

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

V.C., Appellant)

and)

**DEPARTMENT OF THE NAVY, PEARL
HARBOR NAVAL SHIPYARD,
Pearl Harbor, HI, Employer**)

Docket No. 09-334

Issued: August 12, 2009

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2008 appellant filed a timely appeal from an August 28, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated May 14, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On March 28, 2007 appellant, a 50-year-old office automation assistant, filed an occupational disease claim alleging that he developed numbness, tingling and a shocking feeling radiating down to his low back, shoulders, arms, hands and fingers, as a result of employment activities. He stated that he first realized that his condition was causally related to employment factors on March 3, 2007.

On April 9, 2007 the Office informed appellant that the information and evidence submitted was insufficient to establish that his claimed medical condition was related to employment activities. It advised appellant to submit a physician's report containing a diagnosis and an opinion as to how his claimed condition was related to employment factors.

Appellant submitted an undated statement alleging that his duties at the employing establishment since 1978 caused his alleged back and radicular conditions. His duties included pushing, pulling and carrying heavy equipment, bending, twisting, reaching and standing and carrying 20-pound bags.

Appellant submitted reports from Dr. Paul J. Smith, Board-certified in the field of occupational medicine. On April 12, 2007 Dr. Smith diagnosed degenerative lumbar intervertebral disc disease and left lower extremity paresthesias. He noted that appellant was experiencing increased pain associated with new job activities. On April 24, 2007 Dr. Smith reiterated his diagnosis and opined that appellant was able to work full time with restrictions.

By decision dated May 14, 2007, the Office denied appellant's claim. It found that appellant had not submitted sufficient medical evidence to establish that his claimed back condition was causally related to established work events.

On May 21, 2008 appellant submitted an appeal request form requesting reconsideration of the Office's May 14, 2007 decision. He also submitted an undated letter requesting reconsideration, which was received by the Office on June 9, 2008. The lower portion of the letter contained several "date stamps," including a May 8, 2008 date stamp, in which the number "8" was crossed out and replaced with a number "12." The letter also contains a partially illegible date stamp, reflecting the date: "May 21, 2008." Appellant stated that his current position required him to work in a cold environment, which aggravated and caused numbness, tingling and a shocking feeling radiating to his shoulders, fingers and back. He also claimed to be experiencing constant back spasms.

On April 12, 2007 Dr. Smith stated that appellant presented for evaluation of bilateral upper extremity, generalized mid back and generalized lower back problems, which he attributed to work activity, repetitive computer-related activities and exposure to the cold environment of computer room. Results of a neurological examination were grossly normal. Appellant's neck was supple without rigidity. Dr. Smith found tenderness in the lower back, normal muscle tone, no tremors and 5/5 strength. Testing revealed no decreased range of motion. Dr. Smith stated that additional testing was required for a determination of causation.

In follow-up reports dated May 23 and June 15, 2007, Dr. Smith stated that appellant was experiencing lower back pain associated with myospasm, which he experienced more frequently in a cold environment. He diagnosed degeneration of the lumbar intervertebral disc and paresthesia of the upper limbs and opined that appellant could work full time with restrictions. On July 27, 2007 Dr. Smith reiterated appellant's work restrictions and indicated that the employing establishment had accommodated his limitations due to his lower back condition.

On August 31, 2007 Dr. Smith repeated his diagnosis of low back pain and degeneration of lumbar intervertebral disc disease. He opined that while the cause of appellant's condition was shivering, which was a nonindustrial condition, but that the temperature extremes experienced in the work environment temporarily exacerbated his preexisting mid- to lower-back pain. Dr. Smith stated that appellant's condition was primarily subjective, with minimal objective substantiation. The record contains follow-up notes and work restrictions from him dated October 12 and December 10, 2007.

On December 10, 2007 Dr. Smith diagnosed paresthesia of the upper limb, bilateral hand numbness and tingling, low back pain and degeneration of the lumbar intervertebral disc. He opined that appellant's current upper extremity paresthesia had no association with the alleged work-related conditions. Dr. Smith noted that prior cervical films demonstrated significant degenerative changes of the cervical spine and that electrodiagnostic studies were negative for motor radiculopathy and peripheral entrapment problem.

Appellant submitted follow-up notes and restrictions from Dr. Smith dated January 18, March 29, May 3, June 13 and July 12, 2008, in which he reiterated his diagnoses and discussed work status. He also submitted copies of previously submitted reports from Dr. Smith, including reports dated April 12 and April 24, 2007.

The record contains a May 23, 2007 report of an electromyogram (EMG) scan and a nerve conduction study (NCS) from Dr. Coswink Saito, a Board-certified physiatrist, an April 12, 2007 report of a magnetic resonance imaging (MRI) scan of the cervical spine; and a January 19, 2008 report of an MRI scan of the cervical spine.

