

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

R.G., Appellant

and

**DEPARTMENT OF THE ARMY, CORPUS
CRISTI ARMY DEPOT, Corpus Cristi, TX,
Employer**

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**Docket No. 06-1416
Issued: October 3, 2006**

Appearances:
R.G., 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 June 13, 2006 appellant filed a timely appeal of the June 1, 2006 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated September 18, 2002 and the filing of this appeal, 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 refused to reopen appellant's claim for consideration of the merits on the grounds that his request was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On July 31, 2002 appellant, then a 54-year-old plastic worker, filed a traumatic injury claim, alleging that on December 21, 2001 his preexisting fistula in his left arm collapsed due to heavy lifting in the performance of duty. He stated that he had surgery to insert the fistula in July 2001 and that as a result of heavy lifting he required additional surgery. In a narrative statement, appellant noted that in July 2001 a fistula was inserted in his left arm to allow for dialysis. He stated that his physician did not provide him with lifting restrictions. Appellant stated that he regularly lifted 20 to 30 pounds in the performance of his duties and that this lifting caused the fistula to collapse. He underwent emergency surgery to repair the collapsed fistula on December 24, 2001. Appellant asserted that following this surgery his physician informed him that he should not lift more than 15 pounds with his left arm.

The employing establishment controverted appellant's claim asserting that he was aware that he was not to lift over 20 pounds on May 10, 2001. The employing establishment further stated that appellant did not file his claim until he was confronted with the possibility of being placed in another job due to his restrictions for his nonoccupational renal disease, diabetes and anemia. The employing establishment submitted a May 10, 2001 work release form indicating that appellant should not lift over 20 pounds. Dr. Fariba Zarinetchi, a Board-certified internist, completed a report on September 27, 2001 and indicated that appellant should refrain from heavy lifting due to his renal disease, diabetes and anemia.

In a letter dated August 19, 2002, the Office requested additional factual and medical evidence in support of appellant's claim. On August 14, 2002 Dr. Larry Grabhorn, a physician Board-certified in preventative medicine, completed a report noting that appellant had a graft placed in September 2001 and began dialysis in October 2001 for renal failure.

By decision dated September 18, 2002, the Office denied appellant's claim finding that he had not established a factual basis for his traumatic injury claim.

Appellant requested reconsideration on February 28, 2006 and submitted medical reports. In a report dated March 4, 2005, a physician's assistant, Louie Campbell, diagnosed superficial laceration of the right ring finger. On March 7, 2005 Mr. Campbell stated that appellant's right ring finger was healing.

By decision dated June 1, 2006, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error. The Office found that the medical evidence submitted was not relevant to appellant's claim for injury in December 2001.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.¹ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the

¹ 20 C.F.R. § 10.607(a).

discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.²

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 establishes "clear evidence of error."³ Office regulations and procedure 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.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰

² 5 U.S.C. §§ 8101-8193, § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

³ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁴ 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." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

⁵ See *Dean D. Beats*, 43 ECAB 1153, 1157-58 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁷ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 2.

ANALYSIS

In its June 1, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on February 28, 2006 more than one year after the Office's merit decision of September 18, 2002. Therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence on the part of the Office in issuing its September 18, 2002 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In connection with his untimely reconsideration request, appellant submitted documentation from a nurse practitioner¹¹ that he had sustained a laceration to his right ring finger on March 4, 2005. This report does not address the issue before the Office at the time of the September 18, 2002 decision, whether appellant's surgical port had collapsed due to heavy lifting in the performance of duty in December 2001. As appellant has submitted no evidence relevant to his claim, the Office properly determined that he had not established clear evidence of error in the September 12, 2002 decision.

CONCLUSION

The Board finds that appellant has not submitted the necessary evidence to establish clear error on the part of the Office in its September 18, 2002 decision.

¹¹ It is well established that, to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician. See *Vickey C. Randall*, 51 ECAB 357, 361 (2000). The term "physician" includes surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. §§ 8101(2); *James Robinson, Jr.*, 53 ECAB 417, 420 (2002). The report of a physician's assistant is entitled to no weight because physician's assistants are not "physicians" as defined by the Act. *Allen C. Hundley*, 53 ECAB 551, 554 (2002).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 2006
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