

FACTUAL HISTORY

On September 28, 2007 appellant, then a 55-year-old nurse, filed a traumatic injury claim alleging that on August 6, 2007 he cut his right fourth finger when it became caught between a rolling chest of drawers and a window ledge.

By letter dated December 4, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence.

In a December 22, 2008 letter, appellant described the August 6, 2007 employment incident. During the administration of an intravenous infusion, his finger became caught between a chest of drawers and window ledge. Appellant experienced profuse bleeding and pain. He reported the injury to Caroline Montelongo, a supervisor, upon her arrival at work. Appellant received medical treatment in an emergency room at Northwest Medical Center. Medical records dated September 21, 2007 from Northwest Medical Center stated that he sustained acute scrotal cellulitis, scrotal lesions, Leukocytosis and right forearm abscess. He was admitted to the hospital for treatment of his right forearm condition.

By decision dated January 5, 2009, the Office denied appellant's claim. It found that the medical evidence was insufficient to establish a diagnosed right fourth finger condition causally related to the accepted August 6, 2007 employment incident.

On a form dated February 4, 2009 and postmarked February 5, 2009, appellant requested an oral hearing before an Office hearing representative regarding the Office's January 5, 2009 decision.

By decision dated March 17, 2009, the Office's Branch of Hearings and Review found that appellant was not entitled to a hearing on the grounds that his request was not made within 30 days of the issuance of its January 5, 2009 decision. It exercised its discretion and further denied his request on the basis that the issue in the case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that he sustained a medical condition causally related to the accepted employment incident.

On January 23, 2010 appellant requested reconsideration of the Office's January 5, 2009 decision. He attributed his alleged injury to inadequate nursing staff levels due to a noncompliant nursing shortage. Appellant filed a form entitled patient safety notification because he believed that his assignment or environment in which he worked was potentially unsafe for his patients. He submitted a copy of the employing establishment's standard operating procedure for staffing guidelines dated June 27, 2002. Appellant also submitted a blank copy of the patient safety notification form that he filed.

In a February 11, 2010 decision, the Office denied appellant's January 23, 2010 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 January 5,

2009 decision. The Office further found that the evidence submitted failed to raise a substantial question concerning the correctness of the January 5, 2009 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² 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 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.³

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.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹

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.¹⁰ The Board makes

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* at § 10.607(b).

⁵ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁶ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁷ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

⁸ *Leona N. Travis*, *supra* note 6.

⁹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹¹

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.¹² However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³

The most recent merit decision in this case was the Office's January 5, 2009 decision which found that appellant did not sustain an injury while in the performance of duty. The Office found that the medical evidence of record was insufficient to establish that he sustained a right fourth finger injury due to the accepted August 6, 2007 employment incident. As appellant's January 23, 2010 request for reconsideration of the merits of his claim by the Office was made more than one year after the January 5, 2009 merit decision, the Board finds that it was not timely filed.

The Board also finds that the evidence appellant submitted in support of his request for reconsideration do not raise a substantial question as to the correctness of the Office's determination that he did not sustain an injury in the performance of duty or shift the weight of the evidence of record in his favor. Appellant attributed his right fourth finger injury to the employing establishment's nursing staff shortage which violated its standard operating procedure for staffing. He submitted a copy of the operating procedure. Appellant also submitted a blank copy of the patient safety notification form he filed, contending that his assignment or environment in which he worked was unsafe for his patients. These documents do not establish clear evidence of error in the January 5, 2009 decision as they are not relevant to the causal relationship of his right finger condition to the accepted August 6, 2007 employment incident. The Board finds that this evidence is insufficient to show that the Office's denial of appellant's claim for compensation was erroneous or raise 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 *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's January 5, 2009 decision. Consequently, the Office properly denied his reconsideration request as his request does not establish clear evidence of error.

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹³ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

CONCLUSION

The Board finds that appellant's January 23, 2010 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2011
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