United States Department of Labor
Employees' Compensation Appeals Board

H.L., Appellant	)	
and	)	**Docket No. 10-797**
	)	**Issued: November 18, 2010**
U.S. ARMY CORPS OF ENGINEERS, McNARY DAM, Umitilla, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 4, 2010 appellant filed a timely appeal of an August 4, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than one year elapsed from the last merit decision dated October 16, 2007 to the filing of this appeal, the Board lacks jurisdiction over the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

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.

[1] For final Office decisions issued prior to November 19, 2008, claimants had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final Office decisions issued on and after November 19, 2008, claimants have 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e) (2009).

FACTUAL HISTORY

On September 11, 2007 appellant, then a 59-year-old plant mechanic, filed an occupational disease claim alleging that he developed a right wrist condition due to federal employment activities over a 25-year period.[2] He first realized that his wrist condition was causally related to his employment on June 4, 2007.

Appellant submitted a June 4, 2007 report from Dr. James M. Severance, Board-certified in the field of emergency medicine, who described a work-related twisting injury, which occurred on May 29, 2007 and diagnosed sprained right wrist and chronic degenerative wrist injury.

In an October 16, 2007 decision, the Office denied appellant's claim, finding that the medical evidence did not establish a causal relationship between his claimed wrist condition and factors of employment.

In a November 5, 2007 letter to the Office, appellant contended that the October 16, 2007 decision was sent erroneously, since the Office did not have all relevant medical evidence in its possession at the time the decision was issued. He asked the Office to contact him to discuss its intended course of action. Appellant stated:

> "I am not sure what else I need to do at this point to have my claim fairly and professionally processed at this particular office. I am NOT; repeat NOT going through your enclosed Appeals Rights at this point. What I want is someone to contact me, by phone at a prearranged day and time, or through a letter, that shows me you have honestly and fairly considered all my medical information. I don't feel at this time that you have. After this forthcoming contact from your office I will then consider my options to appeal my rights to a fair hearing of some sort; I have not decided which one I will use yet. As far as I am concerned, any time-frames you have with the appeals of rights have not started yet, due to this first hastily-made-decision letter I have received. I am neither requesting a hearing at this point nor a request for reconsideration by the District Office. I want to make that clear, since things do seem to get a little 'screwed up' unless it is very clear and in 'black-and-white.' I am sorry, I don't know how else to say it."

Appellant submitted an October 22, 2007 report from Dr. John A. Durkan, a Board-certified orthopedic surgeon, who stated that he had engaged in work activities that had placed a great deal of stress on the right wrist, including using a percussion hammer and other tools. Dr. Durkan noted the development of arthritic changes in the wrist joint, "which could reflect progressive trauma to the wrist with secondary development of arthrosis."

In a letter dated January 4, 2008, the Office responded to appellant's correspondence, advising him to consider filing an appeal of the October 16, 2007 decision if he was not satisfied

[2] The Office accepted appellant's May 30, 2007 traumatic injury claim for right wrist strain File No. xxxxxx711. It combined File No. xxxxxx711 with File No. xxxxxx703 for more efficient handling.

with the outcome.[3] It advised him to "be cautious that there are timeframes that must be adhered to when filing an appeal."

On April 29, 2009 appellant requested reconsideration of the October 16, 2007 decision. He alleged that he had not received the Office's January 4, 2008 letter and would have responded if he had received it. Appellant was unable to contact Office personnel to discuss his case. He stated:

> "I basically thought that when the rest of the information got to OWCP (Dr. Durkan's letter) that OWCP would look at it and then hopefully reconsider their decision and not have to formally file for appeals. I realize now that is not the way the reconsideration/appeals process works at the OWCP. This was an error on my part and I am truly sorry for the decision I made at that time."

Appellant contended that the Office was on notice that he would be submitting a report from Dr. Durkan; however, it prematurely denied his claim prior to receiving a relevant report.

Appellant submitted additional medical evidence from Dr. Durkan. In a March 31, 2009 duty status report, Dr. Durkan stated that appellant sustained a right wrist injury on May 29, 2009 in the performance of duty. In an April 20, 2009 report, he opined that the development of degenerative joint disease in appellant's right wrist was caused by long periods of vibrations, impacts and repetitious use and over-use of his hands and wrists over the past 27 years of employment.

Appellant submitted a statement describing the work activities claimed to have caused his right wrist condition. He provided a June 4, 2007 computerized tomography scan of the right upper extremity, a June 4, 2007 report of a right wrist x-ray and a copy of Dr. Severance's June 4, 2007 report. In an April 15, 2008 form report, Dr. Kate Flannigan Sawyer, an employing establishment physician, noted that appellant had permanent restrictions due to a right wrist injury.

By decision dated August 4, 2009, the Office denied appellant's April 29, 2009 request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[4] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[5] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

[3] The Board notes that the Office's January 4, 2008 letter was mailed to appellant's address of record.

