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<b>JOSE E. GOMEZ, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 05-843</b>
	)	<b>Issued: July 20, 2005</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Brooklyn, NY, Employer</b>	)	
	)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chief  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

On February 28, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 26, 2004 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 13, 1998 and the filing of this appeal on February 28, 2005, 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).

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Appellant, a 36-year-old chauffeur carrier, filed a Form CA-2 claim for benefits on November 17, 1997, alleging that he developed foot, ankle, bilateral knee and lower back conditions causally related to factors of his employment.

By decision dated February 13, 1998, the Office denied appellant's claim on the grounds that he did not submit medical evidence sufficient to establish that the claimed medical conditions were causally related to his federal employment.

On May 19, 2004 appellant requested reconsideration of the Office's February 13, 1998 decision denying compensation. Appellant submitted a February 19, 2004 rating decision from the Department of Veterans' Affairs which granted him benefits based on three service-connected disabilities.

By decision dated October 26, 2004, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>2</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"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 --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> As one such limitation, the Office has stated that it 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> The Board has found that the

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>3</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(b).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>6</sup> Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.<sup>7</sup>

To establish clear evidence of error, appellant 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 be manifested 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's decision.<sup>13</sup> The Board makes an independent determination of whether appellant 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

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on February 13, 1998. Appellant requested

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<sup>5</sup> See cases cited *supra* note 2.

<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, *supra* note 2.

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

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Faidley*, *supra* note 2.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

reconsideration on May 19, 2004; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's May 19, 2004 request for reconsideration failed to show clear evidence of error. The evidence appellant submitted is not pertinent to the issue on appeal. The February 19, 2004 rating decision from the Department of Veterans' Affairs, the only evidence appellant submitted with his request, is not relevant because it constitutes a finding by another agency of the Federal Government awarding benefits under a different statute with different legal standards.<sup>15</sup> The Department of Veterans' Affairs rating of appellant's service-related disability does not establish clear evidence of error in the Office's determination that appellant did not sustain a medical condition causally related to his federal employment under the Act.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated May 19, 2004. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on October 26, 2004.

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<sup>15</sup> See *Daniel Deparini*, 44 ECAB 657 (1993).

<sup>16</sup> The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 26, 2004 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: July 20, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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