

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

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**R.G., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION, MEDICAL  
CENTER, Houston, TX, Employer**

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**Docket No. 10-157  
Issued: July 6, 2010**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 21, 2009 appellant filed a timely appeal of a September 23, 2009 decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3(e), the Board has jurisdiction over the September 23, 2009 decision. As the most recent merit decision was dated June 8, 2006 the Board does not have jurisdiction over the merits of the claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

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<sup>1</sup> The Board has jurisdiction over final decisions of the Office. See 20 C.F.R. § 501.2(c). For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

## **FACTUAL HISTORY**

On September 8, 2004 appellant, then a 58-year-old housekeeping aide, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in a slip and fall while in the performance of duty on September 3, 2004. The Office accepted the claim for right wrist sprain, contusions to the right hip, leg and shoulder. Appellant returned to work in a light-duty position.

On April 25, 2005 appellant filed a recurrence of disability claim (Form CA-2a) and a claim for compensation (Form CA-7) commencing April 12, 2005.<sup>2</sup> By decision dated July 25, 2005, the Office denied compensation commencing April 12, 2005 on the grounds the medical evidence was insufficient to establish the claim. In a decision dated June 8, 2006, it reviewed the case on its merits and denied modification.

Appellant submitted a reconsideration request dated July 30, 2007. He requested that the Office look at the accompanying medical evidence, as there were statements by his physician that “were not used or made available to you at the time of your June 2006 decision.” The medical evidence submitted included reports that were submitted prior to June 8, 2006. In a February 6, 2006 report, Dr. Robert Fulford, stated that appellant had persistent back, right leg and shoulder pain, with an MRI scan showing a Bankart lesion in the right shoulder. He opined, “all of these complaints” were related to the September 3, 2004 injury. With respect to new evidence, appellant submitted a December 18, 2006 report from Dr. William Watters III, an orthopedic surgeon, indicating he underwent cervical discectomy surgery. In a report dated January 9, 2007, Dr. Watters noted that appellant had neck pain but was doing well after surgery. He advised that appellant’s preexisting neck condition with degenerative arthritis made him vulnerable to an injury at the time of the slip and fall. Dr. Watters further stated, “This is because his radiculopathy developed certainly within very short time of his fall suggesting disc herniation at the level of stenosis. I would therefore argue that symptomatology, which is resolved nicely with the surgery indeed and which dates from the time of fall was indeed a result of that very same fall.”

By decision dated September 23, 2009, the Office found appellant’s letter requesting reconsideration was untimely. It denied merit review on the grounds he had not shown clear evidence of error by the Office.

## **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 CA-7 actually stated April 12, 2004, but presumably appellant intended the date of April 12, 2005.

<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). 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>8</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>9</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>10</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 the Office abused its discretion in denying merit review in the face of such evidence.<sup>11</sup>

### ANALYSIS

Appellant filed a claim for wage-loss compensation commencing April 12, 2005. The last decision on the merits of this claim was issued on June 8, 2006. Pursuant to the Office's implementing regulations, appellant had one-year to file a timely application for reconsideration. In this case his application for reconsideration was dated July 30, 2007, which was more than one year after the June 8, 2006 Office decision. It is therefore an untimely application and appellant must show clear evidence of error by the Office.

The July 30, 2007 application for reconsideration suggested that the Office had not properly considered the medical evidence, although it did not discuss any specific medical report. Appellant referred to evidence being withheld from the Office but it is not clear what

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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> 20 C.F.R. § 10.607.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

<sup>10</sup> *D.O.*, 60 ECAB \_\_\_ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>11</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

specific evidence he contends was not considered by the Office. The Board notes that the issue in the case was the denial of compensation commencing April 12, 2005. None of the reports submitted by appellant on reconsideration provide a rationalized medical opinion on the issue of disability causally related to the September 3, 2004 employment injury commencing April 12, 2005. Dr. Fulford did not discuss any specific period of disability Dr. Watters referred generally to appellant's symptomology and the December 2006 surgery, without discussing the issue of employment-related disability as of April 12, 2005.

As noted, the clear evidence of error standard is a difficult standard to meet. The Board finds that appellant did not establish clear evidence of error in this case by the Office in denying compensation as of April 12, 2005.

### **CONCLUSION**

The Board finds that appellant's application for reconsideration was not timely filed and failed to show clear evidence of error by the Office.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 23, 2009 is affirmed.

Issued: July 6, 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