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

[5] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[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 denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

The Office correctly found that appellant's request for reconsideration was untimely. 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.[10] Appellant had one year from October 16, 2007 to submit a timely request for reconsideration. As his April 29, 2009 reconsideration request was made more than one year after the October 16, 2007 merit decision, the request was untimely. Consequently, appellant must establish clear evidence of error by the Office in denying his claim.[11]

In certain instances, the Board has held that a letter may constitute a request for reconsideration even if it does not contain the word reconsideration.[12] The Office's procedures provide that while no special form is required, the request must be in writing, identify the decision and the specific issues, for which reconsideration is being requested and be accompanied by relevant new evidence or argument not considered previously.[13] The record in this case contains correspondence and medical evidence submitted by appellant subsequent to the Office's decision denying his claim. The Board finds, however, that none of the statements submitted within one year of the October 16, 2007 decision constituted a valid request for reconsideration.

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[6] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[7] *See M.L.*, 60 ECAB ___ (Docket No. 09-956, issued April 15, 2010). *See Leona N. Travis*, *supra* note 5.

[8] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[9] *Pete F. Dorso*, 52 ECAB 424 (2001).

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

[11] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[12] *See Jack D. Johnson*, 57 ECAB 593 (2006); *Gladys Mercado*, 52 ECAB 255 (2001); *Richard J. Chabot*, 43 ECAB 357 (1991).

[13] Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.2(a) (May 1996); *Vincente P. Taimanglo*, 45 ECAB 504 (1994); *see also* 20 C.F.R. §§ 10.605 and 10.606(b).

In a November 5, 2007 letter, appellant asked the Office to contact him so that he could ascertain whether the medical evidence of record had been fully considered. He noted, however, that he was not availing himself of his rights of appeal, including a hearing or reconsideration by the Office. On January 4, 2008 the Office advised appellant to consider filing an appeal of the October 16, 2007 decision if he was not satisfied with the outcome, cautioning him that there are timeframes that must be adhered to when filing an appeal. Appellant did not immediately heed the Office's advice. Rather, he delayed in filing his request for reconsideration until April 29, 2009, more than one year after the date of the Office's merit decision.[14]

As noted, 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.[15] Appellant contended that the Office prematurely denied his claim. He noted that he had great difficulty understanding the appeal process and hoped that the Office would review his case without the necessity of filing a request for reconsideration. These contentions do not establish error on the part of the Office. The Office properly advised appellant of his appeal rights, which included the right to request reconsideration within one year of the October 16, 2007 decision. Appellant did not elect to make a timely request. The Board finds that his arguments are insufficient to raise a substantial question concerning the correctness of the Office's decision

Subsequent to the October 16, 2007 decision, appellant submitted three reports from Dr. Durkan. On October 22, 2007 Dr. Durkan stated that appellant had engaged in work activities that had placed a great deal of stress on the right wrist, including using a percussion hammer and other tools. He noted that the development of arthritic changes in the wrist joint, "[which] could reflect progressive trauma to the wrist with secondary development of arthrosis." On April 20, 2009 Dr. Durkan opined that the development of degenerative joint disease in appellant's right wrist was caused by long periods of vibrations, impacts and repetitious use and over-use of his hands and wrists over 27 years of employment. In a March 31, 2009 duty status report, he stated that appellant sustained a right wrist injury on May 29, 2009 in the performance of duty. Although Dr. Durkan's reports generally support appellant's claim, they fail to raise a substantial question as to the correctness of the Office's decision. 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.[16]

[14] Appellant contends that he did not receive the Office's January 4, 2008 letter. The Board notes, however, that the letter was properly mailed to appellant at his address of record. Under the "mailbox rule," 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. *Michele Lagana*, 52 ECAB 187, 189 (2000).

[15] *A.F.*, 59 ECAB 714 (2008).

[16] *Joseph R. Santos*, 57 ECAB 554 (2006).

Appellant also submitted a statement describing the work activities claimed to have caused his right wrist condition, June 4, 2007 radiograph reports and a work status report from Dr. Sawyer. As none of these documents contains a medical opinion on causal relationship, they are not relevant to the issue at hand. Dr. Severance's June 4, 2007 report is duplicative and does not demonstrate error on the part of the Office.

On appeal, appellant asserts that the Office did not discuss all medical evidence of record in rendering its final decision. The Board finds, however, that the Office properly reviewed and considered the evidence of record, which it determined did not establish clear evidence of error. Appellant also alleges that the Office delayed the processing of his request for reconsideration. The Board notes that the Office issued a decision on his request for reconsideration within 90 days of the request. The Board finds this timeframe to be reasonable and without prejudice to appellant.[17]

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. Thus, the evidence and argument submitted by appellant are insufficient to show clear evidence of error on the part of the Office.[18]

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.

[17] The Office's procedures state that, if a reconsideration decision is delayed beyond 90 days and the delay would jeopardize a claimant's ability to seek a merit review of his claim before the Board, the Office should conduct a merit review and issue a decision so as to protect appellant's right to appeal. *See* Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.9 (May 1996); *see also Ronald A. Eldridge*, 53 ECAB 218 (2001).

[18] The Board notes that appellant submitted additional evidence after the Office rendered its August 4, 2009 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 4, 2009 is affirmed.

Issued: November 18, 2010
Washington, DC

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

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

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