

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

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**T.M., Appellant**

**and**

**DEPARTMENT OF JUSTICE, FEDERAL  
CORRECTIONAL INSTITUTE, Dublin, CA,  
Employer**

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**Docket No. 10-2157  
Issued: June 13, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 26, 2010 appellant filed a timely appeal from a July 15, 2010 decision of the Office of Workers' Compensation Programs that denied his request for reconsideration as it was untimely filed and did not establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit issue in this case. Because more than one year has elapsed between the issuance of the last merit decision on June 2, 2008 and the filing of this appeal on August 26, 2010 the Board lacks jurisdiction to review the merits of the case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of the Office issued on or after November 19, 2008 a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e).

## ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant contends that he does not understand why the reason for denying his claim was changed from failing to establish fact of injury to failure to submit medical evidence showing that his diagnosed condition was causally related to his work duties.

## FACTUAL HISTORY

On October 13, 2005 appellant, then a 32-year-old heating, ventilating and air conditioning (HVAC) supervisor, filed a traumatic injury claim alleging that on October 12, 2005 he suffered a strain to the right side of his back while carrying a refrigerator weighing about 50 pounds. He submitted a January 18, 2006 report wherein Dr. Steven C. Hickey, a chiropractor, noted that appellant's work duties had resulted in chronic low back pain with acute exacerbation consistent with mechanical strain to the lower lumbar spine and paraspinal muscles. Dr. Hickey also noted a subluxation at L3-4 and L4-5.

By decision dated May 9, 2006, the Office denied appellant's claim. It found that he had not established that he sustained an injury in the performance of duty under the Act. The Office noted that the only medical evidence consisted of a report by appellant's chiropractor and that as there was no evidence that he carried out an x-ray to diagnose subluxation of the spine, his chiropractor was not a physician under the Act. It further noted that he did not seek any medical treatment for approximately three months after the reported incident.

Appellant submitted additional medical evidence. In an April 5, 2006 partially illegible handwritten note, Dr. Michael E. Abdel-Malek, a Board-certified internist, stated that appellant sustained a work injury on October 12, 2005 when he was lifting a small refrigerator and felt a sharp pain in his lower back. Dr. Abdel-Malek noted that appellant had a lumbar sprain and indicated that he concurred with Dr. Hickey's treatment. Additional reports were also submitted by Dr. Hickey. In his April 20, 2006 evaluation, Dr. Hickey stated that on April 3, 2006 he took the opportunity to evaluate appellant's lumbar spine with radiograph and noted a mild decrease in disc height at L4-5 and a slight rotational subluxation of the L2 spine with right rotary malposition. He stated that he was recommended to follow up with Dr. Abdel-Malek as it was possible that a combination of manipulation combined with physical therapy modalities and use of medications will be successful. Appellant also submitted an April 2, 2007 report by Dr. Raad Al-Shaikh, a Board-certified orthopedic surgeon, who reviewed an x-ray of the lumbar spine from April 3, 2006 and found L3-4, L4-5 subluxation, L4-5 decreased disc height and slight rotation subluxation of L2 spine with right rotary malposition. Dr. Al-Shaikh assessed appellant with lumbar vertebral subluxation, lumbar muscular spasm and possible lumbar disc disease and noted that these conditions were sustained as a result of the October 12, 2005 work injury.

Requests for reconsideration filed on August 7, 2006 and April 19 and August 1, 2007 were denied after review of the merits of the case in decisions dated November 14, 2006 and June 12 and October 18, 2007. In these decisions, the Office noted that appellant had not

established fact of injury as the evidence failed to establish that a condition existed as a result of the employment incident.

By letter dated March 14, 2008, appellant again requested reconsideration.

By decision dated June 2, 2008, the Office found that the evidence submitted by appellant to request reconsideration was sufficient to modify the Office's October 18, 2007 decision to the extent that the basis for denial was changed from one of failure of the evidence to establish a fact of injury to failure of the evidence to establish a causal relation of the diagnosed condition to factors of federal employment. It stated that the medical physician's reports were not contemporaneous with the incident claimed and did not contain a complete history nor well-reasoned medical opinion as to why the October 12, 2005 employment incident resulted in his back condition, particularly in light of intervening exacerbations as well as ongoing work activities.

