

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

<b>M.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 06-1948</b>
	)	<b>Issued: February 13, 2007</b>
<b>DEPARTMENT OF THE ARMY, RED RIVER</b>	)	
<b>ARMY DEPOT, Hooks, TX, Employer</b>	)	
	)	

*Appearances:*  
*Benjamin Dennis, 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 August 21, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated September 16, 2005 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 that one year has elapsed from the last merit decision issued on July 21, 2000 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

**FACTUAL HISTORY**

This case has previously been before the Board on appeal. The facts and conclusions as set forth in the previous decisions are hereby incorporated by reference. To summarize the pertinent facts, appellant was in an employment-related motor vehicle accident on August 2,

1996 which resulted in a lower back strain and facial lacerations. The Office accepted his claim. On December 16, 1996 appellant filed a claim for a recurrence of disability alleging that, while sitting at his desk on September 9, 1996, he leaned over to retrieve a pen and his back locked up. On July 21, 2000 this Board affirmed Office decisions dated March, September 15 and November 19, 1998 finding that appellant had failed to establish a recurrence of disability on September 9, 1996 causally related to the accepted August 2, 1996 employment injury.<sup>1</sup> Appellant requested reconsideration on February 25, 2003. The request was denied by the Office in a decision dated November 7, 2003 on the grounds that appellant's request was not timely filed within one year of the last merit decision and appellant did not establish clear evidence of error. This decision was affirmed by this Board on March 16, 2005.<sup>2</sup>

By letter received by the Office on July 19, 2005, appellant requested review of an April 2005 decision. Appellant contended that he was making sufficient money prior to his accident of August 2, 1996 to pay his bills. He also indicated that he was enclosing a copy of a doctor's report with regard to his health. Appellant attached an attending physician's report by Dr. Roshan L. Sharma, a Board-certified physiatrist, who indicated that he had chronic pain and restricted lumbar range of motion. Dr. Sharma diagnosed herniated disc L3-4 and lumbar radiculopathy. She checked a box on the form indicating that this condition was caused or aggravated by appellant's employment.

By decision dated September 16, 2005, the Office denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>3</sup> 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.<sup>4</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>5</sup> The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows clear

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<sup>1</sup> Docket No. 99-1143.

<sup>2</sup> Docket No. 04-1721.

<sup>3</sup> 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

<sup>4</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>5</sup> *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

evidence of error on the part of the Office.<sup>6</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> 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 decision.<sup>13</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>14</sup>

### ANALYSIS

Appellant's request for reconsideration was filed on July 19, 2005. Since he filed his reconsideration request more than one year after the Board's July 21, 2000 merit decision, the Office properly determined that the request was untimely.<sup>15</sup>

The Board finds that appellant did not establish clear evidence error. The only new evidence appellant submitted in support of his claim was an April 22, 2005 attending physician's

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<sup>6</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

<sup>7</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>8</sup> See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Pasquale C.D. Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Leon J. Modrowski*, *supra* note 5; *Jesus D. Sanchez*, *supra* note 5.

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, *supra* note 7.

<sup>13</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>14</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>15</sup> The Board's decision, dated March 16, 2005, was not a decision on the merits.

report by Dr. Sharma, who checked a box indicating that appellant's herniated disc L3-4 and lumbar radiculopathy was causally related to appellant's employment. However, Dr. Sharma did not specifically relate appellant's condition to the accepted August 2, 1996 automobile accident. Furthermore, she does not provide a complete history and explanation with regard to appellant's medical condition. Accordingly, this report is not of sufficient probative value to *prima facie* shift the weight of evidence in favor of appellant and cannot establish clear evidence of error.

**CONCLUSION**

The Board finds that appellant filed an untimely application for reconsideration and that his application did not establish clear evidence of error on the part of the Office.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 16, 2005 is affirmed.

Issued: February 13, 2007  
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