In a decision dated August 29, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

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.² The Office 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.³ In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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.⁴

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.⁵ Its procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.⁶ 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.⁷

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.⁸ It is not enough merely to 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 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 raise a substantial question as to the correctness of the Office's decision.⁹ 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.¹⁰

ANALYSIS

The Board has duly reviewed the case record and concludes that the Office properly determined that appellant's May 21, 2008 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

⁵ *Id.*

⁶ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ *Id.*

¹⁰ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

The Office properly determined that appellant failed to file a timely application for review. Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of decision for which review is sought.¹¹ In this case, the one-year time limitation began to run the day following the issuance of the May 14, 2007 decision, the most recent merit decision in the case.¹² The regulations further provide that the application will be deemed timely if postmarked within the time period allowed.¹³ The Office received appellant's undated letter requesting reconsideration on June 9, 2008. The appeal request form was dated May 21, 2008. The record does not include a copy of the envelope in which appellant submitted either document, or any other probative evidence of mailing, or receipt that would otherwise establish a timely filing.¹⁴ The letter was undated, the appeal request form was dated outside the one-year restriction and the record is devoid of any additional information that would render his request timely. Therefore, the Office properly relied on the May 21, 2008 date of the appeal request form, rendering the request untimely.¹⁵ Because appellant's request for reconsideration was dated more than one year after its May 14, 2007 merit decision, he must demonstrate clear evidence of error on the part of the Office in rendering its decision.¹⁶

In support of his request for reconsideration, appellant submitted medical reports from Dr. Smith for the period from April 12, 2007 through July 20, 2008. On April 12, 2007 Dr. Smith stated that he presented for evaluation of bilateral upper extremity, generalized mid back and generalized lower back problems, which he attributed to work activity, repetitive computer-related activities and exposure to the cold environment of computer room. On May 23 and June 15, 2007 he stated that appellant was experiencing lower back pain associated with myospasm, which he experienced more frequently in a cold environment. Dr. Smith diagnosed degeneration of the lumbar intervertebral disc and paresthesia of the upper limbs and opined that appellant could work full time with restrictions. On August 31, 2007 he opined that, while the cause of appellant's condition was shivering, which was a nonindustrial condition, the temperature extremes experienced in the work environment temporarily exacerbated his

¹¹ 20 C.F.R. § 10.607(a) (1999).

¹² See *Angel M. Lebron, Jr.*, 51 ECAB 488 (2000).

¹³ *Supra* note 11.

¹⁴ The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

On appeal, appellant contends that his request for reconsideration was timely filed, and that the Office did not respond to his first appeal letter. However, the Board is unable to determine the date of his letter requesting reconsideration from the information provided. Appellant failed to date his letter, and the unclear and undocumented date stamps do not constitute probative evidence of the date of mailing, or the date the letter was composed.

¹⁵ The Board notes that, had the Office relied instead on the date of receipt of appellant's letter (June 9, 2008), his request would have been untimely.

¹⁶ *Supra* note 11. See *Anna Marie Feeley*, Docket No. 05-1643 (issued October 17, 2005).

preexisting mid- to lower-back pain. On December 10, 2007 Dr. Smith diagnosed paresthesia of the upper limb, bilateral hand numbness and tingling, low back pain and degeneration of the lumbar intervertebral disc. He opined that appellant's current upper extremity paresthesias had no association with the alleged work-related conditions. In January 18, March 29, May 3, June 13 and July 12, 2008 follow-up notes, Dr. Smith reiterated his diagnoses and discussed work status.

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.¹⁷ None of the medical reports submitted manifests on its face that the Office committed an error in denying appellant's occupational disease claim.¹⁸ Rather, they are cumulative in nature, and merely repeat diagnoses and opinions previously provided. Thus, the reports are insufficient to establish clear evidence of error.

Appellant submitted a personal statement, reiterating his claim that working in a cold environment aggravated his back and radicular conditions. He also claimed to be experiencing constant back spasms statements. Appellant's reiteration of arguments previously presented to the Office, does not constitute clear evidence of error.

EMG/NCS reports and MRI scan reports submitted by appellant do not contain an opinion as to the cause of his diagnosed condition. As these reports do not address the issue that was before the Office in its May 14, 2007 decision, namely whether the established employment incidents caused or aggravated a diagnosed condition, they are irrelevant and therefore do not establish clear evidence of error.¹⁹

Appellant also submitted copies of medical documents which were previously considered by the Office. Material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim,²⁰ and lack sufficient probative value to *prima facie* shift the weight of the evidence in favor of him or to raise a substantial question as to the correctness of the Office's decision.²¹

¹⁷ *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁸ The Board notes that, in its March 12, 2002 decision, the Board modified the Office's September 13, 1999 decision to reflect that the evidence of record was sufficient to establish a compensable factor of employment, namely that appellant had been harassed by her supervisor, Ms. Hutchinson, who called her a whore. However, the Board determined that the medical opinion evidence submitted by appellant was not sufficiently rationalized to meet her burden of proof. Accordingly, the Board affirmed the Office's decision denying the claim, as modified.

¹⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992). (To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.)

²⁰ *Lawrence Ellis Myers*, 27 ECAB 262 (1976).

²¹ *Id.*

The Board finds that the evidence submitted does not constitute positive, precise and explicit evidence, which manifests on its face that an error was committed, and fails to raise a substantial question as to the correctness of the Office's May 14, 2007 decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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