

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

L.P., Appellant

and

**U.S. POSTAL SERVICE, SAN BERNARDINO
P & DC, San Bernardino, CA, Employer**

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**Docket No. 10-710
Issued: October 12, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 21, 2010 appellant filed a timely appeal from a July 29, 2009 decision of the Office of Workers' Compensation Programs that denied his request for reconsideration as it was untimely filed and did not establish clear evidence of error. As the last merit decision is dated February 22, 2006, the Board lacks jurisdiction to review the merits of appellant's claim.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the January 21, 2010 decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error. On appeal appellant asserts that he did not receive a February 22, 2006 decision denying his claim for a left hand condition and that, because the Office paid for left upper extremity surgery, his claim had been accepted and he was therefore entitled to a schedule award.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On January 3, 2006 appellant, then a 60-year-old mail handler, filed an occupational disease claim alleging that employment duties of handling mail over a 20-year period caused nerve and muscle damage to his left hand.² In letters dated January 9, 2006, the Office informed appellant of the type of evidence needed to support the claim and requested that the employing establishment respond. Appellant submitted a December 5, 2005 request for occupational therapy for his right index finger. By decision dated February 22, 2006, the Office denied appellant's claim for his left hand on the grounds that the medical evidence did not establish that he sustained an employment-related injury. On May 2, 2006 appellant filed an occupational disease claim alleging that his mail handler duties caused left elbow nerve entrapment that caused pain from the elbow to the left index finger, diminished grip power and muscle loss. He submitted an operative report dated May 24, 2006 noting that he had a left ulnar neuroplasty at the elbow with partial medial epicondylectomy for left cubital tunnel syndrome.

A telephone memorandum dated July 2, 2007 indicates that the Office informed the employing establishment that a left upper extremity claim had not been accepted. On December 23, 2008 appellant filed a schedule award claim for his left upper extremity. By letter dated January 12, 2009, the Office informed appellant that he was not entitled to a schedule award under this claim because it had been denied in a February 22, 2006 decision. In a March 3, 2009 letter, appellant asserted that he did not receive the February 22, 2006 decision, that all medical bills for his left upper extremity had been paid, and that an Office claims examiner informed him that the instant claim was merged with Office file number xxxxxx142.³ On April 28, 2009 he requested reconsideration, asserting that an injury compensation specialist at the employing establishment informed him that his claims were merged and noted that the Office had not responded to his request for prosthesis for the tip of his right index finger. Appellant attached a prescription slip from Dr. Barry E. Watkins, Board-certified in orthopedic and hand surgery, requesting a prosthetic tip for appellant's right index finger.⁴

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

² Appellant has an accepted claim, adjudicated under Office file number xxxxxx142, for an injury that occurred on November 28, 2005 when the tip of his right index finger was amputated by a cancelling machine. An amputation revision was performed in the emergency room that day, and he had additional right upper extremity surgery on March 27, 2006. Appellant received continuation of pay and wage-loss compensation under this claim, and had an additional procedure for resection of radial and ulnar neuromas of the right index finger on August 2, 2006. He returned to modified duty on September 5, 2006. On December 23, 2008 appellant filed a schedule award claim and submitted an October 30, 2007 report in which Dr. Barry E. Watkins, Board-certified in orthopedic and hand surgery, advised that he had a 14 percent right upper extremity impairment and a 28 percent left upper extremity impairment. By decision dated February 17, 2009, appellant was granted a schedule award for 14 percent right upper extremity impairment, and in July 29, 2009 decision, the Office denied his reconsideration request. He did not file an appeal of this schedule award with the Board.

³ *Id.*

⁴ *Id.*

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁵ 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.⁶ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁷ Its procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of its regulations,⁸ if the claimant's application for review shows "clear evidence of error" on the part of the Office. 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.⁹

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 to merely 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 be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁰

Office procedures note that 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 that a schedule award was miscalculated). Evidence such as 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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.¹²

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁸ 20 C.F.R. § 10.607.

⁹ *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *James R. Mirra*, 56 ECAB 738 (2005).

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

ANALYSIS

The Board finds that as, more than one year had elapsed from the date of issuance of the merit decision in this case on February 22, 2006, appellant's request for reconsideration on April 28, 2009, was untimely filed. Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for disability compensation.¹³ The Board also finds that appellant failed to establish clear evidence that the February 22, 2006 decision of the Office was in error.

While appellant argues on appeal that he did not receive the February 22, 2006 decision, the Board has long held that, in the absence of evidence to the contrary, correspondence properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule."¹⁴ The record in this case shows that the February 22, 2006 decision was mailed to appellant's address of record in San Bernardino, California. Appellant has submitted, and the record contains no evidence to the contrary, such as a notice that the decision was returned to the Office as undelivered by the post office.¹⁵

Appellant also asserts that he was told by the Office and an employing establishment injury compensation specialist that the claims for his right and left upper extremity were doubled. A search of both case records fails to show that this was done or that a left upper extremity condition was accepted as employment related. Appellant further asserts that, because the medical expenses for his left upper extremity were paid by the Office, it shows that this condition was accepted. The fact that the Office authorized and paid for some medical treatment does not establish that the condition for which appellant received treatment was employment related.¹⁶ Appellant thus failed to establish clear evidence of error regarding these assertions, and the prescription slip submitted regarding his right index finger is irrelevant to this claim for a left hand condition.

The clear evidence of error is intended to represent a difficult standard and the medical evidence provided here is not the type of positive, precise and explicit evidence which manifested on its face that the Office committed an error.¹⁷ As appellant submitted no probative medical evidence and his arguments are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the February 22, 2006 Office decision, appellant has not established that the Office committed error by its February 22, 2006 decision.¹⁸ The Board therefore finds that, in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the argument submitted by appellant with his April 28, 2009 reconsideration request to ascertain whether it demonstrated

¹³ 20 C.F.R. § 10.607(b).

¹⁴ *W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008).

¹⁵ *See M.U.*, 60 ECAB ____ (Docket No. 09-526, issued September 14, 2009).

¹⁶ *Glen E. Shriner*, 53 ECAB 165 (2001).

¹⁷ *Id.*

¹⁸ *G.H.*, 58 ECAB 183 (2006).

clear evidence of error in the February 22, 2006 decision and correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.¹⁹

CONCLUSION

The Board finds that, as appellant's April 28, 2009 reconsideration request was not timely filed and that he failed to establish clear evidence of error, the Office properly denied a merit review of his claim by its July 29, 2009 decision.²⁰

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 12, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008).

²⁰ The Board notes that the record contains an occupational disease claim for a left elbow injury that has not been adjudicated by the Office. The Board's jurisdiction extends only to the review of final decisions by the Office. *E.L.*, 59 ECAB ____ (Docket No. 07-2421, issued March 10, 2008). Appellant also requested that the prosthesis for his right index finger be authorized. This is not relevant to the instant claim for a left hand condition.