By letter dated May 27, 2009, appellant again requested reconsideration. He questioned why his status went from failure to establish fact of injury to failure to establish a causal relationship.

By decision dated July 7, 2009, the Office denied appellant's request for reconsideration without conducting a merit review.

By letter dated April 19, 2010, appellant filed his most recent request for reconsideration. He again argued that he was unclear as to why his status went from failure of the evidence to establish a fact of injury to failure of the evidence to establish a causal relation of the diagnosed condition to factors of federal employment. Appellant also contended that the Office could not deny his request for reconsideration on the basis that it was untimely filed and did not present clear evidence of error, contending that the Office must review his case on the merits. He submitted no new evidence with his request for reconsideration.

By decision dated July 15, 2010, the Office denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error on the part of the Office.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.<sup>3</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>4</sup>

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

establishes clear evidence of error.<sup>5</sup> Office regulations and procedures provide 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(a), if the claimant's application for review shows clear evidence of error on the part of the Office.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>8</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</sup> 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 decision.<sup>12</sup>

### ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely request for reconsideration. The Board notes that more than one year has elapsed from the date of issuance of the last merit decision in this case, *i.e.*, the Office's June 2, 2008 decision and appellant's request for reconsideration, filed on August 19, 2010. Consequently, appellant must demonstrate clear evidence of error in denying his claim for compensation.<sup>13</sup>

In requesting reconsideration, appellant did not submit any new factual evidence. The only new item submitted was a letter from him contending that the Office should have reviewed

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<sup>5</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, 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 that a schedule award was miscalculated). Evidence such as 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. *Id.* at Chapter 2.1602.3c

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> See *Leona D. Travis*, *supra* note 8.

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>13</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

the case on the merits and not applied the clear evidence of error standard for review. Appellant further stated that he did not understand why his claim was now denied for failure to establish a causal relationship. His arguments are insufficient to meet the clear evidence of error standard of review for untimely requests for reconsideration. Furthermore, appellant did not establish clear evidence of error when he argued that there had been established a causal relationship between the work incident and his injury.

Appellant alleged that he does not understand why the case was denied for failure to establish causal relationship when it was initially denied for failure to establish fact of injury. To establish that an injury was sustained in the performance of duty, the claimant must establish two components. First, he must establish that he actually experienced the employment incident at the time, place and in the manner alleged. The fact that appellant established an employment incident is no longer in dispute. Second, the claimant must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>14</sup> Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.<sup>15</sup> In evaluating the medical evidence, the Office had previously determined that the medical evidence did not establish a causal relationship. It noted such factors as appellant's delay in obtaining x-rays and the lack of a rationalized medical opinion linking his lumbar condition to the accepted employment incident. For example, the Office noted that Dr. Hickey did not begin treatment of appellant until three months after the alleged injury and did not note any x-ray evidence until almost six months after the alleged injury.<sup>16</sup> It noted that the reports of Drs. Al-Shaikh and Abdel-Malek were not contemporaneous with appellant's employment incident and that these physicians had not monitored appellant's care. The Office also noted that these physician's reports did not contain a complete history or a well-rationalized medical opinion as to why the October 12, 2005 incident resulted in appellant's back condition.

Appellant did not submit any new evidence to establish clear evidence of error. For the reasons stated, the Board further finds that the arguments presented by him do not establish clear evidence of error. Counsel's arguments address the merits of the case, over which the Board has no jurisdiction.

### **CONCLUSION**

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

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<sup>14</sup> *T.H.*, 59 ECAB 388 (2008).

<sup>15</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>16</sup> Under section 8101(2) of the Act, chiropractors are defined as physicians and their reports are considered medical evidence to the extent that they treat subluxations as demonstrated by x-ray to exist. See *Sean O'Connell*, 56 ECAB 195 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 15, 2010 is affirmed.

Issued: June 13, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board