

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES E. LANG, JR., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 04-780
Issued: June 2, 2004**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 2, 2004 appellant filed a timely appeal of a January 7, 2004 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. The Office previously denied his claim on the merits in a decision dated May 17, 1996. Because more than one year has elapsed between the May 17, 1996 merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On September 12, 1994 appellant, then a 46-year-old distribution clerk, filed a traumatic injury claim alleging that he experienced back spasms while bending down changing postal

boxes on September 2, 1994. He described his injury as a swollen disc in the small of his back. Appellant stopped work on September 3, 1994 and returned on September 14, 1994.

By decision dated March 14, 1995, the Office denied appellant's claim, finding that the evidence failed to demonstrate that he sustained an injury as alleged.

On November 25, 1995 appellant requested an examination of the written record and he submitted additional evidence. By decision dated December 29, 1995, the Office denied appellant's request for a hearing as untimely.

By letter dated January 26, 1996, appellant requested reconsideration. In a decision dated May 17, 1996, the Office denied modification of the March 14, 1995 decision.

By letter dated January 13, 1998, the Office provided appellant and his attorney a copy of the May 17, 1996 decision, which included his appeal rights. On February 10, 1998 appellant filed an appeal of the January 13, 1998 letter. By order dated June 30, 1998, the Board dismissed the appeal because the Office's January 13, 1998 correspondence was not a final decision of the Office and there was no other final decision issued within a year of the February 10, 1998 appeal.¹

In response to counsel's and appellant's numerous inquiries regarding the status of the claim, the Office on January 25, 2001 provided a copy of the May 17, 1996 decision, noting that his appeal rights had expired within one year of the May 17, 1996 decision.

Appellant's counsel again filed an appeal with the Board seeking review of the Office's January 25, 2001 letter. By order dated July 23, 2001, the Board dismissed appellant's appeal for lack of jurisdiction.²

In a November 8, 2001 letter, appellant, through his attorney, requested reconsideration. He stated that appellant was injured on September 2, 1994 and that he stopped work the following day and saw his attending physician, Dr. C. Herbert Schapera,³ on September 4, 1994. Counsel argued that this information established fact of injury. By letter dated February 4, 2003, appellant's representative again requested reconsideration and enclosed a copy of the November 8, 2001 letter. Counsel reiterated his request on December 6, 2003, noting that if the "facts and circumstances warrant" the Office may reopen a claim even if the request for reconsideration is filed more than one year after the prior decision.

In a decision dated January 7, 2004, the Office denied appellant's reconsideration request as untimely filed and did not establish clear evidence of error.

¹ Docket No. 98-1001.

² Docket No. 01-1036.

³ Dr. Schapera is a Board-certified family practitioner.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act 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 payment of compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁸ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁰ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

ANALYSIS

Appellant's December 6, 2003 request for reconsideration was submitted more than one year after the May 17, 1996 merit decision and is, therefore, untimely. As appellant filed his

⁴ 5 U.S.C. § 8128(a); see *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607 (1999).

⁷ 20 C.F.R. § 10.607(a) (1999).

⁸ 20 C.F.R. § 10.607(b) (1999).

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

request more than one year after the Office's May 17, 1996 decision, appellant must demonstrate "clear evidence of error" on the part of the Office.

Appellant did not submit any additional medical or factual evidence in support of his request for reconsideration. The various letters merely contended that appellant injured himself on September 2, 1994, stopped work the following day and sought medical treatment from Dr. Schapera on September 4, 1994. Counsel represented that appellant apparently made some sort of oral report to the employing establishment prior to formally submitting his claim on September 12, 1994.

The Office considered Dr. Schapera's September 13, 1994 disability slip in its initial decision dated March 14, 1995. Additionally, the Office considered Dr. Schapera's November 2, 1995 report when it last reviewed the claim on the merits in the May 17, 1996 decision.¹⁵ Contrary to counsel's assertion, there is no evidence that Dr. Schapera examined appellant on September 4, 1994 or diagnosed an employment-related injury at that time.¹⁶ The earliest evidence of treatment by Dr. Schapera was the September 13, 1994 disability slip, which provided no diagnosis or indication of how and when appellant injured himself.

The Office denied the claim because both the factual and medical evidence failed to establish that appellant sustained an employment-related back injury on September 2, 1994. While it is evident that appellant was treated in the emergency department on September 4, 1994, the emergency department follow-up instructions did not provide a specific diagnosis or otherwise describe the nature of appellant's condition and its cause. Counsel's argument concerning when appellant first saw his physician does not shift the weight of the evidence in appellant's favor or raise a substantial question as to the correctness of the Office's decision.¹⁷ Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁵ Dr. Schapera advised that appellant was being treated for a flare-up of back pain. He also noted that appellant had documentary evidence of a work-related injury that occurred on September 2, 1994. Dr. Schapera diagnosed acute or chronic low back pain secondary to work injury of 1994.

¹⁶ The September 4, 1994 emergency department follow-up instructions advised that appellant should call for an appointment with Dr. Schapera in 2 to 3 days. The document does not include a diagnosis or a history of injury.

¹⁷ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member