

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

K.V., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
OKLAHOMA AIR LOGISTICS CENTER,
TINKER AIR FORCE BASE, OK, Employer**

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**Docket No. 15-74
Issued: March 20, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 14, 2014 appellant filed a timely appeal from the April 21, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. Since more than 180 days has elapsed between OWCP's most recent merit decision on May 9, 2012 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether appellant's reconsideration request was timely filed and failed to establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 26, 2010 appellant, a 65-year-old machine tool operator, filed an occupational disease claim alleging that his severe hearing loss,² back pain, and right arm/elbow pain and swelling were a result of his federal employment.

OWCP denied appellant's claim in decisions dated May 11, 2010, May 6, December 15, 2011, and May 9, 2012. It accepted that he performed repetitive duties lifting engine parts weighing approximately 50 pounds, but found that the medical evidence did not establish that this activity caused an injury. The medical opinions submitted did not provide a complete and accurate history, including appellant's activity raising mules and working four to six hours a week since he retired in 2007. The physicians provided insufficient rationale to support that the diagnosed cumulative lumbar sprain/strain, cumulative lumbar osteoarthritis, and right elbow lateral epicondylitis were causally related to the specific work duties to which appellant was last exposed in March 2007.

Appellant submitted additional evidence on May 21, 2013. He resubmitted a copy of a January 3, 2011 report from Dr. M. Stephen Wilson, an orthopedic surgeon specializing in injury evaluation and rehabilitation, who evaluated appellant with respect to injuries sustained to his right elbow and lumbar spine "as a result of cumulative work-related activities." Appellant's job duties required activity that caused pain in his back and right elbow, including cranking tailstock, on which he turned a heavy crank for eight hours a day for several days a week, and continuous lifting of heavy engine parts weighing approximately 50 pounds on a daily basis. He stated that he began experiencing the pain in March 2007, the month he retired. Dr. Wilson opined that appellant had sustained an injury to his right elbow and lumbar spine as the result of cumulative work-related activities. "In my opinion, these injuries arose out of, and are causally connected to the above-described occupational trauma within a reasonable degree of medical certainty."

OWCP had previously received Dr. Wilson's January 3, 2011 report on February 7, 2011 and reviewed that report in its May 6, 2011 decision. It found that he had not provided a complete and accurate history. Dr. Wilson offered no discussion of appellant's retirement in 2007 or the physical demands of raising mules. Also, he provided no medical explanation of how the diagnosed conditions resulted from appellant's employment since he was last exposed to work factors in March 2007.

Appellant resubmitted a copy of a January 27, 2012 report from Dr. Don R. Barney, an osteopath, who noted appellant's work history and retirement in 2007. The history that appellant gave him was that of operating a lathe and cranking the tailstock. "The angle that he was in with his body to move the crank put undue stress on the right side of his body causing pain in his right elbow and in his lumbar spine." Dr. Barney noted that appellant repeated this procedure multiple times during his employment. He explained that, while working on this oversized lathe, appellant had repeated microtrauma to his elbow and lumbar spine, which caused injury. Appellant stated that he had pain and discomfort in his back and elbow due to the continual lifting until his retirement.

² Appellant has an accepted hearing loss claim for which a schedule award has already been awarded. OWCP File No. xxxxxx364.

OWCP previously received Dr. Barney's January 27, 2012 report on May 1, 2012 and addressed that report in its May 9, 2012 decision. It noted that it was a duplicate of a report dated June 4, 2011, which OWCP had received on November 30, 2011 and reviewed on December 15, 2011. In its December 15, 2011 decision, OWCP had found Dr. Barney's report to be of no probative value since it did not provide a complete factual and medical history, and did not provide a medical explanation of how the conditions were a result of appellant's employment since his last exposure to work factors in March 2007.

On May 21, 2013 OWCP received copies of other reports that also had previously been submitted and reviewed.

Also on May 21, 2013 appellant submitted a May 8, 2013 statement from a coworker who was talking to appellant in late March 2007 when the injury occurred. The coworker stated that appellant was operating the same lathe a few days later and injured his back.

