

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY M. CLAY and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AR

*Docket No. 99-1468; Submitted on the Record;
Issued August 15, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs in its January 11, 1999 decision properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On August 18, 1994 appellant, then a 52-year-old letter carrier, filed a notice of traumatic injury and claim for compensation alleging that on August 15, 1994 he was hit from behind by a motor vehicle and sustained whiplash while in the performance of duty. He did not stop work.

Appellant submitted a duty status report in support of his claim, however, it only noted that he sustained a neck and right shoulder injury and that no work restrictions would be prescribed. Also, the physician's signature on the report was illegible. On September 15, 1994 the Office requested additional factual and medical evidence to support appellant's claim; however, no additional evidence was submitted within the allotted time period.

By decision dated October 25, 1994, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury as alleged.¹

On November 9, 1998 the Office received a letter from appellant dated June 16, 1998 requesting reconsideration of the October 25, 1994 decision and a letter from his union representative dated June 17, 1998 in support of his request. Appellant argued in his request letter that he did not learn that his file had been misplaced until August 1997; that around the time of the accident, he was taking care of family matters in Missouri and dealing with pressure from the employing establishment regarding the amount of time he had taken off from work; therefore, he enlisted support from John Hogue, his union president, to handle his claim. Mr. Hogue explained in his June 17, 1998 letter that he had assisted with appellant's claim in

¹ Appellant submitted additional information to the Office on October 24, 1994. As this evidence was not received within 30 days from September 15, 1994, the date the Office requested additional evidence, it was not considered in the October 25, 1994 decision.

January 1995 and gathered supportive documentation in support of his reconsideration request; however, the file was subsequently misplaced and he forgot to send in appellant's request.

By decision dated January 11, 1999, the Office found that appellant's reconsideration request was untimely filed and did not establish clear evidence that the Office's final decision was erroneous.

The Board finds that the Office in its January 11, 1999 decision properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is the January 11, 1999 decision, in which the Office 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. Since more than one year has elapsed between the date of the Office's merit decision dated October 25, 1994 and the filing of appellant's appeal on March 11, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations³ provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error 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

In its January 11, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the October 25, 1994 decision, which stated that if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. As appellant's June 16, 1998 reconsideration request was outside the one-year time limit, which began the day after October 25, 1994, appellant's application for review was untimely.

On appeal, appellant alleges that his request for reconsideration should not be considered untimely because his union representative misplaced his file and forgot to send in his request.

² 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application." 5 U.S.C. § 8128(a). 20 U.S.C. § 10.606(a).

⁴ 20 C.F.R. § 10.607.

⁵ 20 C.F.R. § 10.607(b).

Section 10.607(c)⁶ does provide an extension of the one-year time period if a claimant can establish through probative medical evidence that he is unable to communicate in any way and that his testimony is necessary in order to obtain modification of the decision. Appellant, however, has not established such circumstances in this case.

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether the application establishes “clear evidence of error.” The Office will reopen a claimant’s case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows clear evidence of error on the part of the Office.⁷

To establish clear evidence of error, a claimant 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 decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

In support of his June 16, 1998 request for reconsideration, appellant argued that Mr. Hogue, his union representative, was handling his claim because he was taking care of

⁶ 20 C.F.R. § 10.607(c).

⁷ 20 C.F.R. § 10.607(b).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992). The Office regulations promulgated at 20 C.F.R. § 10.138(b) have since been revised and will be utilized in Office decisions issued after January 1, 1999. The new Office regulations will be interpreted with the same applicability as in prior decisions, with regard to time limitations for reconsideration requests and the clear evidence of error standard.

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

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

¹³ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁴ See *Gregory Griffin*, 41 ECAB 458 (1990).

family matters in Missouri and dealing with pressure from the employing establishment regarding the amount of time he had taken off work. Appellant submitted Mr. Hogue's letter in which he explained that he assisted appellant in January 1995 with his claim and gathered supportive documentation in support of appellant's request for reconsideration; however, the file was subsequently misplaced and he forgot to send in appellant's request. Appellant implied that because of this error, his reconsideration request should have been considered timely. The Office determined that neither letter established that the Office's October 25, 1994 decision was in error, or raised a substantial question as to the correctness of that decision. No further evidence was submitted with appellant's June 16, 1998 request. The critical issue in the case at the time the Office issued its October 25, 1994 decision was whether appellant had established that he sustained an injury in the performance of duty as alleged; which required sufficient factual and medical evidence to support his claim. Neither letter relayed any factual information surrounding the alleged work incident or any medical evidence regarding appellant's resulting condition. Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence, which on its face shows that the Office made an error, appellant has failed to establish clear evidence of error with respect to its October 25, 1994 decision.

For the foregoing reasons, the decision of the Office of Workers' Compensation Programs dated January 11, 1999 is affirmed.

Dated, Washington, D.C.
August 15, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member