

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

HAROLD F. FRYE, Appellant)
and) Docket No. 04-1634
U.S. POSTAL SERVICE, ACCOUNTING) Issued: November 24, 2004
SERVICES, Richmond, VA, Employer)

)

Appearances:

Stephen Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On June 14, 2004 appellant filed an appeal of a March 17, 2004 Office decision, which denied his request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the Office's last merit decision dated January 9, 1998 to the filing of this appeal on June 14, 2004, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of his claim. On appeal appellant, through counsel, contends that as the Board issued a decision dated November 7, 2002, his request for reconsideration dated October 31, 2003 was timely filed.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been before the Board on two prior occasions. By decision dated November 21, 2000, the Board affirmed an Office decision dated January 9, 1998, which denied appellant's claim that he sustained an emotional condition in the performance of duty. The Board specifically found that he had not established a compensable factor of employment.¹ In a decision dated November 7, 2002, the Board affirmed a June 7, 2001 decision, in which the Office denied appellant's reconsideration request.² The law and the facts as set forth in the previous Board decisions are incorporated herein by reference.

Subsequent to the Board's November 7, 2002 decision, on October 31, 2003 appellant, through his attorney, requested reconsideration and submitted medical reports from his attending Board-certified psychiatrist, Dr. Padmini Atri, dating from September 3, 1997 to November 2, 2001. In a March 17, 2004 decision, the Office denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error of the last merit decision, the November 21, 2000 decision of the Board.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ The Office 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.⁴ 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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must 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. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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

¹ Docket No. 99-720 (issued November 21, 2000).

² Docket No. 02-1619 (issued November 7, 2002).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁶

ANALYSIS

The only decision before the Board is the March 17, 2004 decision, in which the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that as more than one year had elapsed from the date of issuance of the last merit decision dated November 21, 2000 and appellant's request for reconsideration dated October 31, 2003, his request for reconsideration was untimely. The one-year time limitation on reconsideration requests begins to run subsequent to any merit decisions on the issues, including any such decision of the Board.⁷ Thus, contrary to appellant's assertion on appeal, as the Board's November 7, 2002 decision merely affirmed that the Office properly denied merit review in its June 7, 2001 decision, the November 7, 2002 Board decision was not a decision on the merits of appellant's claim and the last merit decision in this case was the Board's November 21, 2000 decision, which affirmed that appellant did not sustain an emotional condition in the performance of duty. His October 31, 2003 reconsideration request was therefore not timely filed.

The Board further finds that appellant failed to establish clear evidence of error. With his request for reconsideration, appellant submitted additional medical evidence from his attending psychiatrist, Dr. Atri. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must 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.⁸ In the case at hand, the Office found and the Board affirmed, that appellant failed to establish a compensable factor of employment and, therefore, his emotional condition did not arise in the performance of his federal duties. Evidence regarding appellant's medical condition, therefore, is irrelevant does not raise a substantial question concerning the correctness of the Office's decision and is insufficient to establish clear evidence of error.⁹ In addition, appellant did not present any evidence of error in his request letter. Consequently, he has not met his burden to establish clear evidence of error on the part of the Office such that the Office erred in denying merit review.

The Board, therefore, finds that in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

⁶ *Nancy Marcano*, 50 ECAB 110 (1998).

⁷ *Odell Thomas*, 42 ECAB 405 (1991).

⁸ *Nancy Marcano*, *supra* note 6.

⁹ *Id.*

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and he failed to establish clear evidence of error. The Office, therefore, properly denied a merit review of his claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2004 be affirmed.

Issued: November 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member