

This is the second appeal before the Board. Appellant, a 33-year-old letter sorting machine operator, filed a claim for benefits on December 10, 1986, alleging that he sustained a tendinitis condition in the performance of duty. By decision dated August 3, 1987, the Office

denied appellant's claim on the grounds that he failed to establish that his disability was causally related to employment factors. By decision dated December 17, 1987, the Office denied appellant's claim on the grounds that it was not timely filed under section 8122. The Office hearing representative affirmed the December 17, 1987 decision on May 17, 1988, and the Office denied modification of the 1987 decision by decision dated July 11, 1989. In a July 19, 1990 decision,¹ the Board affirmed the Office's decisions. The Board found that: (1) appellant's claim for compensation was not timely filed within the three-year time limitation provision of the Federal Employees' Compensation Act; and (2) the employing establishment did not have timely actual knowledge that appellant alleged that he had developed an arm condition casually related to his job. The complete facts of this case are set forth in the Board's July 19, 1990 decision and are herein incorporated by reference.

By nonmerit decision dated July 22, 1999, the Office denied appellant's claim for reconsideration.

On March 18, 2005 appellant requested reconsideration. Appellant submitted medical evidence from 1979, which he asserted, indicated that he had bilateral carpal tunnel syndrome and that his supervisors had actual knowledge of his condition, which constituted a timely filing of his claim. He submitted a February 7, 1997 affidavit from his union steward, Anthony Gadson, who worked with appellant at the time he was employed with the employing establishment. Mr. Gadson asserted in the affidavit that management was aware that appellant's carpal tunnel condition was work related. Appellant also submitted an undated, unsigned typewritten statement which asserted that the medical evidence from 1979 and 1996 indicated that appellant experienced severe tendinitis in his hands, primarily on the right, with limitation of movement.²

By decision dated January 13, 2006, 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.

On March 3, 2006 appellant requested reconsideration. Appellant submitted a September 17, 1979 letter from postmaster Charles S. Dubberly who informed appellant in his letter that he had received correspondence regarding his claim and that such correspondence should be submitted to the Office for adjudication.

By decision dated March 20, 2006, 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

¹ Docket No. 06-340 (issued June 19, 2006).

² The Office noted that appellant visited the district Office on January 9, 2006 and informed the claims examiner that the Office had misconstrued appellant's March 18, 2005 request for reconsideration as a petition for review.

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 Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ 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).⁵ 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.⁶ 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 under 5 U.S.C. § 8128(a).⁷

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.⁸ 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.⁹

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 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) 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).

⁶ 20 C.F.R. § 10.607(b).

⁷ *See* cases cited *supra* note 4.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested 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's decision.¹⁵ 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.¹⁶

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on July 11, 1989.¹⁷ Appellant requested reconsideration on March 18, 2005 and March 3, 2006; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's March 18, 2005 request for reconsideration failed to show clear evidence of error. The medical reports from 1979 are of limited probative value as they were previously considered and rejected by the Office and the Board in previous decisions. The February 7, 1997 affidavit from his union steward has limited probative value as he is purporting to speak for employing establishment management without any documentary evidence as to their knowledge of appellant's claimed carpal tunnel condition. Appellant's March 3, 2006 request for reconsideration similarly failed to show clear evidence of error. The September 17, 1979 letter from Postmaster Charles S. Dubberly does not support his claim.

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

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

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ The Office stated in its January 13, 2006 decision that the most recent merit decision was issued on May 17, 1988. In its March 20, 2006 decision, it stated that the last merit decision was dated June 19, 1990. As the Office properly found that appellant's requests for reconsideration were untimely, any error is harmless.

Mr. Dubberly merely advised appellant that he needed to submit correspondence regarding his claim to the Office; thus, his letter has no probative value.

The Office reviewed the evidence 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 in its January 13 and March 20, 2006 decisions.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his March 18, 2005 and March 3, 2006 reconsideration requests. Inasmuch as appellant's reconsideration requests were untimely filed and failed to establish clear evidence of error, the Office properly denied further review on January 13 and March 20, 2006.

ORDER

IT IS HEREBY ORDERED THAT the March 20 and January 13, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 22, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board