



on September 15, 2004. He provided a September 19, 2004 hospital report from Dr. Dale Kile, Board-certified in emergency medicine, diagnosing a chest wall injury. Appellant stopped work on October 31, 2004 and did not return. The Office accepted the claim for chest wall strain. Appellant filed claims for disability compensation beginning October 31, 2004 and continuing through June 19, 2006.

In a November 8, 2004 attending physician's report, Dr. Gardner Dixon, a general practitioner and appellant's treating physician, diagnosed intercostal myositis, sternal contusion and osteochondrosis. He stated that appellant's injury occurred at work. In a November 17, 2004 report, Dr. Dixon noted appellant's history of chest wall injury on September 15, 2004 when he attempted to release a ramp at work, "which was done with some difficulty, causing chest pain." Upon physical examination, he found a musculoskeletal injury to the anterior chest wall, intercostal tenderness and pain and tenderness on compression of the sternum. Dr. Dixon diagnosed muscle strain, acute intercostal myositis and osteochondrosis of the sternum and manubrium.

In a January 28, 2005 decision, the Office denied appellant's claim for compensation for the period October 31, 2004 through January 30, 2005 on the grounds that the medical evidence did not support appellant's total disability due to the accepted injury.

On February 10, 2005 appellant requested a review of the written record. He provided diagnostic studies and notes relating to a prior heart condition for which he was treated until 2004. In a January 28, 2005 report, Dr. Dixon noted his continuing chest pain and discomfort. Dr. Dixon opined that appellant's present condition was related to his September 15, 2004 work injury.

In a February 24, 2005 fitness-for-duty examination, Dr. Thomas J. O'Brien, a Board-certified orthopedic surgeon, noted appellant's employment injury on September 15, 2004. He stated that there was "no specific incident or fall that [appellant] can recall." Upon examination, Dr. O'Brien found diffuse tenderness over the entire chest wall, not localized to any one anatomic structure. He noted that appellant's symptoms persisted despite appellant's remaining off work for five months and concluded that appellant "does not have a work-related injury." Dr. O'Brien diagnosed diffuse anterior chest wall pain, but advised that the impression was based on subjective symptoms and that he did not note objective findings on examination.

By decision dated August 11, 2005, the Office denied appellant's claim for wage-loss compensation for the period commencing May 22, 2005.

By decision dated January 20, 2006, an Office hearing representative affirmed the denial of appellant's claim for compensation beginning October 31, 2004 on the grounds that the medical evidence of record did not support his total disability for work during the claimed period due to his accepted condition.

On May 12, 2006 appellant requested that the Office expand his claim to include "psychological and physical conditions due to ... mental harassment and stress on the job." In an April 18, 2006 report, Dr. Dixon noted that appellant's claimed on-the-job harassment caused elevated blood pressure. He stated that appellant's recovery was slow and had been complicated

by concurrent medical conditions. Appellant also provided an October 3, 2006 computerized tomography (CT) scan report from Dr. Kimberly Brennan, a Board-certified diagnostic radiologist, diagnosing a “normal CT of the sternum.” A September 22, 2006 note from Linda Evans, an office administrator with Rivergate Psychiatric and Behavioral Health Center, noted that appellant was being treated for major depression and adjustment disorder. On April 9, 2007 appellant filed an occupational disease claim stating that he developed hypertension and irritable bowel syndrome in the performance of duty. He provided diagnostic studies and reports relating to his 2004 chest condition.

In a March 20, 2006 report, Dr. Nagendra Ramanna, a Board-certified internist, advised that appellant continued to experience occasional pain when rolling over in bed, due to his 2004 chest wall injury. On the same day, Dr. Dixon advised that appellant reported continuing occasional pain related to his September 15, 2004 work-related chest wall injury, particularly when rolling over in bed into certain positions. Upon physical examination, he found that appellant’s sternum was tender. Dr. Dixon diagnosed hypertension, hypertensive heart disease, abnormal electrocardiogram (EKG) apparently due to a repolarization abnormality, and “chest pain with local tenderness and a positional component consistent with musculoskeletal etiology.” Appellant also provided notes from Dr. Dixon’s office, covering the period November 3, 2004 to January 31, 2005. In an October 14, 2004 report, Dr. Greg Rowbatham, a Board-certified internist, who noted that appellant reported sustaining a work-related chest contusion and diagnosed elevated creatinine and hypertension.

On November 14, 2006 the employing establishment terminated appellant’s employment due to his medical incapacity to perform his job.

By correspondence dated October 20, 2007, appellant requested reconsideration of the Office’s January 20, 2006 decision. He acknowledged that his request was not timely but stated that he had sent in additional medical evidence. In an October 12, 2005 report, Dr. Dixon noted that he had treated appellant since his original injury and that appellant continued to suffer “both physically and psychologically” from his work injury. He explained that appellant’s recovery of activity was slow and had been complicated by concurrent medical conditions. Dr. Dixon advised that appellant was still unable to perform his regular duties and that it was unclear when he would be released to return to his regular activities.

By decision dated October 31, 2007, the Office denied appellant’s request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees’ Compensation Act<sup>1</sup> does not entitle a claimant to review of an Office decision as a matter of right.<sup>2</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1990).

10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>3</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 erroneous on its face.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>6</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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</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>9</sup> The evidence submitted must not only be of sufficient probative value as to create a conflict in medical opinion or to 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.<sup>10</sup> The Board makes an independent determination of whether a claimant has established 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>11</sup>

### ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The implementing federal regulation provides that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought. Appellant requested reconsideration of a January 20, 2006 Office decision that denied his claim for compensation for total disability. As appellant's October 20, 2007 reconsideration request was made more than one year following the Office's January 20, 2006 decision, the Board finds that it was untimely filed. Consequently, to have his claim reopened appellant must show clear evidence of error by the Office in its January 20, 2006 decision.

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>6</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>7</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>8</sup> *Leona N. Travis*, *supra* note 6.

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The Office accepted appellant's claim for a chest wall strain and denied his claim for wage-loss compensation beginning October 31, 2004, on the grounds that the medical evidence did not establish that he was totally disabled due to his work injury. Appellant provided reports and chart notes from Dr. Dixon. However, these materials do not address the underlying issue of causal relationship.<sup>12</sup> Rather, the treatment records do not provide any detailed explanation if whether appellant was totally disabled for work due to his accepted chest wall strain during the period claimed. Certain diagnostic test results provided by appellant pertain to hypertension and irritable bowel syndrome while psychiatric records reference nonaccepted depression. However, these conditions were not accepted by the Office as related to the accepted injury. Reports from Drs. Ramanna and Rowbatham reference the employment injury but do not address how any claimed disability beginning October 31, 2004 was due to the September 15, 2004 work injury. The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.<sup>13</sup> The medical evidence provided by appellant is not sufficient to shift the weight of the evidence in favor of his claim or raise a substantial question as to the correctness of the Office's decision that denied disability for work beginning October 31, 2004. Accordingly, the Board finds that appellant has not established clear evidence of error.

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review on the grounds that it was untimely filed and did not establish clear evidence of error.

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<sup>12</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

<sup>13</sup> See *Joseph R. Santos*, 57 ECAB 554 (2006), citing Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconisderations*, Chapter 2.1602.3(c) (January 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 31, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board