

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE GIBSON and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

*Docket No. 00-1551; Submitted on the Record;
Issued May 11, 2001*

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 refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation period and failed to present clear evidence of error.

This case was previously before the Board and the Office's decisions dated October 12 and July 6, 1994 and December 28, 1993 were affirmed.¹ The factual history of the case as contained in the Board's August 22, 1997 decision is incorporated by reference.²

On October 1, 1999 appellant filed a request for reconsideration with the Office and submitted a July 7, 1999 medical report by Dr. Syed S. Ali, a Board-certified neurologist,³ who opined that appellant's work duties "could certainly aggravate the underlying condition and it has been documented on many occasions the kind of work he is doing could cause the carpal tunnel syndrome, so I reiterate my previous statements on the letters I have dictated earlier regarding this causal relationship."

In a decision dated February 11, 2000, the Office determined that appellant's request for reconsideration was untimely filed with respect to the last merit decision of record issued on August 22, 1997. The Office further found that the evidence submitted by appellant failed to present clear evidence of error.

¹ The Office determined that appellant failed to establish that he sustained a compensable injury in the performance of duty on or about February 10, 1984.

² Docket No. 95-627 (issued August 22, 1997).

³ Dr. Ali is appellant's treating physician and the Board reviewed several of his prior reports in the last appeal.

The Board finds that the Office properly determined that appellant filed an untimely reconsideration request on October 1, 1999 and that he failed to demonstrate clear evidence of error.

The Office's regulations at 20 C.F.R. § 10.607(a) (1999) provide that "[a]n application for reconsideration must be sent within one year of the date of the Office decision for which review is sought."⁴ The regulations at 20 C.F.R. § 10.607(b) (1999) further provide that "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision."⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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.¹¹ 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.¹²

Appellant's reconsideration request dated October 1, 1999 is deemed to be untimely filed because it was dated and postmarked more than one year after the August 22, 1997 decision. The Office, however, properly reviewed appellant's October 1, 1999 reconsideration request to determine whether he submitted evidence to show clear evidence of error on behalf of the Office

⁴ 20 C.F.R. § 10.607(a) (1999). The new regulations went into effect on January 4, 1999 and apply to all Office decisions issued on or after that date. Although the Office cited the old regulations at 20 C.F.R. § 10.138(b), the Board notes that the outcome of this decision would be the same under either set of regulations.

⁵ 20 C.F.R. § 10.607(b) (1999).

⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ See *Leona N. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

in denying his claim. The Office properly noted that appellant submitted no evidence to show clear evidence of error. The report from Dr. Ali merely reiterates the physician's opinion, and is still not sufficiently reasoned to carry appellant's burden of proof in establishing his claim.¹³ Consequently, the Board finds that the Office properly denied appellant's reconsideration request dated October 1, 1999 on the grounds that it was untimely filed and failed to show clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated February 11, 2000 is hereby affirmed.

Dated, Washington, DC
May 11, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹³ Dr. Ali's opinion is found to be speculative with respect to the issue of causal relationship and therefore not entitled to probative weight; *see William Nimitz, Jr.*, 30 ECAB 567 (1979).