

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

W.S., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Hazelwood, MO, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 06-1403
Issued: February 16, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 13, 2006 appellant filed a timely appeal from a May 17, 2006 nonmerit decision of the Office of Workers' Compensation Programs, denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated October 1, 1998 and the filing of this appeal on June 13, 2006, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2) but has jurisdiction over the nonmerit issue.

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 establish clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal before the Board on four occasions. In an October 18, 2002 decision, the Board affirmed the Office's April 25 and December 11, 2001 decisions, which denied appellant's untimely January 20 and September 7, 2001 requests for

reconsideration and found that they failed to establish clear evidence of error.¹ On October 30, 2003 the Board issued an order remanding case to the Office for reconstruction and proper assemblage of the case record as it did not contain a complete copy of an Office decision dated July 9, 2003, which denied appellant's June 19, 2003 request for reconsideration. The Board ordered the Office to issue a *de novo* decision on appellant's claim to preserve his right of appeal to the Board.² In a January 26, 2005 order, the Board granted the Office's motion to set aside a November 20, 2003 decision, which denied appellant's June 19, 2003 request for reconsideration. The Board remanded the case to the Office to determine whether appellant's untimely request for reconsideration established clear evidence of error.³ The Board also granted the Office's motion to cancel a scheduled oral argument.⁴ By decision dated November 17, 2005, the Board denied appellant's untimely June 19, 2003 request for reconsideration and found that it failed to establish clear evidence of error.⁵ The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The facts and the history relevant to the present issue are hereafter set forth.

On February 19, 1998 appellant, then a 43-year-old machine distribution clerk,⁶ filed an occupational disease claim. He alleged that his left wrist carpal tunnel syndrome was caused by factors of his federal employment.⁷ By decision dated October 1, 1998, the Office found the evidence of record insufficient to establish that appellant sustained an injury causally related to factors of his federal employment. By decisions dated April 25 and December 11, 2001 and

¹ Docket No. 02-1052 (issued October 18, 2002).

² Docket No. 03-2007 (issued October 30, 2003).

³ In the November 20, 2003 decision, the Office denied appellant's June 19, 2003 request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence not previously considered by the Office. On appeal, the Director of the Office contended that the standard of review should have been whether appellant's untimely request for reconsideration presented clear evidence of error as the last merit decision in the case was issued on October 1, 1998.

⁴ Docket No. 04-592 (issued January 26, 2005).

⁵ Docket No. 05-1359 (issued November 17, 2005).

⁶ The record reflects that appellant's employment was terminated by the employing establishment on March 14, 1995.

⁷ Prior to the instant claim, appellant filed a traumatic injury claim on September 27, 1992 alleging that on that date he hurt his right hand when a bundle of mail fell on it. By letter dated July 8, 1993, the Office accepted his claim for a volar plate avulsion fracture of the right index finger. On December 6, 1992 appellant filed an occupational disease claim alleging that he developed carpal tunnel syndrome and a scapholunate ligament tear of the right wrist due to use of his right upper extremity at work. On June 10, 1993 the Office accepted his claim for carpal tunnel syndrome and a scapholunate ligament tear of the right wrist. By decision dated February 2, 1995, the Office granted appellant a schedule award for a 56 percent permanent impairment of the right upper extremity. In a January 6, 1998 decision, the Office denied appellant's claim for a schedule award for additional permanent impairment of the right upper extremity. By decisions dated January 15, 1999 and February 5, 2001, an Office hearing representative affirmed the January 6, 1998 decision. The Office denied appellant's February 5, 2001 request for reconsideration by decision dated December 11, 2001. In a July 30, 2002 decision, the Office found that appellant did not have more than a 56 percent permanent impairment of the right upper extremity. On September 12, 2003 a hearing representative issued a decision which affirmed the Office's July 30, 2002 decision.

March 9, 2005, the Office denied appellant's January 20 and September 7, 2001 and June 19, 2003 requests for reconsideration, respectively, on the grounds that they were untimely filed and failed to present clear evidence of error.

