

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

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**THOMAS J. GUINANE, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Brick, NJ, Employer**

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**Docket No. 02-813  
Issued: May 12, 2004**

*Appearances:*

*Francis M. Womack III, Esq., for the appellant*

*Thomas G. Giblin, Esq., for the Director*

Oral Argument April 1, 2004

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman

DAVID S. GERSON, Alternate Member

A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On December 28, 2001 appellant filed a timely appeal of the January 16, 2001 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. The Office previously denied appellant's claim for recurrence of disability on the merits in a decision dated January 4, 1994. Because more than one year has elapsed between the last merit decision 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). Accordingly, the only decision properly before the Board is the Office's January 16, 2001 decision denying appellant's request for reconsideration.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On December 23, 1988 appellant, then a 44-year-old letter carrier, sustained a subluxation of the cervical spine as a result of an employment-related motor vehicle accident. Appellant continued to perform his regular duties following his December 23, 1988 employment injury. However, he later ceased working due to alleged recurrences of disability on May 5 and September 21, 1989.

In a November 17, 1992 decision, the Office denied appellant's claim for recurrence of disability as appellant failed to establish a causal relationship between the December 23, 1988 employment injury and the claimed recurrences on May 5 and September 21, 1989. The Office noted, among other things, that appellant had a preexisting cervical condition due to a motor vehicle accident that occurred more than two years prior to his December 23, 1988 employment injury. The medical evidence was found to be inconclusive as to whether appellant's current cervical condition was attributable to his preexisting injury or a result of the December 23, 1988 employment-related motor vehicle accident.

Appellant requested a hearing and, by decision dated August 25, 1993, the Office hearing representative remanded the claim for further factual and medical development. The hearing representative instructed the Office to obtain additional factual information regarding appellant's 1986 motor vehicle accident and the medical treatment appellant received as a result of this prior accident. Additionally, the hearing representative instructed the Office to arrange for an impartial medical evaluation by a Board-certified orthopedic surgeon.

By letter dated December 2, 1993, the Office requested that appellant submit additional factual information regarding the 1986 motor vehicle accident as described in the hearing representative's August 25, 1993 decision.<sup>1</sup> On January 4, 1994 the Office issued a decision denying appellant's claim based on his failure to establish that he sustained a recurrence of disability. The Office noted that appellant had not responded to its December 2, 1993 request for additional information. Additionally, the Office advised that "further action [would] be taken upon receipt of the requested information."

In an undated letter to the claims examiner, which the Office received on August 4, 1994, appellant stated that he received the January 4, 1994 decision and forwarded it to his attorney, Edward Basaman, who sent in a "request for an appeal." Appellant also acknowledged receipt of a June 15, 1994 letter from the Office, which he similarly forwarded to Mr. Basaman.<sup>2</sup> Appellant further stated that "Mr. Basaman ... is now concerned that our original request for an appeal may be misplaced." He went on to state: "If you cannot find this request in my file, please notify me and I will have Mr. Basaman forward or fax you a copy of our appeal request."

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<sup>1</sup> The Office's December 2, 1993 letter did not specify a particular time frame within which appellant was expected to submit the requested information concerning his 1986 motor vehicle accident.

<sup>2</sup> On June 15, 1994 the Office advised appellant that it received his several claims for continuing compensation (Form CA-8), but that it was unable to pay compensation because the claim had been denied on January 4, 1994. The Office further noted that appellant had been previously advised of his appeal rights, and that he should be aware that the time limitation for filing a request for reconsideration expires one year from the January 4, 1994 decision.

On December 13, 1994 Victor E. Raimo, Esq. requested reconsideration on appellant's behalf. He noted, among other things, that the request was within one year of the January 4, 1994 decision. By letter dated March 1, 1995, the Office acknowledged receipt of Mr. Raimo's December 13, 1994 correspondence, but advised him that the request for reconsideration could not be honored because the case record did not identify him as being appellant's authorized representative.

