United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 09-1843**
	)	**Issued: March 12, 2010**
U.S. POSTAL SERVICE, PEMBROKE PINES PROCESSING & DISTRIBUTION CENTER, Pembroke Pines, FL, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
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 July 13, 2009 appellant filed a timely appeal from a June 25, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. The most recent decision of record is that of the Board dated April 7, 2008. Therefore, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board lacks jurisdiction to review the merits of the claim.

ISSUES

The issue is whether the Office properly denied appellant's June 1, 2009 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

On appeal, appellant's attorney asserts that evidence accompanying the June 1, 2009 request for reconsideration was sufficient to establish appellant's claim.

FACTUAL HISTORY

This is the second appeal before the Board in this case. In an April 7, 2008 decision,[1] the Board affirmed November 27, 2006 and April 19, 20007 decisions of the Office finding that appellant had not established that a claimed right femur fracture occurred in the performance of duty. The fracture occurred in a motor vehicle accident while commuting home from work on August 25, 2005 during the onset of Hurricane Katrina. The Board found that appellant did not submit evidence establishing that his drive home was a requirement of his employment, related to emergency duties or occurred during a municipal curfew. The law and the facts of the case as set forth in the Board's decision are incorporated by reference.

In a June 1, 2009 letter, appellant, through counsel, requested reconsideration. He asserted that his commute home occurred during a governmentally declared state of emergency, thereby falling under an exception to the going and coming rule. Counsel argued that the employing establishment required appellant to commute home on August 25, 2005, rendering the claimed injury compensable under the "positional risk" and "neutral risk" doctrines. He submitted an October 19, 2005 state executive order noting that a state of emergency on August 24, 2005, a Florida Department of Transportation emergency order dated August 25, 2005, an August 25, 2005 declaration of local emergency for Broward County, Florida, and an August 25, 2005 e-mail regarding emergency highway funds.

By decision dated June 25, 2009, the Office denied appellant's June 1, 2009 request for reconsideration as it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[6]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence

[1] Docket No. 07-1731 (issued April 7, 2008).

[2] 5 U.S.C. § 8128(a).

[3] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[4] *Thankamma Mathews*, *supra* note 3; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[5] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[6] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3, *Jesus D. Sanchez*, *supra* note 4.

of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[7] Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13]

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 *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.[14] The Board must make 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.[15]

ANALYSIS

In its June 25, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent decision of record is that of the Board dated April 7, 2008. Appellant requested reconsideration in a letter dated June 1, 2009, more than one year after April 7, 2008. Accordingly, his request for reconsideration was not timely filed.

The Board finds that appellant's June 1, 2009 letter does not raise a substantial question as to whether the Board's April 7, 2008 decision and order was in error or *prima facie* shift the weight of the evidence in his favor. Counsel's arguments are substantially similar to those previously considered and rejected on the prior appeal. They are insufficient to establish clear

[7] *Thankamma Mathews, supra* note 3.

[8] 20 C.F.R. § 10.607(b).

[9] *Thankamma Mathews, supra* note 3.

[10] *Leona N. Travis,* 43 ECAB 227 (1991).

[11] *Jesus D. Sanchez, supra* note 4.

[12] *Leona N. Travis, supra* note 10.

[13] *Nelson T. Thompson,* 43 ECAB 919, 922 (1992).

[14] *James R. Mirra,* 56 ECAB 738 (2005).

[15] *Gregory Griffin, supra* note 5.

evidence of error. The governmental declarations and funding request accompanying counsel's letter do not even address whether there was a municipal curfew at the time and location of the August 25, 2005 car accident.[16] Therefore, the evidence accompanying the June 1, 2009 letter is insufficient to raise a substantial question as to the correctness of the Board's April 7, 2008 decision.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Board's decision and order. Consequently, the Office properly denied appellant's reconsideration request as his request does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's June 1, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2009 is affirmed.

Issued: March 12, 2010
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

[16] The Office's procedures provide an exception to the "going and coming" rule for employees required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or for other reasons. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(f) (August 1992).