

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

S.H., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Columbia, MO, Employer**

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**Docket No. 09-269
Issued: September 10, 2009**

Appearances:
Barbara J. Baney, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 5, 2008 appellant, through his representative, filed a timely appeal from a September 26, 2008 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 June 21, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his 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 lacking clear evidence of error.

FACTUAL HISTORY

On January 5, 2007 appellant, then a 34-year-old police officer, filed a traumatic injury claim alleging that on December 30, 2006 he injured his lower back while moving wheelchairs at

the main entrance. He stopped work on December 31, 2006 and returned to light-duty work on January 13, 2007.

In support of his claim, appellant submitted orthopedic treatment notes dated June 1, 2006 to January 12, 2007 from Dr. Joel T. Jeffries, a treating Board-certified orthopedic surgeon, and a September 14, 2006 clinic note by Diane M. Mueller, a nurse practitioner, and physical therapy notes.

In a letter dated February 20, 2007, the Office informed appellant that the evidence of record was insufficient to support his claim and requested additional medical and factual evidence to support his claim. Appellant was given 30 days to provide the requested information.

Subsequent to the February 20, 2007 letter, appellant submitted additional medical and factual evidence including a February 13, 2007 magnetic resonance imaging (MRI) scan, physical therapy notes, reports from Nancy Roberts, a nurse practitioner, and treatment records from Dr. Jeffries and Dr. Robert R. Conway, and Dr. Bridget Early, treating physicians.

Dr. Early noted that appellant injured himself on December 30, 2006 when he lifted up a wheelchair. She related that appellant had a history of back injury going back to November 13, 2005. Dr. Early diagnosed lumbar degenerative disc disease as seen on an MRI scan. She opined that the December 30, 2006 trauma aggravated appellant's preexisting lumbar degenerative disc disease.

By decision dated April 3, 2007, the Office denied appellant's claim on the grounds that he failed to establish that his lumbar strain was causally related to the December 30, 2006 employment incident.

On April 23, 2007 appellant requested reconsideration and submitted additional medical evidence from Drs. Early and Jeffries.

On April 16, 2007 Dr. Early opined that appellant's lumbar strain was caused by the employment injury sustained on December 30, 2006. She advised that appellant sustained an acute lower back injury when he lifted and extended the wheelchair in front of him in order to move it to a new location. Dr. Early stated that appellant's "pain is worsened by standing, wearing a heavy belt and prolonged sitting, and has been incapacitating."

By decision dated June 21, 2007, the Office denied modification of the April 3, 2007 decision.

On September 12, 2008 appellant, through his representative, requested reconsideration. On May 24, 2008 Dr. Early reiterated that appellant had preexisting lumbar degenerative disc disease and that the December 30, 2007 employment injury aggravated his condition. She noted that the symptoms appellant experienced following the December 30, 2007 incident were consistent with a new lumbar injury while lifting and extending an empty wheelchair.

By decision dated September 26, 2008, the Office denied appellant's request for further review of the merits of his claim on the grounds that it was untimely filed and failed to establish 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

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.⁵ 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 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 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.⁶

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 (1989).

⁵ *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

⁶ *See Alberta Dukes*, *supra* note 5.

ANALYSIS

The Board finds that, in its September 26, 2008 decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The most recent merit decision is dated June 21, 2007. Appellant's request for reconsideration was on September 12, 2008, more than one year after June 21, 2007. Accordingly, his request for reconsideration was not timely filed.

In accordance with internal guidelines and 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). It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not establish that its prior decision requesting his claim was in error.

Appellant submitted medical reports from Dr. Early which are insufficient to establish clear evidence of error. As noted, the evidence submitted must be relevant to the issue which was decided by the Office. Appellant's claim was denied on the grounds that the medical evidence did not establish a causal relationship between his low back condition and the December 31, 2006 employment incident involving the moving of a wheelchair. 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, 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.⁷ Dr. Early reiterated her opinion that appellant sustained a lumbar strain and aggravation of his preexisting degenerative lumbar disc disease when he lifted and moved a wheelchair. She provided rationale explaining how appellant's condition was caused aggravated by the December 31, 2006 employment incident. Accordingly, Dr. Early's reports are insufficient to establish clear evidence of error in the Office's June 21, 2007 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.

⁷ A.F., 59 ECAB ____ (Docket No. 08-977, issued September 12, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2008 is affirmed.

Issued: September 10, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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