

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN D.M. AYERS and U.S. POSTAL SERVICE,
POST OFFICE, Beckley, WV

*Docket No. 02-47; Submitted on the Record;
Issued July 2, 2002*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On June 9, 1992 appellant, then a 39-year-old distribution clerk, filed a claim for an occupational disease for bilateral carpal tunnel syndrome. The Office accepted bilateral carpal tunnel syndrome, for which it authorized surgery. Carpal tunnel releases were performed on the left wrist on October 13, 1993 and on the right wrist on December 1, 1993. Appellant did not return to work after October 12, 1993.

On March 23, 1994 appellant filed a claim for a schedule award.

On July 1, 1994 appellant filed a claim for major depression and severe anxiety. This claim was initially rejected by the Office, but upon further development of the evidence it was accepted on August 1, 1995 for an adjustment disorder.

Appellant's application for disability retirement was approved on October 12, 1994. On January 23, 1995 appellant elected to receive compensation under the Federal Employees' Compensation Act in lieu of retirement benefits.

On May 4, 1995 an Office medical adviser reviewed the medical evidence and concluded that a March 24, 1995 medical report from the physician who performed appellant's carpal tunnel releases showed a one percent permanent loss of use of each arm.

By letter dated September 26, 1995, appellant noted that he was receiving compensation for temporary total disability; he requested that he receive his schedule award in a lump-sum payment. In a letter to his Congressional representative dated May 15, 1996, appellant again requested that his schedule award be paid in a lump-sum payment.

By decision dated June 14, 1996, the Office found that a schedule award could not be paid concurrently with compensation for temporary total disability. The Office denied appellant's request for a lump-sum payment of his schedule award on the basis that it would not be in his best interest. The Office stated: "Taking into account the nature of your disability, your age, your occupation and employing agency, a return to gainful employment in the near future would be expected and the schedule award could be paid to you at that time."

By letter dated May 17, 2001, appellant requested that the Office reconsider its decision. He contended that he was entitled to a 50 percent permanent impairment of each arm.

By decision dated August 27, 2001, the Office found that appellant's May 17, 2001 request for reconsideration was not filed within the one-year time limit and that it did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's August 27, 2001 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.607(a), and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on June 14, 1996 and the filing of appellant's appeal on September 26, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that appellant's May 17, 2001 request for reconsideration was not timely filed.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) 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 Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

In the present case, the most recent merit decision by the Office was issued on June 14, 1996. Appellant had one year from the date of this decision to request reconsideration, as he was advised in the appeal rights accompanying the Office's June 14, 1996 decision. As appellant did not request reconsideration until May 17, 2001, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.³ 20 C.F.R. § 607(b) provides: "[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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁵ Evidence which 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 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

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

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

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

⁹ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁰ *Gregory Griffin*, *supra* note 3.

The Board finds that appellant's May 17, 2001 request for reconsideration did not demonstrate clear evidence of error.

The Office's June 14, 1996 decision found that appellant could not receive compensation for a schedule award concurrently with compensation for temporary total disability, and denied appellant's claim for payment of a schedule award in a lump sum on the basis that such payment was not in his best interest. Appellant's May 17, 2001 request for reconsideration raised an issue not adjudicated in the Office's June 14, 1996 decision: that he was entitled to greater than a one percent permanent impairment of each arm. Appellant's request for reconsideration does not raise a substantial question as to the correctness of the Office's June 14, 1996 decision.¹¹

The August 27, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 2, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ This decision does not preclude appellant from submitting medical evidence pertaining to his upper extremity impairment to the Office.