

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HANS ROTHER and U.S. POSTAL SERVICE,
POST OFFICE, Southeastern, PA

*Docket No. 00-68; Submitted on the Record;
Issued November 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

In a decision dated January 7, 1997, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish fact of injury. The Office found that appellant's statement concerning the implicated factors of employment was vague and failed to describe specific instances of work duties. The Office further found that the medical evidence failed to attribute appellant's back or emotional condition to his federal employment.

On April 16, 1999 appellant submitted additional information. He described his working conditions as "deplorable." He alleged that his supervisor had asked him to deliver mail even though he held a router assignment which did not require him to work outside or deliver mail. He stated that he worked with both a kidney and brain tumor, which affected his left eyesight and led to disability. The cause of his disability, he stated, was not his work duties (casing mail) but "the conditions of employment."

Appellant also submitted medical evidence. A May 10, 1998 report from Dr. Joel H. Rosenberg, a licensed psychologist, provided more details concerning the implicated factors of employment and tended to support that appellant's generalized anxiety disorder and dysthymia had arisen in response to external precipitants, particularly work and its environments. He reported that appellant's symptoms and problems "appear to have come about as a result of the cumulative affects of the incidents he experienced during his work at the [employing establishment]."

In a decision dated August 10, 1999, the Office denied appellant's April 16, 1999 request for reconsideration on the grounds that it was filed more than one year after the January 7, 1997 decision denying his claim. The Office further denied appellant's request on the grounds that he failed to present clear evidence of error in the Office's January 7, 1997 decision.

The Board finds that the Office properly denied appellant's untimely request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act does not grant a claimant the right to a merit review of his case.¹ Rather, this section vests the Office with discretionary authority to review prior decisions:

"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, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."²

Section 10.607 of the Code of Federal Regulations 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 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.³

The most recent merit decision issued in this case was the Office's January 7, 1997 decision denying appellant's compensation benefits. Because appellant sent his April 16, 1999 request for reconsideration more than one year after this decision, his request was untimely. The question, therefore, is whether appellant's untimely request demonstrated clear evidence of error in the Office's January 7, 1997 decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ To

¹ *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ *See Leona N. Travis*, *supra* note 5.

⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.⁹ The Board makes an independent determination of whether a claimant 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.¹⁰

The Board finds that appellant's April 16, 1999 request for reconsideration does not establish that the Office's January 7, 1997 decision rejecting his claim was erroneous. Although appellant further addressed the implicated factors of employment and provided medical opinion evidence, the material submitted does not raise a substantial question concerning the correctness of the Office's decision which found no compensable factor of employment. The evidence submitted by appellant does not establish a factual basis for his allegations pertaining to his work environment. Because his request fails to raise a substantial question as to the correctness of the Office's decision, the Office properly denied further review of the claim.

The August 10, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 2, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁹ *Leon D. Faidley, Jr., supra* note 1.

¹⁰ *Gregory Griffin, supra* note 1.