Following the Board's November 17, 2005 decision, appellant submitted a February 8, 2006 medical report of Dr. Paul R. Manske, a Board-certified orthopedic surgeon, who reiterated his prior opinion set forth in reports dated February 19 and September 1, 1998 that appellant's left wrist carpal tunnel syndrome was caused by his employment. Dr. Manske stated that this diagnosis was based on appellant's history, his findings on physical examination and a positive nerve conduction test. He further stated that the relationship between appellant's condition and his employment was based on medical records from Dr. Jacques S. Van Ryn, a Board-certified orthopedic surgeon, who opined that appellant's left wrist condition was caused by factors of his employment and Dr. Donald L. Pruitt, a Board-certified orthopedic surgeon, and Michael J. Spezia, a family practitioner, who opined that appellant's left wrist condition was caused by increased use following surgery for his employment-related right wrist conditions. Dr. Manske opined that the known work-related injuries to both wrists and increased use of the left wrist subsequent to the necessary surgery on the right wrist in the early 1990s contributed to appellant's left carpal tunnel syndrome.

In a letter dated February 12, 2006 and received by the Office on February 23, 2006, appellant requested reconsideration. He contended that the correct date of his injury was June 3, 1988. Appellant stated that he sustained a dorsal flexion stress injury while trying to toss a bundle of heavy newspapers. He reported this injury on June 3, 1988. Appellant described the development of his left wrist condition and notice he provided to the employing establishment regarding this injury. Appellant concluded that he was totally disabled from any type of work.

Appellant submitted a duplicate copy of an unsigned and incomplete report dated September 1, 1998, which he claimed was authored by Dr. Manske who noted that he made a mistake regarding his statement in a February 28, 1998 evaluation that appellant's left hand became symptomatic two years ago. Dr. Manske stated that appellant had ongoing pain in his left wrist intermittently and it flared up in 1995 presumably due to the decreased ability to use his right upper extremity. He further stated that a nerve conduction test was compatible with carpal tunnel syndrome on the left and appellant had radial scaphoid osteoarthritis on the left, which was symptomatic and led to his problems. Dr. Manske related that appellant believed his carpal tunnel syndrome was caused by repetitive work duties, which was supported by medical authorities.

Appellant also submitted a duplicate copy of Dr. Van Ryn's August 19, 1988 report, which stated that appellant had a scapholunate strain. He noted his medical treatment plan and physical restrictions. Dr. Van Ryn stated that appellant may perform his regular work duties.

A duplicate copy of Dr. Pruitt's July 31, 1992 report found that appellant sustained scapholunate space widening of the wrist and an avulsion fracture of the base of the middle phalanx most consistent with a volar plate injury. Dr. Pruitt opined that, although appellant could not recall a specific injury, it looked relatively recent, within the last one to two months.

By decision dated May 17, 2006, the Office found that appellant's letter requesting reconsideration was dated February 23, 2006, more than one year after the Office's October 1, 1998 decision and was untimely. The Office found that appellant did not submit evidence to establish clear evidence of error in the prior decision finding that he did not sustain a left wrist condition causally related to his federal employment.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁸ does not entitle a claimant to a review of an Office decision as a matter of right.⁹ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹⁰

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of

⁸ 5 U.S.C. § 8128(a).

⁹ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Id.* at § 10.607(b).

¹² *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁴ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

the claimant and raise a substantial question as to the correctness of the Office decision.¹⁷ 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.¹⁸

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁹

The last merit decision in this case was issued by the Office on October 1, 1998. It found that appellant failed to establish that his left wrist condition was caused by factors of his federal employment. As his February 23, 2006 letter requesting reconsideration was made more than one year after the Office's October 1, 1998 merit decision, the Board finds that it was not timely filed.

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 failed to establish that he sustained a left wrist injury causally related to factors of his federal employment. The Board notes that this issue is medical in nature.

In support of his February 23, 2006 request for reconsideration, appellant submitted Dr. Manske's February 8, 2006 report, which reiterated his prior opinion that appellant's left carpal tunnel syndrome, was causally related to his employment. Duplicate copies of reports from Drs. Manske, Van Ryn and Pruitt dated September 1 and August 19, 1998 and July 31, 1992, respectively, which stated that appellant sustained left carpal tunnel syndrome and scapholunate osteoarthritis on the left. Dr. Manske opined that appellant's conditions were work related. The Board notes that the Office had weighed this medical evidence submitted and found it to be insufficient to establish that appellant sustained a left wrist injury causally related to factors of his federal employment. The Board finds that the submission of the reports from Drs. Manske, Van Ryn and Pruitt are insufficient to shift the weight of the evidence in favor of appellant's claim as they are duplicative of that already of record.²⁰

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 *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁹ *Larry L. Litton*, 44 ECAB 243 (1992).

²⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2006 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: February 16, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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