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

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| **T.M., Appellant** | ) | |
| **and** | ) | **Docket No. 09-321** |
| | ) | **Issued: December 30, 2009** |
| **U.S. MARINE CORPS, MARINE CORPS LOGISTICS BASE, Albany, GA, Employer** | ) | |

*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 November 13, 2008 appellant filed a timely appeal from a June 19, 2008 nonmerit decision denying his request for a review of the written record and a July 16, 2008 nonmerit decision denying his request for reconsideration as it was untimely and failed to demonstrate clear evidence of error. He also appeals August 20 and October 15, 2008 nonmerit decisions denying his requests for review of the written record. As there is no merit decision issued within one year of the appeal, the Board lacks jurisdiction to review the merits of this case.[1]

### ***ISSUES***

The issues are: (1) whether the Office, in its June 19, 2008 decision, properly denied appellant's request for review of the written record under 5 U.S.C. § 8124; (2) whether it properly denied his request for reconsideration as it was untimely and did not establish clear evidence of error; and (2) whether the Office, in its August 20 and October 15, 2008 decisions, properly denied appellant's requests for review of the written record under section 8124.

[1] 20 C.F.R. 501.2(c), 501.3.

## ***FACTUAL HISTORY***

On August 7, 2001 appellant, then a 46-year-old heavy mobile mechanic, filed a claim alleging that on August 6, 2001 he sustained an injury to his lower left back and left leg in the performance of duty. The Office accepted the claim for lumbar strain.

On July 3, 2002 appellant filed a claim for a schedule award. In progress reports dated April 29 and July 22, 2002, Dr. J. Kenneth Burkus, a Board-certified orthopedic surgeon, found that he had no permanent impairment. By decision dated August 19, 2002, the Office denied appellant's claim for a schedule award.

On September 3, 2002 appellant requested a review of the written record. In a decision dated January 23, 2003, the Office hearing representative affirmed the August 19, 2002 decision.[2] The hearing representative noted that there was no medical evidence showing that appellant had a permanent impairment due to his August 6, 2001 injury to his lower back.

On April 11, 2007 appellant appealed to the Board. In an order dated April 28, 2008, the Board dismissed his appeal as there was no reviewable decision.[3]

On May 13, 2008 appellant requested a review of the written record.[4] He submitted a January 10, 2005 report from Dr. Patrick A. Griffith, a Board-certified neurologist, who diagnosed chronic post-traumatic back pain and right lumbosacral radiculopathy at L4-5 and S1. Dr. Griffith listed range of motion findings for the back and provided work restrictions. Appellant further submitted a September 21, 2001 pain management report and a September 29, 2004 magnetic resonance imaging (MRI) scan study. In a statement dated May 5, 2008, he noted that the Office denied his schedule award claim based on Dr. Burkus' April 29, 2002 report finding that he had no impairment. Appellant argued that the relevant issue was whether Dr. Burkus properly diagnosed his condition. He indicated that he was challenging the Board's order dismissing his appeal.

By decision dated June 19, 2008, the Office denied appellant's request for a review of the written record under section 8124. It noted that he had previously received a review of the written record and thus was not entitled to either an oral hearing or another review of the written record on the same issue. The Office exercised its discretion and found that the matter could be equally well addressed by appellant submitting evidence showing that he had a permanent impairment due to his August 6, 2001 employment injury.

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[2] The employing establishment terminated appellant effective December 13, 2004 for misconduct.

[3] Order Dismissing Appeal, Docket No. 07-1313 (issued April 28, 2008). In October 2004 appellant filed a recurrence of disability claim on July 20, 2004 causally related to his August 6, 2001 work injury. As he claimed new work factors, the Office adjudicated the claim as a new injury and assigned the file number xxxxxx141. The Board obtained the case records for file numbers xxxxxx141 and xxxxxx248 and noted that there was no decision of the Office issued within one year in either file number.

[4] On September 29, 2008 appellant filed an appeal with the Board of a purported April 29, 2008 Office decision. In an order dated September 29, 2008, the Board dismissed his appeal at his request. Order Dismissing Appeal, Docket No. 08-1575 (issued September 29, 2008).

On June 21, 2008 appellant requested reconsideration of a purported March 28, 2007 decision. In an accompanying statement, he discussed an April 18, 2002 injury. On June 25, 2008 appellant related that he was requesting reconsideration of a March 28, 2007 decision because his supervisor did not file his April 18, 2002 traumatic injury claim. He submitted medical evidence from 2001 and 2002. By letter dated July 3, 2008, the Office informed appellant that there was no decision dated March 28, 2007 in file number xxxxxx248. It requested that he clarify his request for reconsideration. In a July 10, 2008 response, appellant related that he wanted the Office to reopen file number xxxxxx248 for medical treatment. He further requested reconsideration of the January 23, 2003 hearing representative's decision based on evidence submitted July 1, 2008. Appellant submitted a February 6, 2002 MRI scan study of the lumbar spine.

