

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

D.R., Appellant

and

**DEPARTMENT OF THE ARMY, WHITE
SANDS MISSILE RANGE, NM, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-563
Issued: October 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 December 26, 2006 appellant filed a timely appeal from an October 5, 2006 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. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the October 5, 2006 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

¹ See 5 U.S.C. § 501.2(c).

FACTUAL HISTORY

On March 6, 1991 appellant, then a 34-year-old industrial hygienist, filed an occupational disease claim alleging that he sustained anxiety and depression due to factors of his federal employment. The Office accepted his claim for post-traumatic stress disorder and methylene chloride exposure.

By letter dated June 29, 1999, the Office referred appellant to Dr. Thomas Kurt, Board-certified in preventive medicine, and Dr. Curtis J. Spier, a Board-certified anesthesiologist, for second opinion examinations. The appointment with Dr. Kurt was scheduled for July 12, 1999 in Dallas, Texas. The appointment with Dr. Spier was scheduled for July 19, 1999 in El Paso, Texas. In the June 29, 1999 referral letters, the Office notified appellant that he should immediately inform the Office and the physician if he was unable to attend the appointment. Appellant did not appear for either appointment.

On July 20, 1999 the Office notified appellant that it proposed to suspend his compensation under 5 U.S.C. § 8123(d) because he failed to keep the medical appointments scheduled with Dr. Spier and Dr. Kurt. The Office requested that he submit a written explanation of his reasons for obstructing the examinations within 14 days. By decision dated August 5, 1999, the Office suspended appellant's compensation under section 8123(d) for refusing to submit to a scheduled medical examination. The Office noted that he had not responded to its request that he explain in writing his failure to attend the scheduled medical appointments.

Appellant requested an oral hearing, which was held on July 19, 2000. At the hearing, he submitted a statement arguing that the Office erred in referring him for an appointment on July 12, 1999 with a physician over 600 miles from his residence and in failing to provide him with more notice prior to the appointments. Appellant additionally contended that the Office did not show that specialists were not available closer to his geographical area. He further maintained that he was not afforded due process.

In a decision dated September 1, 2000, the Office hearing representative affirmed the August 5, 1999 decision suspending appellant's compensation. The hearing representative noted that he did not challenge the selection or the location of the physicians prior to missing the scheduled appointments.

Appellant appealed to the Board. On January 30, 2001 the Board noted that it had not received the case record and remanded the case for reconstruction of the case record and an appropriate decision protecting his appeal rights.² In a decision dated March 29, 2001, the Office reissued its August 5, 1999 decision suspending appellant's compensation.

² Order Remanding Case, Docket No. 00-2819 (issued January 30, 2001).

In a letter dated September 4, 2001, received by the Office on September 3, 2002, appellant requested reconsideration.³ He challenged the location of the physician's appointments and alleged due process violations. In a decision dated September 9, 2002, the Office denied modification of its March 29, 2001 decision.⁴ The Office noted that it had properly informed him of the July 12 and 19, 1999 medical appointments and of the consequences for failing to attend the appointments.

By letter dated September 6, 2006, appellant requested reconsideration of the September 9, 2002 decision. He argued that he was unable to adequately respond to the suspension of his compensation due to his mental condition. Appellant also contended that the Office's September 9, 2002 decision contained inadequate explanations and did not attach relevant portions of the case record. In its September 9, 2002 decision, the Office failed to consider the lack of appropriate notice he received of the medical appointments and that a selected physician was outside his commuting area. Citing to *Billie J. Gardner*,⁵ appellant contended that the Office failed to document the lack of physicians available within his commuting area prior to suspending his compensation. He noted that he had fully participated in second opinion examinations closer to his residence both prior to and subsequent to the suspension of compensation. Appellant again asserted that until recently his mental condition prevented him from adequately raising these arguments and from understanding the consequences of failing to keep the July 1999 medical appointments.

In a decision dated October 5, 2006, 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 regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁶ 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.⁷ 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.⁸ The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

³ In a letter dated April 6, 2001, appellant argued that the Board had reversed the suspension of compensation. By letter dated March 27, 2002, he indicated that he was challenging the Office's suspension of his compensation in federal court.

⁴ The Office again paid appellant compensation beginning April 6, 2001, the date that he agreed to participate in a medical examination.

⁵ 53 ECAB 356 (2002).

⁶ 5 U.S.C. §§ 8101-8193.

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

⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997).

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.⁹ 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.¹⁰

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.¹¹ 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹² 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.¹³

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ As appellant's September 6, 2006 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in suspending his compensation for refusing to submit to a medical examination.¹⁶

⁹ 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).

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

¹² *Id.*

¹³ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Robert F. Stone*, 57 ECAB ____ (Docket No. 04-1451, issued December 22, 2005).

¹⁶ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB ____ (Docket No. 05-1637, issued October 18, 2005).

Appellant contended that his mental condition prevented him from properly responding to the suspension of his compensation. He has not, however, submitted any medical evidence supporting that his mental condition prevented him from comprehending the Office's instructions or adequately responding to the suspension of compensation. Thus, appellant has not raised a legal argument sufficient to establish clear evidence of error.

Appellant additionally argued that the September 9, 2002 Office decision contained inadequate explanations and did not attach appropriate portions of the case record. The September 9, 2002 decision, however, properly addressed the arguments he raised in his September 4, 2001 request for reconsideration, which the Office received on September 3, 2002. Consequently, appellant's argument does not show clear evidence of error by the Office.

Appellant also argued that the Office, in the September 9, 2002 decision, did not consider that it referred him to a physician in a location remote from his residence and did not consider that it failed to provide him with sufficient time prior to the scheduled appointments. Citing to *Gardner*, he contended that the Office must show that it attempted to locate appropriate specialists in a claimant's geographical error prior to suspending compensation.¹⁷ In *Gardner*, the Board held that the Office may refer a claimant to a distant city for a referral examination after documenting that there are no appropriate specialists in the claimant's geographical location.¹⁸ In *Gardner*, however, the claimant informed the Office and the physician prior to the date of the scheduled examination that he was unable to attend the medical appointment because of the short notice and the distance between the location of the physician and his residence.¹⁹ In this case, appellant did not inform the Office that he could not attend the physician's appointments either after receiving the June 29, 1999 referral letter or after receiving the July 20, 1999 notice of proposed suspension of compensation. The term "clear evidence of error" is intended to represent a difficult standard. The evidence must *prima facie* shift the weight of the evidence in favor of appellant.²⁰ Appellant has not raised a legal argument which establishes "on its face" that the Office's merit decision was erroneous.

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.²¹

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

¹⁷ See *supra* note 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *G.H.*, 58 ECAB ____ (Docket No. 06-1417, issued November 27, 2006).

²¹ See *Veletta C. Coleman*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 5, 2006 is affirmed.

Issued: October 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