

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUSSELL MIURA and U.S. POSTAL SERVICE,  
POST OFFICE, Santa Ana, CA

*Docket No. 02-2379; Submitted on the Record;  
Issued February 6, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

This case has previously been before the Board. By decision issued on October 25, 2000, the Board affirmed the Office's May 14, 1999 decision finding that appellant's March 31, 1999 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

By letter dated November 6, 2000, appellant requested reconsideration. He stated that he was submitting pertinent new evidence, but no new evidence was received.

By decision dated January 23, 2002, the Office denied appellant's request for reconsideration, finding that his letter neither raised substantive legal questions nor included new and relevant evidence and was thus insufficient to warrant merit review. The Office also noted that appellant did not clearly identify the grounds upon which reconsideration was being requested.<sup>1</sup>

Appellant requested reconsideration a second time by resubmitting the November 6, 2000 letter. The letter was faxed to the Office and received on September 4, 2001.

By decision dated August 15, 2002, the Office denied appellant's request for reconsideration as untimely filed, as the request received on September 4, 2001 was not made within one year of the Office's most recent merit decision. The Office noted that the Board's decision issued on October 25, 2000 was not a merit decision and the last merit decision of record was dated August 14, 1997.

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<sup>1</sup> The Board notes that this denial should have been based on the untimely filing of appellant's request, since it was received more than one year after the Office's last merit decision of August 14, 1997.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board on this appeal is the August 15, 2002 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision on August 14, 1997, which affirmed the denial of appellant's emotional condition claim, and the filing of appellant's appeal on September 12, 2002. As such, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>2</sup>

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.<sup>3</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>4</sup>

The Office properly found in the August 15, 2002 decision that the one-year time limit for filing a request for reconsideration of the Office's August 14, 1997 decision expired on August 14, 1998. The general rule is that timeliness is determined by the postmark on the envelope, if available, otherwise the date of the letter itself is used.<sup>5</sup> In this case, since there is no envelope as the letter was faxed, the date of the letter will be used. The date of appellant's letter is November 6, 2000, which is over two years after August 14, 1998, the one-year time limit for filing a request for reconsideration. Since appellant's letter was not received within one year of the Office's last merit decision on August 14, 1997, the Office correctly found that his request was untimely.<sup>6</sup>

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>7</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

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<sup>2</sup> 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's final decision being appealed.

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *Douglas McLean*, 42 ECAB 759 (1991).

<sup>6</sup> The Board acknowledges that appellant resubmitted the November 6, 2000 letter and also that the second request for reconsideration was received on September 4, 2001. The Board finds that, since appellant's request would be found untimely by using the date of the letter or by using the date the letter was received, the Board will use the date of the letter.

<sup>7</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

In support of his November 6, 2000 request for reconsideration, appellant submitted an Equal Employment Opportunity transcript dated October 31, 1997. Appellant alleges on appeal that, when he returned to work after his accepted left shoulder condition, he was told to work outside his limited-duty work restrictions and this contributed to his emotional condition. The Board has reviewed the evidence submitted and finds that the transcript does not constitute the necessary clear evidence of error. The Board acknowledges that the transcript contains some evidence that appellant may have been working outside his work restrictions; however, the medical evidence of record is insufficient to *prima facie* shift the weight of the medical evidence in favor of appellant and raise a substantial question as to the correctness of the Office decision. The Board notes that the term "clear evidence of error" is intended to represent a difficult standard and it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup>

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>9</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 4.

<sup>12</sup> *Leona N. Travis*, *supra* note 10.

<sup>13</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>15</sup> *Gregory Griffin*, *supra* note 7.

<sup>16</sup> *Leona D. Travis*, *supra* note 10.

Appellant did not submit any new evidence which raised a substantial question as to the correctness of the Office's August 14, 1997 decision affirming the denial of his emotional condition claim.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

The August 15, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 6, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member