



## **ISSUE**

The issue is whether the Office properly determined appellant's April 7, 2009 request for reconsideration was untimely filed and failed to establish clear evidence of error.

## **FACTUAL HISTORY**

The Office accepted that appellant, a supply clerk, sustained a traumatic injury on October 8, 1970, resulting in lumbar strain. It subsequently authorized surgical procedures including spinal fusion, rhizotomy, discography and lumbar fusion L1-4. Appellant received compensation for intermittent periods of disability. He received benefits based upon a 1986 wage-earning capacity until March 9, 2005. Appellant has received total disability compensation since March 9, 2005.

On April 7, 2009 appellant filed a request for reconsideration, contending that he sustained a recurrence of disability on June 30, 1989 and should have received total disability benefits from June 30, 1989 to March 8, 2005.

The Office received a number of reports detailing appellant's continuing medical treatment in 2009 from appellant's treating physician, Dr. James W. Simmons, Jr., a Board-certified orthopedic surgeon.<sup>2</sup> In a December 19, 2000 report, Dr. Simmons noted that there had been confusion regarding the report of appellant's June 22, 1989 office visit. He stated that appellant was seen on June 22, 1989 at which time he reported mild to moderate back pain. In a June 20, 2003 report, Dr. Simmons stated that EMG evaluation performed on July 22, 2002 showed a significant worsening especially in the S2 through S4 components, which had previously not been sampled due to lack of prior bowel or bladder incontinence. He concluded that appellant had gradually and progressively worsened and was unable to work.

By decision dated October 29, 2009, the Office found appellant's request for reconsideration was untimely filed. It further found that he was not entitled to merit review as his reconsideration request did not establish clear evidence of error.

## **LEGAL PRECEDENT**

The Federal Employees' Compensation Act 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.<sup>3</sup> The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>4</sup>

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<sup>2</sup> The reports dated August 1, 1989, May 10, 1991 and September 22, 1992 were previously of record at the time of the Board's August 3, 1994 decision.

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.605 (1999).

Section 8128(a) of the Act<sup>5</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.<sup>8</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. The Office will consider an untimely application 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.<sup>9</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>10</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>11</sup> 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.<sup>12</sup>

### ANALYSIS

Appellant requested reconsideration on April 7, 2009, but did not specify which Office decision he wanted reviewed. The last decision on the merits of the claim was the Office's March 9, 2005 decision which found that he was entitled to total disability compensation as of that date and modified the loss of wage-earning capacity determination which had been in place since April 1986. To file a timely application for reconsideration, appellant had to file his application within one year of the 2005 merit decision. There is no evidence to establish that he timely filed his application for reconsideration within one year of the March 9, 2005 decision.

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

<sup>11</sup> *D.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>12</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

The Board finds the Office properly held the application for reconsideration received on April 7, 2009 was untimely filed.

Since the application was untimely, appellant is not entitled to a merit review unless the application demonstrates clear evidence of error.

Appellant argued that the Office should have also awarded total disability benefits from June 30, 1989 to March 9, 2005. If he had submitted new evidence in support of his allegation, the issue presented would be whether the Office properly modified his loss of wage-earning capacity determination. Appellant did not submit new medical evidence in support of his request. The medical reports he submitted following his April 7, 2009 request for reconsideration, from Dr. Simmons, pertaining to his medical condition prior to March 9, 2005 were previously of record as of March 9, 2005. The Office therefore properly treated appellant's request for reconsideration, as a request for reconsideration, not a request for modification of the initial loss of wage-earning capacity determination.<sup>13</sup>

The medical progress notes submitted from Dr. Simmons dating from August 1, 1989 describe appellant's continuing pain complaints, and findings pertaining to conditions other than the accepted medical conditions. These reports do not constitute persuasive evidence that the Office's March 9, 2005 decision finding appellant totally disabled as of that date was clearly in error.

On appeal appellant submitted evidence to the Board. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2010).

### **CONCLUSION**

The Board finds appellant's April 7, 2009 application for reconsideration was untimely filed and failed to establish clear evidence of error.

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<sup>13</sup> See *J.H.*, Docket No. 08-1035 (issued September 25, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 29, 2009 is affirmed.

Issued: December 3, 2010  
Washington, DC

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

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

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