

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

L.N., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
WEAPONS STATION, Seal Beach, CA,)
Employer)

**Docket No. 07-1092
Issued: January 9, 2008**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 18, 2007 appellant filed a timely appeal from the September 19, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated April 11, 2005 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 denied appellant's request for reconsideration as untimely filed and not establishing clear evidence of error.

FACTUAL HISTORY

On April 2, 2004 appellant, then a 40-year-old ordnance equipment mechanic, filed a traumatic injury claim alleging that on March 26, 2004 he injured his right lower groin while lifting a barrel of saw dust.

By letter dated April 14, 2005, the Office informed appellant that the evidence was insufficient to support his claim. The Office advised him as to the medical and factual evidence required to support his claim. Appellant did not respond.

By decision dated May 27, 2004, the Office denied appellant's claim on the grounds that he failed to establish fact of injury. The Office noted that the record was devoid of any medical evidence containing a diagnosis.

Subsequent to the decision, the Office received a June 15, 2004 ultrasound and a July 20, 2004 disability and return to work certificate. The ultrasound found no evidence of a right inguinal hernia. It noted a small bilateral varicocele and approximately a 0.3 centimeter bilateral peritesticular vein measurement. The return to work certificate indicated that appellant could return to work on July 21, 2004 with restrictions.

On March 28, 2005 appellant requested reconsideration and submitted a January 31, 2005 report by Dr. Dennis L. Clark, an attending Board-certified internist and a March 21, 2005 report by Dr. David Wall, a treating physician. Dr. Clark noted that appellant had been diagnosed with a right torn groin muscle. He noted that the condition would heal faster if appellant was not required to lift up to 40 pounds or push and pull up to 100 pounds, as required by his job. Dr. Wall opined that it was "very likely [that] the groin injury" sustained by appellant "could have been caused by him lifting the barrel in an awkward way at work."

By decision dated April 11, 2005, the Office denied modification of the May 27, 2004 decision. The Office found that the medical evidence appellant submitted did not establish that the diagnosed condition was causally related to the accepted March 26, 2004 employment incident.

In an April 11, 2006 memorandum of telephone call, the Office noted that appellant requested an extension to file a request for reconsideration, which the Office advised could not be granted.

In a letter dated April 6, 2006 and received on June 22, 2006, appellant requested reconsideration. He stated that he was including a statement by his surgeon. The date of the postmark on the envelope is illegible. In a May 25, 2006 report, Dr. William B. Hutchinson, Jr., a treating physician, noted that appellant was being treated for a hernia and surgery was scheduled. He related that appellant informed him that the hernia occurred on March 26, 2004 when he was lifting a barrel.

By decision dated September 19, 2006, the Office denied appellant's request on the grounds that it was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act¹ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ 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.⁴ If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.⁵ In the absence of this evidence, the Office procedures state that the date of the reconsideration request letter should be used to determine timeliness.⁶

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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.⁷ 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. The Board makes an independent determination of whether a claimant has submitted

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 10.605.

³ *Id.* at 10.607(a).

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

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (June 2002).

⁷ *See Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

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.⁸

ANALYSIS

In its September 19, 2006 decision, the Office determined that appellant failed to file a timely application for review. Although his letter requesting reconsideration is dated April 6, 2006. The evidence does not support that the report was timely. The postmark on the envelope is illegible. The Office procedure manual states that when a postmark is illegible, other evidence may be used to determine the date of the mailing. When there is no evidence to establish the date of the mailing, the date of the letter requesting reconsideration should be used.⁹

Although appellant's letter requesting reconsideration was dated April 6, 2006, which the Board notes is within one year of April 11, 2005, the Board finds that the evidence does not support that his request was timely. The record contains a memorandum of telephone call by appellant on April 11, 2006. Appellant called to request an extension of time to file his reconsideration request, which the Office denied. He noted in his letter that he was including a medical report. A May 25, 2006 report by Dr. Hutchinson was received by the Office on June 22, 2006. This was the same day that the Office received appellant's April 6, 2006 letter requesting reconsideration. The evidence of record does not support that April 6, 2006 was the date that he filed his reconsideration request with the Office. As appellant's letter requesting reconsideration and accompanying medical report were received by the Office on June 22, 2006, and as appellant called the Office on April 11, 2006 requesting an extension of time to file a request for reconsideration, the Board finds that he filed his request for reconsideration on June 22, 2006. The Office rendered its most recent merit decision on April 11, 2005. As appellant's letter requesting reconsideration was received by the Office on June 22, 2006, which is more than one year after the April 11, 2005 merit decision it was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). The Office reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly establish that the Office's prior decision was in error.

The evidence submitted on reconsideration, a May 25, 2006 report by Dr. Hutchinson, do not establish clear evidence of error by the Office. As noted, the evidence submitted must be relevant to the issue which was decided by the Office. Here, appellant's claim was denied on the grounds that the medical evidence did not establish a causal relationship between appellant's diagnosed condition and the March 26, 2004 employment incident. Accordingly, the evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. Evidence such as a detailed,

⁸ See *Alberta Dukes*, *supra* note 7.

⁹ *Jack D. Johnson*, 57 ECAB ____ (Docket No. 06-433, issued May 17, 2006); see also 20 C.F.R. § 10.607(a); *supra* note 6.

well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is insufficient to show clear evidence of error.¹⁰ The May 25, 2006 report by Dr. Hutchinson noted that appellant was being treated for a hernia, which appellant attributed to his lifting a barrel on March 26, 2004. Dr. Hutchinson provided no supporting rationale explaining how appellant's condition was caused by the March 26, 2004 employment incident. Accordingly, his report is insufficient to establish clear evidence of error in the Office's April 11, 2005 merit decision. Appellant has submitted no other evidence sufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration, as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 19, 2006 is affirmed.

Issued: January 9, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁰ See *Alberta Dukes*, *supra* note 7.