United States Department of Labor
Employees' Compensation Appeals Board

JEFFREY M. SAGRECY, Appellant	)	
and	)	**Docket No. 04-1189**
	)	**Issued: September 28, 2004**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Jeffrey M. Sagrecy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 31, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated March 2, 2004 which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated August 6, 2002 to the filing of this appeal on March 31, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On May 9, 2002 appellant, then a 26-year-old special agent, filed a notice of traumatic injury alleging on that date he sustained a back and head injury in the performance of duty. Appellant stated: "When fighting with the Redman we went into the wall and I hit my head on

the wall." Appellant's injury occurred at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. A witness reported that appellant hurt his back when he hit the wall while doing the Redman exercise. A second witness noted that appellant vomited three or four times on route to the health unit but remained conscious. Appellant provided his home address as 403 W. High Street, Springfield, Kentucky 40069.

The Office requested medical evidence from appellant in a letter dated June 18, 2002 and mailed to his address of record. The Office allowed 30 days for a response. Appellant did not respond.

By decision dated August 6, 2002, the Office denied appellant's claim finding that while he experienced the claimed employment incident, there was no medical evidence establishing a condition resulting from this incident. The Office mailed the decision to appellant's address of record.

On February 4, August 18 and November 14, 2003, the Office received a note dated May 9, 2002 from Dr. M. Mou, the medical officer at FLETC, reporting a closed head trauma and vomiting and diagnosing head injury. On the same dates the Office also received emergency room notes from the Southeast Georgia Regional Medical Center in Brunswick, Georgia, dated May 9, 2002 at 11:49 a.m. diagnosing head injury and reporting that appellant was undergoing training when he was hit in the head and then hit his head into a padded wall. Appellant was wearing a helmet at the time of the injury. Appellant had no loss of consciousness, but vomited three times within a half an hour following the incident.

On February 9, 2004 appellant requested reconsideration of the Office's August 6, 2002 decision. He stated that he sustained his injury during "Redman" drills at FLETC. Appellant asserted that he did not receive either the August 18, 2002 request for medical evidence or the August 6, 2002 decision denying his claim. Appellant noted that he remained at FLETC training from March 6 through August 9, 2002 and that his home address "was in the process of changing." He stated:

> "Furthermore, conversations with the hospital indicate that there is no additional information to be provided. The Brunswick hospital has provided all the information that they possess. The emergency room visit was a consultation only. There were no x-rays, blood work or any other test performed. After consulting with the doctor he did not feel it was necessary to perform any tests unless I deemed it necessary. I was sent to the emergency room at the request of the FLETC Health unit as a precaution."

Appellant listed his address as 119 Copperfields Way, Bardstown, Kentucky 40004.[12]

[1] Appellant noted that he had received a bill for the medical treatment that he received, stated that he felt that he should not be held responsible for this debt as his injury was employment related and requested that the Office pay his medical expenses. As the Office has not issued a final decision on this issue, the Board may not address it for the first time on appeal. 20 C.F.R. § 501.2(c).

By decision dated March 2, 2004, the Office denied reconsideration of the merits on the grounds that his request for reconsideration was not timely and did not establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through its 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 reconsideration is filed within one year of the date of that decision.[6] 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).[7]

The Office's regulations require that an application for reconsideration must be submitted in writing[8] and define an application for reconsideration as the request for reconsideration "along with the supporting statements and evidence."[9] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration 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."[10]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[11]

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[3] 5 U.S.C. § 8128(a).

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

[5] *Id.* at 768; *see also Jesus D. Sanchez,* 41 ECAB 964, 966 (1990).

[6] 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).

[7] 20 C.F.R. § 10.607(b); *Thankamma Mathews, supra* note 3 at 769; *Jesus D. Sanchez, supra* note 4 at 967.

[8] 20 C.F.R. § 10.606.

[9] 20 C.F.R. § 10.605.

[10] 20 C.F.R. § 10.607(b).

[11] *Thankamma Mathews, supra* note 3 at 770.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17]

The Office's regulations also provide that a copy of the decision shall be mailed to the employee's last known address.[18] The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.[19] This is known as the "mail box rule."

ANALYSIS

Appellant requested reconsideration through a written application on February 9, 2004. Since appellant filed his reconsideration request more than one year following the Office's August 6, 2002 merit decision, the Office properly determined that the request was untimely. Furthermore, the Office mailed its August 6, 2002 decision and June 18, 2002 request for information to the address of record provided by appellant, 403 W. High Street, Springfield, Kentucky 40069. The record does not contain a written change of address from appellant. The Board finds that there is no error on the part of the Office in complying with its regulations and mailing information to the address provided by appellant.

The underlying issue in this case is whether appellant sustained a head injury on May 9, 2002 causally related to his federal employment. The Office accepted that the May 9, 2002

[12] *Thankamma Mathews, supra* note 3 at 770.

[13] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[14] *Jesus D. Sanchez, supra* note 4 at 968.

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

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

[17] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[18] 20 C.F.R. § 10.127.

[19] *Kenneth E. Harris*, 54 ECAB ___ (Docket No. 02-713, issued March 25, 2003).

incident occurred at 10:00 a.m. as alleged but found that appellant failed to submit any medical evidence to establish that this incident caused an injury.

In the February 9, 2004 "application for reconsideration," appellant stated, in part:

> "Furthermore, conversations with the hospital indicate that there is no additional information to be provided. The Brunswick hospital has provided all the information that they possess. The emergency room visit was a consultation only. There were no x-rays, blood work or any other test performed. After consulting with the doctor he did not feel it was necessary to perform any tests unless I deemed it necessary. I was sent to the emergency room at the request of the FLETC Health unit as a precaution."

In his "application for reconsideration" appellant has not raised any error on the part of the Office in the issuance of its most recent merit decision of August 6, 2002. He merely noted that all of the evidence in support of his claim for a head injury has been submitted to the record. Appellant has not, in accordance with 20 C.F.R. § 10.607(b), demonstrated clear evidence of error on the part of the Office in finding that he did not establish a head injury on May 9, 2002 in the performance of duty. His application for reconsideration does not establish "on its face" that the Office's August 6, 2002 merit decision was erroneous.

This case is distinguishable from *Shakeer Davis*[20] in which the claimant initially submitted evidence of an employment incident but no medical evidence, resulting in the Office's denial of his claim. The claimant there filed an untimely application for reconsideration which specifically referenced new medical evidence submitted after the Office's decision and alleged that this evidence was sufficient to establish clear evidence of error on the part of the Office on the grounds that the medical evidence established that an employment-related injury did, in fact, occur.[21] The Board concluded that the medical documentation was sufficient to establish clear evidence of error in the Office's finding that an injury had not occurred.

In the current appeal before the Board, appellant did not submit any medical evidence or raise any specific legal contention which would establish that the Office committed error in its August 6, 2002 decision denying his claim for a head injury resulting from the May 9, 2002 employment incident. Therefore, the Board finds that appellant has not established clear evidence of error in the Office's finding that an injury in the performance of duty was not established on May 9, 2002, as alleged.

CONCLUSION

The Board finds that the Office properly denied further merit review of this claim. Appellant filed an untimely request for reconsideration and on the face of his written application for reconsideration failed to provide clear evidence of an injury resulting from the accepted employment incident.

[20] 52 ECAB 448 (2001).

[21] *Id.* at 449.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member