

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

M.H., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Leavenworth, KS, Employer**

)
)
)
)
)
)

**Docket No. 10-390
Issued: October 6, 2010**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal of the September 4, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error.¹ Because more than one year has elapsed between the most recent merit decision dated November 14, 2002 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ The Board notes that appellant also appealed a June 10, 2009 "decision." The Board finds, however, that the June 10, 2009 Office document is an informational letter and thus does not purport to be a final adverse decision. In this letter the Office briefly reviewed the procedural history of the case and noted that appellant had yet to exercise her appeal rights following the issuance of the Office hearing representative's November 14, 2002 decision affirming the April 19, 2002 Office decision terminating her compensation benefits. 20 C.F.R. § 501.3(a).

² For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal with the Board. 20 C.F.R. § 501.3(d)(2). For Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

On appeal, appellant contends that the Office should have expanded his claim to include additional diagnosed conditions.

FACTUAL HISTORY

The Office accepted that on May 1, 2001 appellant, then a 35-year-old cook supervisor, sustained a right rotator cuff tear and concussion when a window fell onto his head while working at the employing establishment. It authorized right rotator cuff repair which appellant underwent on July 23, 2001.

By decision dated April 19, 2002, the Office terminated appellant's compensation for wage-loss and medical benefits with regard to his accepted employment-related injuries, effective that date. On February 15, 2002 Dr. Jeffrey D. Lawhead, an attending Board-certified family practitioner, found that appellant could return to his regular work duties as a cook supervisor with no restrictions. The opinion of Dr. Lawhead constituted the weight of the medical opinion evidence.

By decision dated November 14, 2002, an Office hearing representative affirmed the April 19, 2002 termination decision, finding that the medical evidence was sufficient to establish that appellant did not have any continuing residuals or disability causally related to his accepted employment-related injuries.³

In an undated letter received by the Office on August 19, 2009, appellant requested reconsideration of the April 19, 2002 termination decision. He submitted duplicate copies of medical reports dated February 8, 2002 to May 19, 2004 which stated that he had fibromyalgia, sleep apnea, chronic fatigue syndrome and hypometabolism of the brain. Reports dated January 25, 2002 to March 27, 2008 also reiterated the previously stated diagnoses.

By decision dated September 4, 2009, the Office denied appellant's August 19, 2009 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that his request was not timely filed within one year of the Office's November 14, 2002 decision. The Office also found that the evidence submitted failed to establish a substantial question concerning the correctness of the November 14, 2002 decision.

³ By decision dated October 22, 2003, the Office granted appellant a schedule award for eight percent impairment of the right upper extremity. In a September 29, 2004 decision, an Office hearing representative affirmed the October 22, 2003 schedule award decision. By decision dated May 18, 2005, the Office denied modification of the September 29, 2004 decision. In a May 24, 2006 decision, it denied appellant's May 12, 2006 request for reconsideration of the May 18, 2005 decision on the grounds that it neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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 decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that the Office properly determined that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁵ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶

The last merit decision in this case was the Office hearing representative's November 14, 2002 decision which affirmed the April 19, 2002 termination of appellant's compensation. The hearing representative found that the medical evidence was sufficient to establish that appellant no longer had any residuals or disability causally related to his accepted employment-related right rotator cuff tear and concussion. As appellant's August 19, 2009 letter to the Office requesting reconsideration of his claim was made more than one year after the November 14, 2002 merit decision of the hearing representative, the Board finds that it was not timely filed.

The Board finds that the evidence submitted by appellant in support of his August 19, 2009 request for reconsideration does not raise a substantial question as to the correctness of the Office's termination of compensation benefits or shift the weight of the evidence of record in his favor. Appellant resubmitted medical reports which found that he had fibromyalgia, sleep apnea, chronic fatigue syndrome and hypometabolism of the brain. This evidence was previously considered by the Office in its prior decisions and does not establish that the Office committed clear evidence of error in terminating appellant's compensation in 2002. Further, this evidence did not provide any opinion addressing whether the diagnosed conditions were causally related to the accepted May 1, 2001 employment-related injuries. The Board finds that the medical reports resubmitted by appellant do not discharge his burden of showing clear evidence of error.

Similarly, none of the medical reports dated January 25 to March 27, 2008 establishes clear evidence of error in the November 14, 2002 termination decision. This evidence does not provide any opinion addressing the causal relationship between appellant's fibromyalgia, sleep apnea, chronic fatigue syndrome and hypometabolism of the brain, and the May 1, 2001 employment-related injuries. The Board finds that these reports are insufficient to show that the Office's termination of appellant's compensation benefits effective April 19, 2002 was erroneous or raised a substantial question as to the correctness of the Office's 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

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB ____ (Docket No. 08-977, issued September 12, 2008).

¹⁶ *D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, 57 ECAB 292 (2005).

correctness of the Office's November 14, 2002 termination decision. 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 August 19, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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