By decision dated July 16, 2008, the Office denied appellant's request for reconsideration of its January 23, 2003 decision as the request was untimely and did not demonstrate clear evidence of error.

On July 26, 2008 appellant requested a review of the written record on the July 16, 2008 decision. He argued that his August 6, 2001 work injury caused more than a lumbar strain. Appellant also described other file numbers.[5]

By decision dated August 20, 2008, the Office denied appellant's request for a review of the written record as he had previously requested reconsideration under 5 U.S.C. § 8128.[6] It noted that he could again request reconsideration and submit evidence showing that he had a permanent impairment due to his work injury.

On August 22, 2008 appellant again requested a review of the written record regarding the July 16, 2008 decision. He maintained that the issue was whether he sustained a recurrence of disability due to his August 6, 2001 work injury.[7] By decision dated October 15, 2008, the Office denied appellant's request for a review of the written record as he had previously received reconsideration under section 8128.

On appeal appellant argues that his supervisor knowingly made his case appear fraudulent. He referenced an August 7, 2001 e-mail message from his supervisor challenging that he sustained an injury on August 6, 2001. Appellant also asserted that the employing establishment referred him to a physician who found that he could work when he should have placed him on light duty.

[5] On August 11, 2008 appellant requested that the Office reopen file number xxxxxx248 for medical treatment. In a statement dated August 12, 2008, he argued that it should have been adjudicated as a short form closure.

[6] The record indicates that on April 12, 2005 appellant was convicted of aggravated assault, terroristic threats and theft of government property on August 19, 2004 at the employing establishment.

[7] On September 10, 2008 appellant requested reconsideration of the July 16, 2008 merit decision.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8124(b)(1) of the Federal Employees' Compensation Act[8] provides that a claimant not satisfied with a decision of the Office is entitled, upon timely request, to a hearing before a representative of the Office.[9] The Office's regulations allow claimants to exercise this statutory right by requesting either an oral hearing or a review of the written record.[10] The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[11] Specifically, the Board has held that the Office has the discretionary authority to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period for requesting a hearing, and when the request is for a second hearing on the same issue.[12] The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.

## ***ANALYSIS -- ISSUE 1***

On August 19, 2002 the Office denied appellant's claim for a schedule award. On September 3, 2002 he requested a review of the written record. Following a review of the written record, in a decision dated January 23, 2003, a hearing representative affirmed the August 19, 2002 schedule award decision. On May 13, 2008 appellant again requested a review of the written record. By decision dated January 19, 2008, the Office denied his request for a review of the written record as he had previously received a review of the written record.

The Office properly determined that appellant was not entitled to a second hearing under section 8124 as a matter of right. A hearing takes the format of either an oral hearing or a review of the written record.[13] As appellant previously received a review of the written record on January 23, 2003, he was not entitled to a subsequent review of the written record on the same issue.[14] Though he was not entitled to a review of the written record as a matter of right, the Office properly conducted a review of his request within its discretion and denied the request for a discretionary hearing after finding that the matter could be equally well addressed through the

[8] 5 U.S.C. §§ 8101-8193.

[9] *Id*. at § 8124(b)(1).

[10] 20 C.F.R. § 10.615.

[11] *Henry Moreno*, 29 ECAB 475 (1998).

[12] *J.C.*, 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007); *P.P.*, 58 ECAB ___ (Docket No. 07-1045, issued September 5, 2007).

[13] 20 C.F.R. § 10.615.

[14] *L.D.*, 58 ECAB ___ (Docket No. 06-1627, issued February 8, 2007).

reconsideration process.[15] Consequently the Office, in its June 19, 2008 decision, properly denied appellant's request for a review of the written record.

## ***LEGAL PRECEDENT -- ISSUE 2***

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.[16] As one 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 part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[17]

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.[18] 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.[19]

## ***ANALYSIS -- ISSUE 2***

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 the original Office decision.[20] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[21] Appellant initially requested reconsideration on June 21, 2008; however, he referenced a decision that was not of record. In response to the Office's request for clarification, on July 10, 2008 he specified that he was requesting reconsideration of the January 23, 2003 hearing representative's

[15] *Id*.

