

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

RAYMOND M. GARZA, Appellant

and

**DEPARTMENT OF THE ARMY, CORPUS
CHRISTI ARMY DEPOT, TX, Employer**

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**Docket No. 05-858
Issued: November 4, 2005**

Appearances:
Raymond M. Garza, 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
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On March 2, 2005 appellant filed a timely appeal of a January 3, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which denied his October 13, 2004 request for reconsideration as untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated July 3, 2002 and the filing of this appeal on March 2, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal, the Board issued an order granting appellant's request to dismiss his appeal on December 14, 1995.¹ In the second appeal, the Board issued an order remanding the case as the case record had not been received by the Board.² In the third appeal, the Board affirmed a September 10, 2003 decision which denied appellant's request for a merit review.³ The facts of this case are set forth in the Board's prior decisions and are hereby incorporated by reference.

In a letter dated October 13, 2004, appellant requested reconsideration and submitted evidence in support of his claim. The evidence included a September 22, 2001 affidavit by Mary J. Munoz and a September 14, 2001 statement by Edward Evans and a September 3, 2004 report by Dr. John P. Masciale, an attending Board-certified orthopedic surgeon, all of which had been previously submitted and considered by the Office. By decision dated January 3, 2005, the Office determined that appellant's request for reconsideration was untimely and failed to show 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.⁴ 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.⁵ 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.⁶ The Office procedures state 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, if the claimant's application for review shows "clear

¹ Docket No. 96-197 (issued December 14, 1995). On September 28, 1994 appellant, a 51-year-old aircraft mechanical parts work leader, filed a traumatic injury claim alleging that he sprained his cervical and lumbar regions when he attempted to control an automated guided vehicle (AGV) that rammed against a stationary scooter with a flatbed. By decision dated March 23, 1995, the Office denied appellant's claim on the basis that he failed to establish an injury in the performance of duty. By decision dated July 26, 1995, the Office denied appellant's request for modification. The Office found the medical evidence contained inconsistencies in the way the injury occurred when compared with the CA-1 form and the witness report.

² Docket No. 97-339 (issued April 27, 1998).

³ Docket No. 04-422 (issued April 19, 2004).

⁴ 5 U.S.C. §§ 8101-8193. 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. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

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

⁶ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

evidence of error” on the part of the Office.⁷ 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.¹⁰ 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.¹² 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.¹³ 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.¹⁴ 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.¹⁵

ANALYSIS

The Office found that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision

⁷ 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 merit decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

⁸ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ See *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Pasquale C. D’Arco*, 54 ECAB ____ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez*, *supra* note 6.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, *supra* note 8.

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ See *George C. Vernon*, 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

on the issues.¹⁶ The last merit decision in this case, was the Office's July 3, 2002 decision denying appellant's claim for modification of the denial of his claim on the grounds that he failed to establish that he sustained an injury in the performance of duty. As his October 13, 2004 letter requesting reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, appellant must demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.¹⁷

Appellant's October 13, 2004 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office in its July 3, 2002 decision. The Office denied appellant's claim for neck and back injuries of September 28, 1994 on the basis that fact of injury was not established due to the inconsistencies in statements regarding how the injury occurred and the failure by appellant to submit any evidence resolving the inconsistencies. Appellant, however, provided no evidence resolving the inconsistency found by the Office when he made his October 13, 2004 request for reconsideration. Nothing in appellant's October 13, 2004 request for reconsideration remotely suggests that the Office's January 28, 2003 decision was erroneous in finding that fact of injury had been established. Appellant resubmitted affidavits by Mary J. Munoz and Edward Evans and a September 3, 2004 report by Dr. Masciale. However, this evidence had previously been found to be insufficient to resolve the inconsistency found by the Office when he made his October 13, 2004 request for reconsideration.

CONCLUSION

The Board finds that the Office properly determined that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error.

¹⁶ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

¹⁷ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 3, 2005 is affirmed.

Issued: November 4, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board