

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERIC A. CLARK and U.S. POSTAL SERVICE,
POST OFFICE, San Mateo, CA

*Docket No. 97-2884; Submitted on the Record;
Issued September 1, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

On October 26, 1992 appellant, then a 35-year-old clerk-carrier, filed an occupational disease claim, alleging that factors of employment caused stress, anxiety and hypertension. By decision dated May 19, 1993, the Office denied appellant's claim.¹ By letters dated November 7, 1996 and May 5, 1997, appellant requested reconsideration and submitted additional evidence. By decision dated July 8, 1997, the Office denied appellant's request finding that, pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed within one year of the May 19, 1993 decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

The only decision before the Board is the Office's July 8, 1997 decision denying appellant's request for reconsideration of the May 19, 1993 decision. Because more than one year had elapsed between the issuance of this decision and September 16, 1997, the date

¹ The record indicates that appellant was removed from the employing establishment premises on December 21, 1991 due to disruptive behavior. On July 20, 1992 appellant's employment was terminated. In the May 19, 1993 decision, the Office stated that of the 15 specific incidents implicated by appellant, all but that of December 21, 1991 had been addressed in previous claims. The Office noted that two had been accepted and closed, one for hypertension accepted for medical benefits only, and all others denied. The Office found that as grievance proceedings supported the employing establishment's version of the December 21, 1991 incident, error and abuse had not been established. A grievance was denied at Step III on April 30, 1992 and withdrawn prior to arbitration on July 21, 1992. In Equal Employment Opportunity Commission decisions dated June 16 and August 13, 1992, no discrimination was found. A National Labor Relations Board appeal was denied on December 21, 1992.

appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 19, 1993 Office decision.²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ 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.⁴ 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.⁵ To establish clear 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 be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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 decision.⁶

The Board finds that as more than one year had elapsed from the date of issuance of the Office's May 19, 1993 merit decision and appellant's request for reconsideration dated November 7, 1996, his request for reconsideration was untimely. The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's May 19, 1993 merit decision. While appellant submitted a number of statements regarding the events of December 21, 1991,⁷ these do not rise to the level of establishing clear evidence of error. The Office, therefore, did not abuse its discretion in denying a merit review of his claim.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

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

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *Howard A. Williams*, 45 ECAB 853 (1994).

⁷ The new evidence submitted by appellant with his requests for reconsideration included a sworn statement by a former supervisor, Emmanuel S. Arca, who indicated that his previous statement regarding the events of December 21, 1991 had been in error and statements by police officers who indicated that appellant did not appear out of control when they came to escort him from the employing establishment on December 21, 1991. He also submitted a statement from a coworker, Dan Gentleman, who stated that appellant was under stress on December 21, 1991.

The decision of the Office of Workers' Compensation Programs dated July 8, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 1, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member