U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of RAYMOND RICHARDSON and U.S. POSTAL SERVICE,
POST OFFICE, Shreveport, LA

*Docket No. 02-695; Oral Argument Held May 7, 2003;*
*Issued June 18, 2003*

Appearances: *Bettye L. Richardson*, for appellant; *Jim C. Gordon, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

This case was previously on appeal before the Board. By decision dated May 11, 2000, the Board found that the Office's decision of September 22, 1998 properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act. The Board further found that it did not have jurisdiction to review the Office's August 7, 1997 decision which denied appellant's claim for compensation on the grounds that the medical evidence was not sufficient to establish that his condition was caused by an employment factor.[1] The law and the facts as set forth in the previous Board decision are incorporated herein by reference.

By letter dated June 11, 2000, appellant requested reconsideration. Appellant addressed an August 21, 1997 hearing request and argued that the request demonstrated that he had timely requested a hearing. A discharge summary dated February 7, 1997 from Dr. Jody K. Meek was also submitted. By decision dated January 4, 2002, the Office found that appellant's request for reconsideration was not timely filed, and that it did not present clear evidence of error.

The Board finds that appellant's June 11, 2000 request for reconsideration was not timely filed.

[1] Docket Number 99-602 (issued August 7, 1997).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). As one such limitation, section 10.607(a) provides that "[a]n application for reconsideration must be sent within one year of the date of the [Office's] decision for which review is sought."[3] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[4]

In the present case, the most recent merit decision regarding appellant's claim was the Office's August 7, 1997 decision, which determined that appellant had not submitted any evidence which would establish causation between his federal employment and his current medical condition. The one-year limitation period, therefore, began to run on August 7, 1997. Although the Board had issued a decision on May 11, 2000 affirming a denial of an oral hearing, this decision does not constitute a merit review of the case and thus does not extend the one-year period to file a request for reconsideration.[5] Appellant had one year from the date of the Office's August 7, 1997 decision to request reconsideration and did not do so until June 11, 2000. The Office therefore properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in section 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[6] Section 10.607(b) of the implementing regulations provides: "[the Office] will consider an untimely application for reconsideration only if the

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a) (1999).

[4] *George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003).

[5] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[6] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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."[7]

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

The Board finds that appellant's June 11, 2000 request for reconsideration did not demonstrate clear evidence of error.

In his June 11, 2000 request for reconsideration and previously, appellant contended that he had timely requested an oral hearing and referenced a letter dated August 21, 1997. The Board, however, finds that this statement does not establish, on its face, that appellant had timely requested an oral hearing. The record is devoid of a copy of such letter and any evidence indicating when such letter was mailed. The Board has held that it is appellant's burden to present proof regarding all elements of his claim.[10] Proof of such a letter dated and postmarked August 21, 1997 may well have been sufficient to corroborate appellant's contention raised in his June 11, 2000 request for reconsideration and previously that he filed a timely request for an oral hearing, appellant still retains the burden of proof. As either appellant or his representative possess such copies of this type of correspondence or can obtain the mail logs from his previous attorney, the burden is on appellant to produce such copies of the correspondence.[11] Accordingly, there is no clear evidence of error in the record to establish that appellant timely requested an oral hearing.

Although appellant submitted a discharge report dated February 13, 1997, this report fails to contain any discussion regarding the cause of appellant's current medical condition. Thus, the

[7] 20 C.F.R. § 10.607(b) (1999).

[8] *See George C. Vernon, supra* note 4.

[9] *Id.*

[10] *Elaine Pendleton,* 40 ECAB 1143 (1989).

[11] *Thomas F. Jordan,* 47 ECAB 382 (1996).

Board finds that the February 13, 1997 medical report is insufficiently rationalized to effect a *prima facie* shift of the weight of the evidence in appellant's favor.

Therefore, the Office's January 4, 2002 decision finding that appellant's June 11, 2000 request for reconsideration was untimely filed and did not establish clear evidence of error was correct under the law and the facts of this case.

The January 4, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 18, 2003

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member