On April 15, 2014 OWCP received an appeal request form indicating with an "X" that appellant was requesting reconsideration. Appellant submitted a copy of OWCP's May 9, 2012 decision and a copy of OWCP's April 8, 2014 correspondence, which noted that he had submitted a congressional inquiry, but had not exercised his appeal rights.

In a decision dated April 21, 2014, OWCP denied appellant's reconsideration request. It found that the request was untimely and did not present clear evidence of error in its most recent merit decision. OWCP noted that the medical reports received after its May 9, 2012 decision duplicated reports that were previously received and already taken into consideration.

Appellant argues that he has met all five of the basic elements for his claim, especially causal relationship. He advised OWCP on more than one occasion that he had a witness to his injuries. Appellant asks for his claim to be approved. He submitted a witness statement together with a number of medical reports.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."³

OWCP, 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

³ 5 U.S.C. § 8128(a).

application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁶

ANALYSIS

The Board has no jurisdiction to review the merits of appellant’s occupational disease claim. The most recent decision on the merits of his claim was OWCP’s May 9, 2012 decision denying modification of its prior decision. Appellant had 180 days to appeal the May 9, 2012 decision to the Board, but he did not do so. The Board therefore lacks jurisdiction to review it.

Appellant filed his October 14, 2014 appeal within 180 days of OWCP’s April 21, 2014 nonmerit decision denying reconsideration. The Board may therefore review that decision. However, the only issue the Board may review is whether the reconsideration request was timely filed and failed to show clear evidence of error.⁷

Appellant’s reconsideration request was untimely. OWCP issued its most recent merit decision on May 9, 2012. As the appeal rights attached to that decision explained, any reconsideration request had to be received by OWCP within one calendar year, or by May 9, 2013. The reconsideration request OWCP received on April 15, 2014 was therefore untimely.

Because appellant’s reconsideration request was untimely, OWCP would reopen his case only if the request demonstrated clear evidence of error in the May 9, 2012 decision. Appellant’s request, however, made no argument for error and presented no evidence. He submitted a copy of OWCP’s May 9, 2012 decision and a copy of OWCP’s April 8, 2014 letter noting that he had not exercised his appeal rights. Nothing accompanying his request demonstrated clear evidence of error in OWCP’s most recent merit decision. On its face, then, appellant’s request was insufficient.

OWCP conducted a limited review of all the medical reports it had received since its May 9, 2012 decision, as the denial of appellant’s claim rested on a finding that the medical

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

⁶ *Id.* at Chapter 2.1602.5.b.

⁷ Appellant’s appeal identifies a July 25, 2014 decision, but the record shows that it was not a final decision but merely an informational letter. 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions of OWCP in any case arising under FECA).

opinion evidence was insufficient to establish the critical element of causal relationship. The medical reports it received were duplicates of reports previously submitted and previously considered in denying appellant's claim. In earlier decisions, OWCP had discussed each of these reports and explained the reason each was insufficient to establish causal relationship.

The Board thus finds that the reconsideration request received on April 15, 2014 was untimely and failed to demonstrate clear evidence of error in OWCP's May 9, 2012 denial of appellant's claim. Accordingly, the Board will affirm OWCP's July 25, 2014 decision denying his request.

Appellant notes that he had a witness to his injuries, but a witness statement will not establish that he sustained an injury in the performance of duty. The issue upon which OWCP denied his claim was causal relationship, which is a medical issue. The evidence needed to establish causal relationship is rationalized medical opinion evidence, not the statement of a witness. In prior decisions, OWCP reviewed the medical opinions provided by Dr. Wilson, the orthopedic surgeon, and Dr. Barney, the osteopath. It explained the reasons those opinions were not sufficient to establish causal relationship.

Appellant has submitted a number of medical reports on appeal. The Board's review is limited to the evidence that was before OWCP at the time of its April 21, 2014 nonmerit decision.⁸ The Board, therefore, lacks jurisdiction to review new evidence. The Board has conducted a limited review of the medical evidence OWCP received following its May 9, 2012 merit decision, and has found that this evidence does not establish, on its face, that the May 9, 2012 decision was erroneous.

CONCLUSION

The Board finds that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error.

⁸ 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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