

FACTUAL HISTORY

This case has previously been before the Board. By decision dated October 21, 2009, the Board affirmed an October 21, 2008 nonmerit decision denying appellant's request for reconsideration as it was not timely and did not show clear evidence of error.² The facts and circumstances surrounding the prior appeal are hereby incorporated by reference.

On November 28, 2009 appellant requested reconsideration. He argued that the Board found that the May 13, 2003 report of Dr. Robert D. Aikin, a Board-certified neurologist and a June 16, 2008 magnetic resonance imaging (MRI) scan study established error by the Office in finding that he had not established a recurrence of disability. Appellant further contended that he submitted evidence showing that mail was not delivered at his location. With his request for reconsideration, he submitted a copy of the last page of the Board's October 21, 2009 decision. The Board, after explaining why the May 13, 2003 report from Dr. Aiken and the June 16, 2008 MRI scan study did not show clear evidence of error, ended the paragraph with the statement, "Dr. Aiken's report and the MRI scan study do show that the Office committed an error in finding that appellant had not establish a recurrence of disability."

By decision dated March 2, 2010, the Office denied appellant's claim and the grounds that his request for reconsideration was untimely and insufficient to show clear evidence of error. It noted that the Board determined that he had not established clear evidence of error by the Office in finding that he did not establish a recurrence of disability on April 16, 2003. The Office further found that there was no evidence to support that appellant failed to receive the Office's April 21, 2006 decision.

On appeal, appellant contends that he requested reconsideration of the April 21, 2006 decision but that the Office did not address that issue. He questions why the Office applied the clear evidence of error standard when he requested reconsideration five weeks after the Board's October 21, 2009 decision. Appellant asserts that he is entitled to a merit review as the Office waited 92 days from the date he requested reconsideration to issue its March 2, 2010 decision.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.³ As such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the

² Docket No. 09-435 (issued October 21, 2008). The Office accepted that on July 29, 1985 appellant, then a 30-year-old letter carrier, sustained acute lumbar strain and a herniated L5 disc delivering mail. It began paying him compensation for four hours per day beginning September 6, 2002. In a decision dated November 29, 2005, the Office found that appellant failed to establish a recurrence of disability beginning April 16, 2003 due to his July 29, 1985 work injury. By decision dated April 21, 2006, the hearing representative affirmed the November 29, 2005 decision.

³ 5 U.S.C. §§ 8101-8193.

part of the Office 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. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁵ 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.⁶

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of its original decision.⁷ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁸ As appellant’s November 28, 2009 request for reconsideration was submitted more than one year after the last merit decision of record dated April 21, 2006, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.⁹

Appellant argued that the Board found that he had established clear evidence of error based on Dr. Aitkin’s May 13, 2003 report and a June 16, 2008 MRI scan study. He quoted a portion of the Board’s decision that indicated that the MRI scan study and Dr. Aitkin’s report found clear evidence of error. In its October 21, 2009 decision, the Board stated, “Dr. Aiken’s report and the MRI scan study do show that the Office committed an error in finding that appellant had not establish a recurrence of disability.” When read in the context of the rest of the paragraph and the decision as a whole, however, it is clear that the Board’s statement that the report and MRI scan study “do show” rather than “do not show” was a typographical error.

Appellant additionally asserted that mail was not reliably delivered to his address. The Board, on prior appeal, found that the Office’s April 21, 2006 decision was properly addressed and mailed in the ordinary course of business and that there was no evidence that it was not

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

⁶ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Robert F. Stone*, *supra* note 6.

⁹ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005). The Board’s decision dated October 21, 2009 was a nonmerit decision.

received. Appellant has not submitted any additional evidence showing that he did not receive the Office's April 21, 2006 decision. Thus, he has not established clear evidence of error by the Office in this regard.

On appeal, appellant questions why the Office applied the clear evidence of error standard when he requested reconsideration within five weeks of the Board's October 21, 2009 decision. As previously noted, the Office's procedures provide that a claimant has one year to request reconsideration from the date of the original Office decision.¹⁰ Appellant also has a right to reconsideration within one year of any subsequent merit decision on the issue.¹¹ The last merit decision in this case was issued April 21, 2006. Consequently, appellant's November 28, 2009 request was untimely and he is not entitled to merit review of this case absent a demonstration of clear evidence of error.

Appellant further contends that he is entitled to a merit review as the Office waited 92 days after his reconsideration request to issue its decision. Office procedure provides that, when an Office decision is delayed more than 90 days after a request for reconsideration is filed and the delay jeopardizes the claimant's right to merit review before the Board, the Office should conduct a merit review.¹² The Office, however, issued its last merit decision on April 21, 2006. There is no obligation to conduct a merit review if the maximum time limit for requesting review by the Board will have expired within the 90-day period following the Office's receipt of a claimant's request for reconsideration.¹³ Consequently, the Office did not jeopardize appellant's right to merit review by the Board in delaying beyond 90 days in issuing its decision.

Appellant additionally asserts that the Office considered whether he established reconsideration of the October 21, 2009 decision rather than the April 21, 2006 decision. The Office, however, properly considered his arguments and determined that he had not established clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

¹⁰ *Supra* note 7; *A.F.*, 59 ECAB 714 (2008).

¹¹ *See D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, *supra* note 6.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004); *Janice M. Hatcher*, 55 ECAB 155 (2003).

¹³ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.1602.9 (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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