

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

CECIL H. WALLACE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 05-1885
Issued: February 13, 2006**

Appearances:
Cecil H. Wallace, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 12, 2005 appellant filed a timely appeal from nonmerit Office of Workers' Compensation Programs' decisions dated December 6, 2004 and June 24, 2005, which denied reconsideration on the grounds that the requests were untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 24, 1987 and the filing of this appeal on March 8, 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).

ISSUE

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

FACTUAL HISTORY

Appellant, a 37-year-old letter carrier, filed a Form CA-2 claim for benefits on May 15, 1987, alleging that he developed pneumonia and asthma conditions causally related to factors of his employment. By decision dated November 24, 1987, the Office denied the claim. In a

July 12, 1988 decision, the Board affirmed the November 24, 1987 Office decision denying benefits. By decisions dated March 23, 1990, April 25, 1991 and August 24, 1992, the Office denied modification of the November 24, 1987 decision.

By letter dated October 28, 2004, appellant requested reconsideration and submitted treatment notes and summary medical reports from 1987 through 2002, documenting his pneumonia and asthma condition during that period.

By decision dated December 6, 2004, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and failed to submit factual or medical evidence sufficient to establish clear evidence of error.

By letter dated March 7, 2005, appellant requested reconsideration.

By decision dated June 24, 2005, 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 it made an error and that there was no evidence submitted to establish that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle an employee to a review of an Office decision as a matter of right.² 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).³ As one such limitation, the Office has stated

¹ 5 U.S.C. § 8128(a).

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

³ 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; (2) advances 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).

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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).⁵

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.⁶ 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 the appellant's application for review shows "clear evidence of error" on the part of the Office.⁷

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

⁴ 20 C.F.R. § 10.607(b).

⁵ See cases cited *supra* note 2.

⁶ *Rex L. Weaver*, 44 ECAB 535 (1993).

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

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, *supra* note 2.

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ See *Leon D. Faidley*, *supra* note 2.

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

ANALYSIS

The Office properly determined in this case that appellant failed to file timely applications for review. The Office issued its last merit decision in this case on November 24, 1987. Appellant requested reconsideration on October 28, 2004 and March 7, 2005; thus, appellant's reconsideration requests were untimely as they were outside the one-year time limit.

The Board finds that appellant's October 28, 2004 and March 7, 2005 requests for reconsideration failed to establish clear evidence of error. The treatment notes appellant submitted merely contain findings on examination and relate appellant's complaints of back pain from 1987 through 2002. They do not provide a reasoned medical opinion on the relevant issue, *i.e.*, whether appellant sustained pneumonia and asthma conditions in the performance of duty. No other evidence was received by the Office.

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.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration requests dated October 28, 2004 and March 7, 2005. Inasmuch as appellant's reconsideration requests were untimely filed and failed to establish clear evidence of error, the Office properly denied further review on December 6, 2004 and June 24, 2005.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2005 and December 6, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 13, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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