that it was his opinion that these conditions were employment related.

By decision dated July 2, 2009, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that he did not present clear evidence of error by it.² It found Dr. Lee's report was repetitive of his prior reports in that he merely restated his opinion.

² The Board notes that, following the July 2, 2009 nonmerit decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *M.B.*, 60 ECAB ___ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

The Federal Employees' Compensation Act³ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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.⁷ The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁸ 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.⁹

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely request for reconsideration. The Office procedures provide that the one-year time limitation

³ 5 U.S.C. § 8101 *et seq.*

⁴ 20 C.F.R. § 10.605.

⁵ *Id.* at § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009).

⁹ *See W.G.*, 60 ECAB ____ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

period for requesting reconsideration begins on the date of the original Office decision.¹⁰ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹¹

The last decision on the merits of appellant's case was the Office's May 18, 2008 decision modifying the denial of his claim to reflect that the evidence established the conditions of bilateral carpal tunnel syndrome and right knee meniscus tear, but was insufficient to establish causal relationship. Appellant had one year from the date of that decision to request reconsideration from the Office. The attached statement of appeal rights properly notified him of this time limitation and, together with the attached appeal request form, instructed appellant how to prepare an application for reconsideration and where to send it. Appellant did not follow these instructions. These were the same instructions he successfully followed when he made his July 23 and October 23, 2007 applications for reconsideration. The Office granted those applications and reopened his case for a review on the merits, but in the calendar year following the Office's May 18, 2008 merit decision, appellant did not complete the appeal request form, did not send it to the Office at the address given on that form, did not write reconsideration request on the outside of the envelope and did not submit pertinent new and relevant evidence not previously submitted. He corresponded instead with his congressional representative. It was not until June 2, 2009 that appellant sent the Office an application for reconsideration. As he made this application more than 12 months after the Office's May 18, 2008 merit decision, the Board finds that the Office properly found that the application was untimely.

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 did not establish that the diagnosed conditions were causally related to his employment. Appellant has not established clear evidence of error by the Office in this regard. He did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

In support of his request for reconsideration, appellant submitted a June 27, 2008 report from Dr. Lee, who diagnosed bilateral carpal tunnel syndrome and bilateral pronator syndrome, which he attributed to appellant's employment duties. However, this evidence is insufficient to establish that the Office erred in its denial of appellant's claim. Dr. Lee did not provide any medical rationale explaining his conclusion that appellant's conditions were employment related. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed well-rationalized medical report which, if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.¹² Dr. Lee's report does not raise a substantial question as to the correctness of the Office's May 15, 2008 merit decision or demonstrate clear evidence of error. The Office properly found that appellant's reconsideration does not establish clear evidence of error.

¹⁰ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

¹¹ *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

On appeal appellant contends that the Office failed to consider Dr. Lee's June 27, 2008 report when it denied his request for reconsideration. He also contends that prior to joining the employing establishment he had no injuries or medical conditions. Contrary to appellant's contention, the Office did consider Dr. Lee's report in its July 2, 2009 nonmerit decision and found the report repetitive of his prior reports. Appellant's contention that he had no medical condition prior to his work at the employing establishment fails to establish clear evidence of error. The Board has held the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹³

CONCLUSION

The Board finds that the Office 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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2009 is affirmed.

Issued: June 22, 2010
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

¹³ *Roy L. Humphrey*, 57 ECAB 238 (2005).