The Office also wrote to appellant on March 1, 1995 to advise him of Mr. Raimo's December 13, 1994 correspondence. The Office explained that the record revealed that Mr. Basaman had represented appellant before the Branch of Hearings and Review and there was no indication that appellant had authorized Mr. Raimo to represent him. The Office further noted that Mr. Raimo's December 13, 1994 request was deficient in that it was ambiguous, it did not include any additional medical evidence, and it did not specify which decision or issue was the subject of the reconsideration request. The Office advised appellant that it would take no further action on the letter it had received.

The Office's March 1, 1995 correspondence to appellant also stated the following: "On another matter, it is noted than in a letter received in the Office on August 4, 1994, you refer to an appeal request made by Mr. Basaman, but to date we have never received it. You might wish to look into this matter."

In an undated letter received by the Office on March 28, 1995, appellant referenced the December 13, 1994 request for reconsideration and advised that Mr. Raimo was his representative. Mr. Raimo wrote to the Office on March 24 and August 7, 1995 advising that he was appellant's authorized representative, and in the August 7, 1995 correspondence he reiterated his earlier request that the claim be reviewed. The Office took no further action at that time.

For several years appellant continued to regularly submit Form CA-8, claim for continuing compensation, and Form CA-20a, attending physician's supplemental report. In November 1999, appellant sought the assistance of his Congressman and after an exchange of correspondence between appellant, the Office and appellant's Congressman, the Office advised the Congressman on July 28, 2000 that it would consider appellant's request for reconsideration. Additionally, appellant submitted factual and medical information regarding his 1986 motor vehicle accident that the Office initially requested on December 2, 1993. In an undated letter received on January 24, 2000, appellant characterized his May 1986 motor vehicle accident as a "minor mishap" that resulted in no additional loss of work time. Additionally, appellant submitted a December 5, 1986 report from Dr. Joseph S. Falkowski who treated appellant for his 1986 motor vehicle accident.<sup>3</sup>

In a decision dated October 3, 2000, the Office denied appellant's request as untimely. The Office further found that appellant failed to demonstrate clear evidence of error on the part of the Office in issuing the January 4, 1994 decision. By decision dated January 16, 2001, the

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<sup>3</sup> Dr. Falkowski is Board-certified in family practice by the American Osteopathic Association.

Office reviewed its October 3, 2000 decision, and again concluded that appellant's request for reconsideration was untimely and failed to present clear evidence of error.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>6</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>7</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>8</sup> In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."<sup>9</sup>

### **ANALYSIS**

In this case, the one-year time limitation begins the day the Office issued its January 4, 1994 decision, as this was the last merit decision in the case.<sup>10</sup> As evident from the record, appellant expressed his desire to obtain further review of the Office's January 4, 1994 decision at least six months prior to the expiration of the one-year time limitation for filing a timely request for reconsideration. On August 4, 1994 the Office received an undated letter from appellant wherein he stated that his attorney had submitted a "request for an appeal" regarding the January 4, 1994 decision. Appellant expressed concern that the Office might have misplaced the original request and he specifically stated: "If you cannot find this request in my file, please notify me and I will have Mr. Basaman forward or fax you a copy of our appeal request." The

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<sup>4</sup> The Office reopened the October 3, 2000 decision because the senior claims examiner who issued the decision had previously considered the claim in November 1992.

<sup>5</sup> 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607 (1999).

<sup>8</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>9</sup> 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>10</sup> *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

Office waited approximately seven months before responding to appellant's August 4, 1994 correspondence. By the time the Office responded on March 1, 1995, the one-year time limitation for filing a timely request for reconsideration had already elapsed. The Office's seven-month delay in responding to the August 4, 1994 correspondence effectively precluded appellant from perfecting a timely request for reconsideration and further denied him the opportunity to obtain a merit review of his claim before the Board. Given the circumstances, and particularly the Office's undue delay, the Board finds that the Office erred in denying appellant a merit review of his claim.<sup>11</sup> Accordingly, the case is remanded to the Office to undertake any appropriate additional development and after such further development of the case record, a *de novo* decision shall be issued.

### **CONCLUSION**

The Board finds that the Office improperly declined to reopen appellant's claim for reconsideration of the merits.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 16, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this decision.

Issued: May 12, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> *Marilyn F. Wilson*, 51 ECAB 234, 237 (1999); *Brian R. Leonard*, 43 ECAB 255, 260 (1991).