

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

D.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Kensington, PA, Employer**

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**Docket No 06-1634
Issued: January 26, 2007**

Appearances:
Appellant, pro se
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 July 12, 2006 appellant filed a timely appeal from nonmerit decisions of the Office of Workers' Compensation Programs dated August 18, 2005 and February 27, 2006, which found that his December 29, 1995 request for reconsideration was untimely filed and did not present clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. As the last decision on the merits of the claim was a July 29, 1994 decision denying his request for modification of the denial of his recurrence claim, the only decisions on appeal are the August 18, 2005 and June 20, 2006 Office nonmerit decisions.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a), on the grounds that the request was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This is the fourth appeal to the Board. On February 15, 1994 the Board found that the Office abused its discretion in a June 4, 1992 decision by finding that appellant failed to file a timely request for reconsideration of his claim for a recurrence of disability due to his October 18, 1985 neck injury.¹ The Board noted that appellant submitted pertinent new and relevant medical evidence subsequent to the March 15, 1991 merit decision, which the Office did not consider. The Board remanded the case to the Office to conduct a merit review.² Subsequent to the Board's decision, the Office issued a merit decision dated July 29, 1994 denying modification. Appellant filed several requests for reconsideration with the most close in time being December 29, 1995. He submitted medical evidence already contained in the record including reports dated September 18 and 28, 1990 by Dr. Jeffrey D. Lemberg, a treating Board-certified physiatrist. As this request was outside the one-year time frame, the Office issued a decision dated January 28, 1999 denying his request for reconsideration as being untimely filed and not establishing clear evidence of error. In the second appeal, the Board remanded the case to the Office for reconstruction and proper assemblage as the case record had not been received as of January 6, 2000.³ In the third appeal, the Board found that the Office failed to follow its instructions in the two prior decisions.⁴ The facts and the circumstances are set out in the prior decision and are hereby incorporated by reference.

Subsequent to the Board's remand order, the Office issued a nonmerit decision dated August 18, 2005. It noted that it was reissuing its January 28, 1999 decision, which found that appellant had filed an untimely request for reconsideration and failed to establish clear evidence of error. On February 27, 2006 the Office reissued the August 18, 2005 nonmerit decision as appellant stated that he had not received the decision.

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.⁵ 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.⁶ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear

¹ This was assigned file number 03-017646.

² Subsequent to the Board's decision, the Office issued a merit decision dated July 29, 1994 denying appellant's request for reconsideration. The Office found the May 22, 1991 report by Dr. Mary Norek insufficient to establish that appellant's recurrence of disability beginning November 7, 1990 was causally related to his accepted October 18, 1985 work injury.

³ Docket No. 99-1481 (issued January 6, 2000).

⁴ Docket No. 04-623 (issued March 23, 2005).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.607; *see also* Alan G. Williams, 52 ECAB 180 (2000).

evidence that its final merit decision was in error.⁷ 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 evidence of error" on the part of the Office.⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

⁷ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ 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).

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

¹⁰ See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Leon J. Modrowski*, *supra* note 7; *Jesus D. Sanchez*, *supra* note 7.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, *supra* note 9.

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁶ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

ANALYSIS

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its July 29, 1994 merit decision. Appellant's December 29, 1995 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office in its July 29, 1994 decision. The Office denied appellant's claim that he sustained a recurrence of disability due to his accepted October 18, 1985 employment injury. In support of his request, appellant submitted medical evidence previously of record including reports dated September 18 and 28, 1990 by Dr. Lemberg, a treating Board-certified physiatrist. Nothing in appellant's December 29, 1995 request for reconsideration remotely suggests that the Office's July 29, 1994 decision was erroneous in denying his claim that he sustained a recurrence of disability due to his October 18, 1985 employment injury.

Because appellant's December 29, 1995 request for reconsideration does not establish, on its face, that the Office July 29, 1994 decision was erroneous, the Board will affirm the Office's August 8, 2005 and February 27, 2006 decisions not to reopen his case for a review on the merits. Appellant's untimely request does not warrant such action under the law.

CONCLUSION

The Board finds that the Office properly determined that appellant's December 29, 1995 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 27, 2006 and August 18, 2005 are affirmed.

Issued: January 26, 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