United States Department of Labor
Employees' Compensation Appeals Board

ISAAC CLIFFORD BARNES, Appellant	)	
and	)	**Docket No. 04-1767**
	)	**Issued: December 10, 2004**
U.S. POSTAL SERVICE, MIDTOWN STATION, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 29, 2004 appellant filed a timely appeal of a nonmerit decision of the Office of Worker's Compensation Programs dated April 9, 2004 which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated June 26, 1996 to the filing of this appeal on April 9, 2004, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On February 20, 1979 appellant, then a 31-year-old letter carrier, slipped on some stairs while delivering mail and fell, sustaining pain and tenderness of the neck and upper back areas,

trauma to the third and fourth fingers of the left hand, cervical strain with radiculopathy, and lumbosacral strain with radiculopathy. Appellant received appropriate compensation benefits.

By decision dated August 3, 1995, he was advised that his compensation would be terminated effective August 10, 1995 on the grounds that he had no continuing injury-related disability and no need for medical treatment. At that point appellant alleged that his disability was a head injury related, even though no head injury-related disability had ever been accepted by the Office in appellant's case.

Appellant requested an oral hearing, which was held on February 28, 1996. By merit decision dated June 26, 1996, the Office hearing representative affirmed the August 3, 1995 decision finding that the weight of the medical evidence supported that appellant had no further disability, which was supported by the special weight accorded the impartial medical examiner's opinion.

Following this last merit decision on January 19, 2004, appellant submitted medical evidence previously of record and considered by the Office consisting of: a January 25, 1988 neurological/psychiatric report from a clinical psychologist, Dr. Victoria C. Rivamonte, who diagnosed adjustment disorder with mixed emotional features, dependent personality and bilateral diffuse cervical radiculopathy; an October 19, 1987 psychiatric report by Dr. Lennard Belok, a Board-certified psychiatrist; an orthopedic report dated November 28, 1986 by Dr. Irving Liebman and several 1984, 1985 and 1986 reports were submitted years prior to the termination of appellant's compensation entitlement.

On January 19, 2004 appellant requested reconsideration of the merits of the June 26, 1996 decision.

By decision dated April 9, 2004, the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) for the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary to determine whether it will review an award for or against compensation.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation

[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[3] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[4] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

The Office regulations require that an application for reconsideration must be submitted in writing.[6] The regulations provide:

> "[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."[7]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[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 manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[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 so as 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's decision.[13]

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[5] 20 C.F.R. 607(b); *Thankamma Mathews, supra* note 2; *Jesus D. Sanchez, supra* note 3.

[6] 20 C.F.R. § 10.606; 20 C.F.R. § 10.605.

[7] 20 C.F.R. § 10.607(b).

[8] *See Thankamma Mathews, supra* note 2.

[9] *Id.*

[10] *Jesus D. Sanchez. supra* note 3.

[11] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[12] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[13] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

ANALYSIS

Appellant requested reconsideration of a June 26, 1996 decision on January 19, 2004. Therefore, the Board finds that the reconsideration request was untimely made after the one year time limitation. However, the Office cannot reject an appellant's request for reconsideration, even if it is untimely made, until the Office has performed a limited review of the evidence submitted with the request to determine whether he had presented clear evidence of error on the part of the Office.

In this case appellant submitted evidence which apparently was previously submitted to the record and considered by the Office prior to the issuance of the August 3, 1995 decision which terminated appellant's compensation benefits.[14] He submitted no additional medical evidence in support of his reconsideration request.

As appellant did not submit any medical evidence or raise any specific legal contention which would establish that the Office committed error in its April 9, 2004 decision denying his claim for further disability causally related to his February 20, 1979 injury, the Board finds that appellant has not established clear evidence of error in the Office's finding that appellant submitted no clear evidence of error in the April 9, 2004 decision.

CONCLUSION

The Board finds that the Office properly denied further merit review of this claim. Appellant filed an untimely request for reconsideration and on the face of his written application for reconsideration he failed to provide clear evidence of error in the evidence submitted after the June 26, 1996 decision and leading up to the April 9, 2004 decision.

[14] Evidence which is repetitive or duplicitous of that already contained in the record and previously reviewed is insufficient to warrant further review. *See James R. Bell*, 52 ECAB 414 (2001); *Eugene F. Butler*, 36 ECAB 393 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation dated April 9, 2004 is hereby affirmed.

Issued: December 10, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member