

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. STELLA and U.S. POSTAL SERVICE,
CATHEDRAL STATION POST OFFICE, New York, NY

*Docket No. 02-1788; Oral Argument Held October 1, 2003;
Issued November 18, 2003*

Appearances: *John P. Stella, pro se; Julia Mankata-Tamakloe, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

This case was previously before the Board.¹ By decision and order dated August 27, 1993, the Board affirmed Office decisions dated March 23, 1992 and August 13, 1991 denying appellant's claim for an emotional condition. The Board's August 27, 1993 decision is herein incorporated by reference.

On December 15, 1996 appellant requested reconsideration of the Office's March 23, 1992 decision. In an accompanying statement, he alleged that his supervisor made an ethnic slur concerning his Italian background and told lies concerning charges for his removal from his job. Appellant indicated that he did not request reconsideration previously because he was mentally incompetent due to his depression which began in 1990.

By decision dated April 9, 1997, the Office denied appellant's request for reconsideration on the grounds that the request was not timely submitted within one year of the previous merit decision and did not show clear evidence of error.

On March 26, 2002 appellant requested reconsideration and reiterated the allegations made in his December 15, 1996 request for reconsideration. He indicated that he was mentally incompetent to request reconsideration previously because of his depression.

¹ See Docket No. 92-1992 (issued August 27, 1993).

By decision dated May 1, 2002, the Office denied appellant's request for reconsideration on the grounds that his request was not timely filed within one year of the Office's last merit decision and did not show clear evidence of error.

The Board finds that the Office properly found that appellant's request for reconsideration was not timely filed and did not show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed his appeal with the Board on June 24, 2002, the only decision properly before the Board is the Office's May 1, 2002 decision denying appellant's request for further merit review of his claim.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ The Office will not review a decision denying or terminating compensation benefits unless the application for review is filed within one year of the date of that decision.⁷ Since more than one year elapsed from the March 23, 1992 decision denying compensations benefits to appellant's March 26, 2002 application for review, the request for reconsideration is untimely.

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁸ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *pet. for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Leon D. Faidley, Jr.*, *supra* note 4. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.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 on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

The evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor. In support of his request for reconsideration, appellant alleged that his supervisor made a derogatory ethnic remark and told lies in connection with his removal from his job. However, appellant did not provide any corroborating evidence establishing these allegations as factual. Therefore, this evidence does not show clear evidence of error on the part of the Office in denying his claim for an emotional condition.

Appellant alleged that he was incompetent to request reconsideration in a timely manner because of his depression that began in 1990. However, the record shows that he was competent to file a claim for compensation in 1990, to request an oral hearing following the Office's August 13, 1991 decision, to file an appeal with the Board in 1992 and to request reconsideration from the Office following the Board's August 27, 1993 decision. Additionally, there is no medical evidence of record establishing that appellant was not mentally competent to file a timely request for reconsideration.

¹¹ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁴ *Gregory Griffin*, *supra* note 4.

The decision of the Office of Workers' Compensation Programs dated May 1, 2002 is affirmed.

Dated, Washington, DC
November 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member