

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

E.M., Appellant

and

**DEPARTMENT OF THE ARMY, FORT
MCCOY, Sparta, WI, Employer**

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**Docket No. 09-511
Issued: September 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 12, 2008 nonmerit decision finding that his request for reconsideration was untimely filed and failed to show clear evidence of error. The most recent decision on the merits of the claim was dated July 24, 1996. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this appeal.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. The findings of facts and conclusions of the law from the prior decision are hereby incorporated by reference.¹ The relevant facts are briefly set forth below.

Appellant sustained injury on February 9, 1979 accepted for acute muscle spasm with C5-6 radiculopathy and a discectomy and fusion at C5, C6-7. On July 13, 1994 the Office terminated her compensation benefits effective June 18, 1994 due to his refusal to accept a light-duty job. This decision was affirmed by a hearing representative on June 20, 1994. On July 13, 2007 the Board affirmed an August 24, 2005 Office decision, which denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.²

Subsequent to the Board's decision, appellant resubmitted documents that had been of record before the 1994 termination of compensation benefits, including Office documents regarding his compensation payments, physician's reports and rehabilitation notes.

By letter dated August 26, 2008, appellant again requested reconsideration. He contended that Dr. Gay Anderson gave him a poor evaluation, that the Department of Veterans Affairs found him to be 100 percent disabled, that a physician's report was forged and that he experienced chronic pain. Appellant submitted letters from his congressman dated July 15 and August 1, 2008, to which the Office sent responses. In the August 1, 2008 letter, his congressman submitted an undated page from a vocational report.

By decision dated September 12, 2008, the Office denied appellant's request for reconsideration as it was not timely filed and failed to show clear evidence of error.

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.³ It 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.⁴ When an application for review is untimely, it undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁵ The Office's implementing procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth at section 10.607, if the claimant's application for review shows clear

¹ Docket No. 06-1946 (issued July 13, 2007).

² *Id.*

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

evidence of error. In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

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. 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁷

ANALYSIS

The last merit decision in this case was dated July 24, 1996. The date of appellant's request for reconsideration was August 26, 2008. The underlying decision terminated appellant's compensation benefits because he refused an offer of suitable work. Since the application for reconsideration was filed more than one year after the last merit decision, it was untimely pursuant to 20 C.F.R. § 10.607(a).

On appeal, he again requests that the Board review the August 24, 2005 Office decision. However, the Board has addressed this decision in the prior appeal. Therefore, the issue of whether the Office properly denied reconsideration in its August 24, 2005 decision is *res judicata* and not subject to further consideration.⁸ The Board also finds that appellant's contentions that the Office either lost or hid his file to be without merit. Appellant did not submit any evidence to support his contentions.

As to the September 12, 2008 Office decision, it denied reconsideration as the request was not timely filed and found that he failed to establish clear evidence of error. The Board finds that this denial of reconsideration was proper. Appellant filed an August 26, 2008 request for reconsideration from the July 24, 1996 Office merit decision. As this was more than one year following the issuance of the decision, it was untimely filed. Although the request is untimely, it would be sufficient for a merit review if it showed clear evidence of error on the part of the Office in the July 24, 1996 decision. However, the Board evidence submitted in support of the request is new; most of the evidence is dated from prior to the 1994 termination of compensation benefits. Appellant's congressman submitted a page from a vocational report. However, the Board notes that it pertains to an October 18, 1995 vocational report that was of record and previously considered by the Office. Furthermore, the arguments made by appellant in his

⁶ 20 C.F.R. § 10.607.

⁷ *Alberta Dukes*, 56 ECAB 247 (2005).

⁸ A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d). See also *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

August 26, 2008 letter were reviewed and rejected by the Office. The evidence does not shift the weight of evidence in favor of his claim or raise a substantial question as to the correctness of the Office's decision. Appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2008 is affirmed.

Issued: September 4, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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