

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

F.G., Appellant

and

**U.S. POSTAL SERVICE, AIR MAIL FACILITY,
Jamaica, NY, Employer**

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**Docket No. 10-1253
Issued: April 8, 2011**

Appearances:

Thomas S. Harkins, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 1, 2010 appellant, through his attorney, filed a timely appeal from an October 22, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as it was untimely and insufficient to establish clear evidence of error. As the last merit decision was issued on October 4, 1996, more than one year prior to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.¹ Pursuant to the Federal Employees' Compensation Act² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The Office accepted that on December 19, 1990 appellant, then a 36-year-old mail processor, sustained a concussion, cervical sprain and a swollen left side of his face when he was struck by a coworker. He sustained intermittent periods of total disability following his injury.

By decision dated October 4, 1996, the Office terminated appellant's compensation effective that date. It found that the opinion of Dr. John S. Mazella, a Board-certified orthopedic surgeon who provided a second opinion examination, established that he had no further disability due to his December 19, 1990 work injury.

On August 3, 2009 appellant, through his attorney, requested reconsideration.³ He argued that at the time the Office terminated benefits a conflict existed between appellant's attending physician and Dr. Mazella. Counsel argued that, consequently, the Office failed to meet its burden of proof as the existence of the conflict necessitated referring appellant to an impartial medical examiner under 5 U.S.C. § 8123(a).

By decision dated October 22, 2009, the Office denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

On appeal, appellant's attorney argues that at the time of the Office's termination of compensation appellant remained disabled due to his employment injury.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitation on the exercise of its discretionary authority under section 8128(a) of the Act.⁴ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁶ To establish clear

³ Counsel also requested reconsideration of a July 11, 2001 decision issued under another file number. The Office indicated that it was reviewing that request for reconsideration under the relevant file number.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁷

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ As appellant's August 3, 2009 request for reconsideration was submitted more than one year after the last merit decision of October 4, 1996 it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁰

In the August 3, 2009 request for reconsideration, appellant's attorney generally alleged that a conflict existed between an unspecified attending physician and Dr. Mazella, the second opinion physician, at the time the Office terminated compensation benefits effective October 4, 1996. He thus argued that the Office did not meet its burden of proof. Appellant's attorney, however, did not point to any specific report by an attending physician addressing disability at the time of the Office's termination or refer to any findings made by an attending physician. He further did not cite to any evidence that he believed was sufficient to create a conflict in medical opinion or explain how the Office erred in its evaluation of the evidence. Moreover, the term "clear evidence of error," however, is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹

On appeal, appellant's attorney asserts that appellant was disabled due to his work injury at the time of the Office's termination of his compensation. As discussed, however, he has not raised any argument or submitted any evidence sufficient to raise a substantial question regarding the correctness of the Office's last merit decision. Appellant, therefore, has not submitted evidence on reconsideration that meets the standard for establishing clear evidence of error.

⁷ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Robert F. Stone*, *supra* note 7.

¹⁰ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹¹ *See D.G.*, 59 ECAB 455 (2008); *Joseph R. Santos*, 57 ECAB 554 (2006).

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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