

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

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**W.C., Appellant**

**and**

**DEPARTMENT OF THE ARMY,  
Huntington, WV, Employer**

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**Docket No. 09-473  
Issued: October 9, 2009**

*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 December 8, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated November 17, 2008 denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision of the Office, October 12, 2005, and the filing of this appeal on December 8, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**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 is on appeal to the Board for the sixth time. The Office accepted that appellant, then 29 years old, sustained a lumbosacral strain resulting from a February 23, 1967 work injury. Appellant underwent a laminectomy in 1960 and had a spinal fusion in 1967. It also accepted a

low back strain superimposed on preexisting degenerative disc disease when appellant was kicked in the back by a coworker on February 10, 1988. On July 29, 1998, the Board affirmed the Office's termination of appellant's compensation benefits effective November 12, 1994.<sup>1</sup> On September 20, 2001 appellant claimed a recurrence of disability beginning February 10, 1988 that he attributed to his February 10, 1988 work injury and the failure of his 1967 back surgery. In an April 18, 2005 order, the Board set aside the Office's September 4, 2003 nonmerit decision denying appellant's reconsideration request and remanded the case so that the case files could be doubled.<sup>2</sup> On July 17, 2006 the Board affirmed the Office's October 12, 2005 decision which denied modification of a December 31, 2002 decision finding that appellant did not establish a recurrence of disability.<sup>3</sup> On May 1, 2007 the Board affirmed an October 26, 2006 Office decision that denied appellant's request for a merit review of his claim.<sup>4</sup> On January 25, 2008 the Board affirmed the Office's June 18, 2007 decision denying appellant's request for reconsideration.<sup>5</sup> The facts and the circumstances of the case as set out in the Board's prior decisions are incorporated herein by reference.

In an August 14, 2008 letter, appellant requested reconsideration. He submitted a computer disc along with a June 7, 2007 x-ray report of the lumbar spine, which he contended proved the 1994 report of Dr. Carl Roncaglione, an impartial medical examiner,<sup>6</sup> was wrong as there had never been a disc fusion mass at the L4, L5, S1 levels on his back. Thus, he contended the Office was in violation of 18 U.S.C. § 1001, Fraud and False Statements, in relying upon Dr. Roncaglione's opinion when it terminated his compensation benefits. The June 7, 2007 x-ray report of the lumbar spine noted significant degenerative changes at the L4 and L5 levels, facet arthropathy and abdominal aorta arteriosclerotic change with no evidence of fracture, subluxation or pars defect present.

By decision dated November 17, 2008, the Office found that appellant's August 14, 2008 letter requesting reconsideration was untimely and that he did not submit any evidence concerning his specific condition(s) or clear evidence of error in the Board's May 1, 2007 decision.

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<sup>1</sup> Docket No. 96-1682 (issued July 29, 1998); *petition for recon. denied* (issued November 16, 1998).

<sup>2</sup> Docket No. 04-764 (issued April 18, 2005).

<sup>3</sup> Docket No. 06-195 (issued July 17, 2006).

<sup>4</sup> Docket No. 07-296 (issued May 1, 2007).

<sup>5</sup> Docket No. 07-1955 (issued January 25, 2008); *petition for recon. denied* (issued June 3, 2008).

<sup>6</sup> In its July 29, 1998 decision, the Board found that the April 5, 1994 report of Dr. Roncaglione established that appellant did not have residuals of his accepted injury.

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act<sup>7</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>8</sup> 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 regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>9</sup>

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.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

<sup>11</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>12</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>13</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>14</sup> *Leona N. Travis*, *supra* note 12.

<sup>15</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

## 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 the original Office decision.<sup>17</sup> A right to reconsideration within one year also accompanies any subsequent merit decision.<sup>18</sup> Appellant's August 14, 2008 request for reconsideration was submitted more than one year after the Board's July 17, 2006 decision, the last merit decision of record.<sup>19</sup> It was therefore untimely. Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for compensation.<sup>20</sup>

The Board, in its July 17, 2006 decision, affirmed the Office's October 12, 2005 decision denying modification of a December 31, 2002 Office decision which found that appellant did not establish a recurrence of disability. In his August 14, 2008 request for reconsideration, appellant submitted a CD along with a June 7, 2007 x-ray report. The evidence appellant submitted, however, does not address the relevant issue of whether he sustained a recurrence of disability causally related to the accepted 1967 injury. Thus, this evidence does not established clear evidence of error.<sup>21</sup>

Appellant also argued that the CD and the x-ray report clearly showed that Dr. Roncaglione was wrong, as there was never a disc fusion mass in his back, and that the Office erroneously relied on his false opinion when it terminated his compensation benefits. However, the Board, in its July 29, 1998 decision, affirmed the Office's termination of appellant's compensation benefits effective November 12, 1994 and on November 16, 1998 the Board denied appellant's petition for reconsideration. The Board's decision on this matter became final after 30 days from the date of the filing of the decision.<sup>22</sup> Appellant generally alleged fraud by the Office in terminating his claim but he has submitted no evidence raising a substantial question concerning the correctness of the Office's decision. Furthermore, this argument does not relate to the issue in the most recent merit decision, the denial of his claim for a recurrence of disability. The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>23</sup> Appellant has not submitted the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

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<sup>17</sup> 20 C.F.R. § 10.607(a).

<sup>18</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>19</sup> The Office erroneously noted the Board's May 1, 2007 decision, which affirmed an October 26, 2006 nonmerit decision of the Office, was the most merit decision of record. This is harmless error as the Office properly found appellant's August 14, 2008 request for reconsideration was untimely and properly analyzed the evidence and argument under the clear evidence of review standard.

<sup>20</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>21</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999) (in order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office).

<sup>22</sup> See 20 C.F.R. § 501.6(d).

<sup>23</sup> *D.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009).

On appeal, appellant reiterates the contentions made in his request for reconsideration. For the reasons discussed above, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's November 17, 2008 decision. The Office properly determined that he did not show clear evidence of error in that decision.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 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