

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

S.A., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Pine Knot, KY, Employer**

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**Docket No. 08-923
Issued: September 4, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated November 16, 2007 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated July 3, 2006 to the filing of this appeal on February 11, 2008, 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 denied appellant's request for reconsideration without conducting a merit review on the grounds that the request was untimely and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 26, 2006 appellant, then a 34-year-old correctional officer, filed a traumatic injury claim alleging that he hyperextended his left wrist while assisting another officer in breaking up a fight between inmates on December 25, 2005. He did not stop work.

By correspondence dated May 30, 2006, the Office requested additional information concerning appellant's claim. No additional evidence was received and by decision dated July 3, 2006, the Office denied appellant's claim on the grounds that there was no medical evidence rendering a diagnosis that could be connected to the established work-related event. The decision was sent to appellant's address of record as stated on the initial traumatic injury claim form.

In an August 14, 2006 report, Dr. William L. Hardy, an orthopedic surgeon, noted appellant's history of a left wrist injury on December 25, 2005, which appellant related occurred at work when he broke up a fight between two inmates. He explained that appellant initially believed that he had sprained his wrist but that over the following months his pain worsened until he had very limited motion in his left wrist. On physical examination, Dr. Hardy found tenderness to palpation over the mid proximal carpus over the lunate and radial carpal joint on the dorsal and volar aspects and limited motion with pain. X-rays taken on the date of examination revealed an apparent scaphoid fracture, partially healed. Dr. Hardy diagnosed left wrist sprain with fracture of the scaphoid and possible avascular necrosis of the lunate.

In a December 22, 2006 statement to his congressional representative, appellant explained that he injured his left wrist on December 25, 2005 when he broke up a fight between two inmates. He explained that the employing establishment's medical staff took x-rays and told him that nothing was broken but that his pain continued for four to six months thereafter. Appellant stated that the employing establishment then advised him to see Dr. Hardy.

In a January 5, 2007 letter, the Office advised appellant's congressional representative of the status of the claim and noted that appeal rights were enclosed with the July 3, 2006 decision and that appellant should pursue those rights if he disagreed with the Office's decision.

By correspondence dated November 1 and postmarked November 5, 2007, appellant requested reconsideration. He explained that he submitted an "appeal" to the employing establishment in April 2007 but that he later discovered that the employing establishment failed to submit the documentation to the Office. Appellant argued that the employing establishment told him that it would submit the review request but failed to do so. He provided a copy of a reconsideration request dated April 12, 2007 which he indicated was given to the employing establishment. The employing establishment submitted a November 1, 2007 letter from Richard Kearnelly, a safety specialist, indicating that appellant submitted a reconsideration request dated March 12, 2007. Mr. Kearnelly stated that he did not know if this was sent by the previous person who was handling appellant's case. He advised that he could not explain what happened with the paperwork and why the Office did not earlier receive appellant's reconsideration request.

By decision dated November 16, 2007, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that it was untimely filed and failed to establish clear evidence of error. It noted that the initial July 3, 2006 denial included appeal rights that advised appellant to submit his request for reconsideration directly to the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

The Office's regulations provide:

“[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”⁶

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 658 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁴ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ 20 C.F.R. § 10.607(b).

⁷ *Thankamma Mathews*, *supra* note 2 at 770.

⁸ *Id.*

be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³

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. As appellant's November 1, 2007 reconsideration request was made more than one year following the Office's July 3, 2006 decision, the Board finds that appellant's request was untimely filed. The Board notes that appellant indicates he submitted a reconsideration request dated April 12, 2006 to the employing establishment which failed to forward the request to the Office. However, the appeal rights included in the Office's July 3, 2006 decision clearly instructed appellant to submit his reconsideration request directly to the Office. The evidence does not indicate that the Office received an earlier request for reconsideration from appellant. Therefore, the Board finds that the request was untimely. Consequently, to have his claim reopened appellant must show clear evidence of error by the Office in its July 3, 2006 decision.

The Office denied appellant's traumatic injury claim on the grounds that the medical evidence did not establish that the employment incident caused an injury. After issuance of the Office's July 3, 2006 decision, appellant submitted an August 14, 2006 medical report from Dr. Hardy. However, Dr. Hardy's report is insufficient to establish evidence or clear error in the Office's July 3, 2006 decision. While he relates the history of injury provided by appellant, the physician did not provide his own specific opinion that the December 25, 2005 employment incident caused an injury. Furthermore, even if Dr. Hardy's recounting of appellant's history could be construed as support for causal relationship, the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. For example, 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 nonetheless not clear

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Jesus D. Sanchez*, *supra* note 3 at 968.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

evidence of error and would not require a review of the case.¹⁴ The Board finds that Dr. Hardy's August 14, 2006 report is insufficient to raise a substantial question as to the correctness of the Office's decision and does not establish clear evidence of error.¹⁵ Therefore, 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 failed to establish 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 failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *Joseph R. Santos*, 57 ECAB 554 (2006), citing Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

¹⁵ Appellant asserted that he submitted evidence to the employing establishment and the employing establishment failed to forward it to the Office. Although the employer is responsible for submitting any relevant factual or medical evidence in its possession, the Board notes that it is ultimately appellant's burden to submit sufficient evidence to perfect his claim. See 20 C.F.R. §§ 10.115(f), 10.118(a).