

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE A. LOVATO and DEPARTMENT OF VETERANS AFFAIRS,
REGIONAL OFFICE, Lincoln, Nebr.

*Docket No. 97-1464; Submitted on the Record;
Issued January 22, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and failed to present clear evidence of error.

By decision dated September 5, 1995, the Office denied appellant's traumatic injury claim for a neck injury on the grounds that the evidence failed to demonstrate that appellant sustained an injury on May 23, 1995 as alleged and, therefore, fact of injury was not established. Appellant claimed that he injured his neck when a coworker struck him three times in the neck.

By letter dated September 11, 1995, appellant requested reconsideration. The letter was accompanied by an accident report noting appellant's alleged injury on "May 25, 1995" and a copy of appellant's letter to the employing establishment noting his interest to pursue an Equal Employment Opportunity (EEO) complaint. In a nonmerit decision dated October 13, 1995, the Office denied appellant's reconsideration request. On December 26, 1996 appellant filed a request for reconsideration.¹ In support of his request, appellant submitted documents relating to his EEO complaint filed against the employing establishment received by the Office on January 8 and 22, 1997. Appellant also submitted pictures of himself in a neck brace and a chiropractor's report.

By decision dated March 3, 1997, the Office denied appellant's reconsideration request as untimely filed and found that the evidence submitted presented no clear evidence of error on the part of the Office.

¹ Appellant noted in his request that he was also seeking to file a claim for psychological injury.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office 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.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's September 5, 1995 merit decision to the date that appellant's request for reconsideration was filed, December 26, 1996, appellant's request for reconsideration was untimely. The Board further finds that the evidence submitted by appellant in support of the request for reconsideration does not raise a substantial question as to the correctness of the Office's September 5, 1995 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, appellant submitted documentation noting his grievance against a coworker for allegedly striking him three times on May 23, 1995 and a report from a chiropractor. The Board notes that the Office had previously advised appellant regarding the circumstances in which a chiropractor would be considered a physician under the Federal Employees' Compensation Act, and noted further that no medical evidence had been submitted that would support a diagnosis causally related to the alleged incident. The Board also notes that the Office had previously considered the issues contained in appellant's grievance file concerning his EEO complaint. Since this evidence was repetitious of that already contained in the file it is not sufficient to establish clear error in this case.⁵

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's March 3, 1996 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.⁶

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (finding that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

⁶ The Board notes that appellant submitted additional evidence subsequent to the Office's March 3, 1997 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated March 3, 1997 is affirmed.

Dated, Washington, D.C.
January 22, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member