[16] 5 U.S.C. §§ 8101-8193.

[17] 20 C.F.R. § 10.607.

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

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

[20] 20 C.F.R. § 10.607(a).

[21] *Robert F. Stone*, *supra* note 19.

decision.[22] As appellant's July 10, 2008 request for reconsideration was submitted more than one year after January 23, 2003, the date of the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his schedule award claim.[23]

In a statement dated June 25, 2008, appellant raised arguments regarding an April 18, 2002 traumatic injury claim. He asserted that his supervisor failed to file his April 18, 2002 traumatic injury claim. The relevant issue, however, is whether appellant has established that he sustained a permanent impairment due to his August 6, 2001 work injury. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[24]

In a report dated January 10, 2005, Dr. Griffith diagnosed chronic post-traumatic back pain and right radiculopathy at L4-5 and S1. He provided work restrictions and listed range of motion findings for the back. Dr. Griffith, however, did not address whether appellant sustained a permanent impairment of a lower extremity due to his August 6, 2001 work injury. Consequently, his report is insufficient to establish clear evidence of error.

With his request for reconsideration, appellant submitted medical evidence from 2001 and 2002. He also submitted MRI scan studies of the lumbar spine dated 2002 and 2004. None of the medical evidence submitted, however, addressed whether he had any impairment due to his accepted work injury. As discussed, to establish clear evidence of error a claimant must submit evidence relevant to the issue which was decided by the Office.[25]

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.[26]

On appeal appellant contends that his supervisor knowingly made his case appear fraudulent by challenging the circumstances of his claim in an August 7, 2001 e-mail message. He also asserted that the physician who treated him should have placed him on light duty. The Office, however, accepted that he sustained a lumbar strain due to an injury on August 6, 2001 and he is not claiming compensation for total or partial disability. The relevant issue is whether

[22] Appellant also related that he wanted the Office to reopen file number xxxxxx248 for medical treatment. The Office has not issued a final decision on this issue and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c).

[23] 20 C.F.R. § 10.607(b); *see A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009).

[24] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[25] *See D.D.*, 58 ECAB ___ (Docket No. 06-1148, issued November 30, 2006).

[26] *See D.E.*, 59 ECAB ___ (Docket No. 07-2334, issued April 11, 2008).

appellant has submitted evidence showing that he is entitled to a schedule award for a permanent impairment due to the injury.[27]

## ***LEGAL PRECEDENT -- ISSUE 3***

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[28]

The Office procedure manual states that appeals include hearings, reconsiderations and review by the Board.[29] The procedure manual provides "Appeals may be requested in any order, except that a hearing may not be held after the case has been reconsidered."[30]

## ***ANALYSIS -- ISSUE 3***

The Office denied appellant's schedule award claim in decisions dated August 19, 2002 and January 23, 2003. On June 19, 2008 the Office denied his request for a review of the written record as he had previously received a review of the written record on the same issue. Appellant requested reconsideration on July 10, 2008. By decision dated July 16, 2008, the Office denied his request for reconsideration as it was untimely and did not establish clear evidence of error.

On July 26, 2008 appellant requested a review of the written record in reference to the July 16, 2008 decision. By decision dated August 20, 2008, the Office denied his request for a review of the written record as he had previously requested and received reconsideration under section 8128. As appellant had previously received review of his claim under section 8128(a), he was not entitled to a hearing under section 8124.[31]

On August 22, 2008 appellant again requested a review of the written record. In a decision dated October 15, 2008, the Office denied his request as he had previously received reconsideration under section 8128. Again, the statute and the Office's procedure manual provide that a claimant is not entitled to a hearing after review under section 8128.[32] As appellant had previously received reconsideration of his claim under section 8128, he was not entitled to a review of the written record.

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[27] Appellant submitted new medical evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c); *G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007).

[28] 5 U.S.C. § 8124(b)(1).

[29] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Review Process*, Chapters 2.100.1 (June 1997).

[30] *Id*. at 2.1600.4 (December 1991).

[31] 5 U.S.C. § 8124; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Review Process*, Chapter 2.100.4 (December 1991).

[32] *Id*.

## ***CONCLUSION***

The Board finds that the Office, in its June 19, 2008 decision, properly denied appellant's request for review of the written record under 5 U.S.C. § 8124. The Board further finds that the Office properly denied his request for reconsideration as it was untimely and did not establish clear evidence of error and that the Office, in its August 20 and October 15, 2008 decisions, properly denied his requests for review of the written record under section 8124.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 15, August 20 and June 19, 2008 are affirmed.

Issued: December 30, 2009
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