

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

L.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
DOWNEY VETERANS HOSPITAL,)
North Chicago, IL, Employer)

**Docket No. 08-714
Issued: July 7, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated December 10, 2007 denying his request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated September 29, 2006 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.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 19, 2006 appellant, a 62-year-old electrician, filed an occupational disease claim alleging that he developed severe arthritis in his knees as a result of conditions of employment.

He contended that his condition resulted from required work activities, which included climbing ladders, kneeling on floors and crawling.

Appellant submitted reports from Dr. Thomas E. Baier, a Board-certified orthopedic surgeon, for the period March 17, 2004 through April 29, 2005. Dr. Baier diagnosed severe arthritis of the right knee and moderate to severe arthritis of the left knee, noting that appellant's job required substantial amounts of climbing and crawling on his knees. On April 30, 2004 he reported that appellant had varus deformity of both knees. In a December 27, 2004 report, Dr. Baier diagnosed a possible torn left rotator cuff, noting that appellant had been experiencing increasing pain in his left shoulder for the previous six to eight months. On April 29, 2005 he diagnosed right shoulder biceps tendinitis and right knee arthritis.

Appellant submitted reports from Dr. Jennifer Capezio, a Board-certified internist, for the period May 24, 2001 through August 20, 2003. Dr. Capezio diagnosed generalized osteoarthritis, with symptoms primarily in the knees, right shoulder and hands. The record also contains rheumatology progress notes for the period July 2 through August 27, 2003 and reports of x-rays of the knees, right shoulder, hands, pelvis and lumbar spine.

By decision dated September 29, 2006, the Office denied appellant's claim, finding that he had failed to establish that his claimed medical condition was causally related to the established work-related events.

On November 20, 2007 appellant submitted an appeal request form, requesting reconsideration of the September 29, 2006 decision. He did not submit any documents in support of his request for reconsideration.

On December 10, 2007 the Office denied appellant's request for reconsideration on the basis that it was untimely filed and did not present 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.¹ 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.² 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.³ 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 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

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

³ *Veletta C. Coleman*, 48 ECAB 367 (1997).

evidence of error” on the part of the Office.⁴ 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.⁵

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.⁶ 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.⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office’s procedures provide that the one-year time limitation period for requesting reconsideration commences the date following the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision.⁹ Appellant’s November 20, 2007 request for reconsideration was submitted more than one year after the Office’s merit decision of September 29, 2006 and was therefore untimely. Consequently, he must demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.¹⁰

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant’s application for reconsideration

⁴ 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 decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

⁵ See *Alberta Dukes*, 56 ECAB 247 (2005); see also *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ See *Alberta Dukes*, *supra* note 5; see also *Leon J. Modrowski*, 55 ECAB 196 (2004).

⁷ *Id.*

⁸ See *Alberta Dukes*, *supra* note 5. See also *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

⁹ *Veletta C. Coleman*, 48 ECB 367, 368 (1997).

¹⁰ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241, 244 (2004).

showed clear evidence of error that would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. Appellant's request for reconsideration consisted of an appeal request form, in which he indicated with a checkmark that he desired a merit review of the Office's September 29, 2006 decision. His request, in and of itself, does not constitute positive, precise and explicit evidence which manifests on its face that the Office committed an error in its September 29, 2006 decision. Appellant provided no argument and submitted no evidence in support of his request. The Board finds, therefore, that appellant has failed to submit the evidence required 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.¹¹

The Board finds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly determined that appellant's November 20, 2007 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ *Id.*