

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

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**P.T., Appellant**

**and**

**PEACE CORPS, Cameroon, Employer**

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**Docket No. 08-2324  
Issued: February 4, 2009**

*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 August 25, 2008 appellant filed a timely appeal from an August 7, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated May 19, 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 was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

This is the third appeal before the Board.<sup>1</sup> On August 26, 2003 the Board remanded the case because the Office's delay in issuing an April 1, 2003 decision, denying appellant's August 21, 2002 request for reconsideration which precluded his right to a merit review before the Board. By decision dated April 26, 2005, the Board affirmed a January 22, 2004 Office decision which denied appellant's claim for disability between July 2, 1995 and February 18, 2000 due to his accepted tropical pulmonary eosinophilia, respiratory wheezes and extrinsic asthma. The law and the facts of the previous Board decisions are incorporated herein by reference.

By merit decision dated May 19, 2006, the Office again denied appellant's claim for disability between July 2, 1995 and February 18, 2000 due to his accepted tropical pulmonary eosinophilia, respiratory wheezes and extrinsic asthma.

In an undated letter received by the Office on December 12, 2007, appellant requested reconsideration and submitted additional evidence. He argued that a May 3, 2000 report from Dr. Andreas Schlanstein, previously of record, established that he was totally disabled in February 1996 due to his accepted conditions. Dr. Schlanstein stated that appellant was hospitalized in 1996 for chronic obstructive bronchitis. He opined that appellant's work in the Peace Corps led to an exacerbation of his condition and an inability to work. Dr. Schlanstein stated that appellant could not work in a job with exposure to higher than normal levels of dust pollution.

In a January 17, 2007 report, Dr. Horst Huckauf, a physician specializing in lung and bronchial medicine, provided an assessment of appellant's respiratory impairment causally related to his accepted lung conditions. Dr. Huckauf stated that appellant had experienced progressive dyspnea (shortness of breath) episodes since his discharge from the Peace Corps in July 1995. Disabling dyspneic episodes occurred in response to triggers such as dust and molds. He advised that appellant reached maximum medical improvement in 2001 to 2002 with a progressive decline thereafter. Dr. Huckauf indicated that appellant was able to work only in a controlled, trigger-free environment. In a July 10, 2007 report, he discussed appellant's lung impairment. In a September 26, 2007 report, Dr. Huckauf stated that appellant had been disabled since 1994 from his position as a woodworker or from any position in a similar environment and that his lung condition had worsened over time.

In an April 2, 2007 report, Dr. Vijay K. Mahajan, a Board-certified pulmonologist, reviewed appellant's medical history and stated that appellant developed bronchial asthma while serving in the Peace Corps in Cameroon between 1993 and 1995.<sup>2</sup> He provided a respiratory impairment rating. Dr. Mahajan opined that appellant should not be employed in an occupation

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<sup>1</sup> 56 ECAB 503 (2005). *See* Docket No. 03-1439 (order remanding case issued August 26, 2003). On March 1, 1999 appellant, then a 47-year-old Peace Corps volunteer, filed an occupational disease claim alleging that he developed a lung condition while working in Cameroon. The Office accepted his claim for tropical pulmonary eosinophilia, respiratory wheezes and extrinsic asthma.

<sup>2</sup> Dr. Mahajan did not personally examine appellant.

with exposure to dust, fungi or other irritants. He did not discuss any specific periods of disability.

By decision dated August 7, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error in the last merit decision dated May 19, 2006.

### **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>3</sup> As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. It will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>4</sup>

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.<sup>5</sup>

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.<sup>6</sup> Evidence which 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> To show clear evidence of error, the evidence submitted not only must 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.<sup>8</sup> The Board makes an independent determination of whether a claimant has

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

<sup>6</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

<sup>7</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>8</sup> *Id.*

submitted 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>9</sup>

### ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was received by the Office on December 12, 2007, more than one year after the May 19, 2006 merit decision. Therefore it was not timely. The issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

The record reflects that the Office's May 19, 2006 merit decision denied appellant's claim for disability between July 2, 1995 and February 18, 2000 on the grounds that the medical evidence did not establish that his disability was causally related to his accepted work-related tropical pulmonary eosinophilia, respiratory wheezes and extrinsic asthma. With his December 12, 2007 request for reconsideration, appellant submitted reports from Dr. Huckauf who provided an assessment of his lung impairment and indicated that he was able to work only in a controlled, trigger-free environment. Dr. Huckauf stated that appellant had been disabled since 1994 from his position as a woodworker and his lung condition had worsened over time. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. He did not address the issue of appellant's disability from any type of work between July 2, 1995 and February 18, 2000 due to his accepted tropical pulmonary eosinophilia, respiratory wheezes and extrinsic asthma. Therefore, Dr. Huckauf's reports do not raise a substantial question as to the correctness of the Office's May 19, 2006 merit decision or demonstrate clear evidence of error.

On April 2, 2007 Dr. Mahajan provided a lung impairment rating and stated that appellant should not be employed in any occupation with exposure to dust or other irritants. He did not address the issue of whether appellant was totally disabled for work between July 2, 1995 and February 18, 2000 due to his accepted pulmonary conditions. Therefore, Dr. Mahajan's report does not raise a substantial question as to the correctness of the Office's May 19, 2006 merit decision or demonstrate clear evidence of error.

Appellant asserted that Dr. Schlanstein's May 3, 2000 report, previously of record, established his claim for disability. In this report, Dr. Schlanstein stated that appellant was hospitalized in 1996 for chronic obstructive bronchitis. Appellant's work in the Peace Corps led to an exacerbation of his condition and an inability to work in a job with exposure to higher than normal levels of dust pollution. However, Dr. Schlanstein did not address the issue of whether appellant was totally disabled from any type of work between July 2, 1995 and February 18, 2000 due to his accepted tropical pulmonary eosinophilia, respiratory wheezes and extrinsic asthma. Therefore, Dr. Schlanstein's report does not raise a substantial question as to the correctness of the Office's May 19, 2006 merit decision or demonstrate clear evidence of error.

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<sup>9</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

Because appellant's untimely request for reconsideration did not establish clear evidence of error in the May 19, 2006 merit decision, the Office properly denied his request for reconsideration.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the May 19, 2006 Office merit decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 7, 2008 is affirmed.

Issued: February 4, 2009  
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