

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

ROBERT F. STONE, Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Springfield, MA, Employer**

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**Docket No. 04-1451
Issued: December 22, 2005**

Appearances:
Robert F. Stone, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument November 8, 2005

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 11, 2004 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated March 24, 2004, denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because the Office has not issued a merit decision within one year of the filing of this appeal on May 11, 2004, the Board lacks jurisdiction to review the merits of appellant's claim.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the March 24, 2004 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

¹ See 5 U.S.C. § 501.2(c).

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board affirmed the Office's termination of appellant's compensation, effective October 6, 1994, on the grounds that he refused an offer of suitable work.² On appeal for the second time, the Board affirmed the Office's December 4, 2000 and March 5, 2001 decisions, denying his requests for reconsideration as untimely filed and not presenting clear evidence of error.³ The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

By letter dated January 1, 2003, appellant requested reconsideration. He argued that the Office erroneously failed to provide his attending physician with the entire case record.

In a decision dated February 7, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error.

In a letter dated October 6, 2003, appellant again requested reconsideration. He asserted that he was "denied constitutional due process because the Office did not give him a fair hearing before an impartial and neutral decision maker before it terminated his compensation." Appellant contended that Shirley Bridge, the claims examiner, who issued the October 6, 1994 decision terminating his compensation, was biased against him because he had filed two Equal Employment Opportunity (EEO) complaints against her for actions taken in connection with his claim. He cited the case of *Withrow et. Al v. Larkin*,⁴ arguing that the Supreme Court held that it was impermissible for a decision maker who had been criticized by a claimant to decide a case. Appellant noted that Ms. Bridge knew that he had filed EEO complaints against her prior to issuing the decision in his case. He additionally argued that the content of sworn statements provided by Ms. Bridge on July 21 and 22, 1994 as part of an investigation by the employing establishment revealed that she was prejudiced against him and his case. Appellant maintained that the employing establishment erroneously prevented him from using the evidence of bias by Ms. Bridge in his workers' compensation claim by threatening criminal sanctions for divulging information connected with his EEO complaint. He noted that the EEO Commission subsequently informed the employing establishment in a July 2001 letter that the language prohibiting the use of information from EEO complaints was too restrictive. Appellant also asserted that Ms. Bridge had a pecuniary interest in denying his claim as he had accused her of wrongdoing which could endanger her job.

In support of his request for reconsideration, appellant submitted an October 8, 1993 letter that he wrote to Ms. Bridge detailing his complaints against her and accusing her of placing false statements in his case record. He further submitted a report from an EEO counselor which established that on October 28, 1993 the counselor contacted Ms. Bridge and "discussed [the] case and reprisal complaint." A later report from an EEO counselor reveals that a counselor

² *Robert F. Stone*, Docket No. 96-166 (issued July 25, 1997).

³ *Robert F. Stone*, Docket No. 01-1549 (issued August 5, 2002).

⁴ 421 U.S. 35 (1975).

contacted Ms. Bridge on May 18, 1993 regarding appellant's EEO complaint. Additionally, appellant submitted a sworn statement by Ms. Bridge dated July 21, 1994 in which she responded to the complaints raised against her by appellant. He also provided a March 27, 1996 letter that he received from the employing establishment warning him against disclosing information about his EEO complaint and a July 20, 2001 letter from the EEO Commission notifying the employing establishment that the language warning employees to treat the information in EEO complaints as confidential "could have a chilling effect on the EEO process" and, thus, could not be used.

By decision dated March 24, 2004, the Office denied appellant's claim on the grounds that it was untimely and failed to establish clear evidence of error.

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.⁵ 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.⁶ 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.⁷ The Office procedures states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year 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.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 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.¹⁰ 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

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.607; *see also* *Alan G. Williams*, 52 ECAB 180 (2000).

⁷ *Veletta C. Coleman*, 48 ECAB 367 (1997)

⁸ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

¹⁰ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Dorletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinions 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's decision.¹¹ 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.¹²

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ In this case, appellant's October 22, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record and, thus, it was untimely. Consequently, he must demonstrate "clear evidence of error" by the Office in denying his claim for compensation.¹⁴

Appellant contended that the Office denied him a constitutionally fair hearing because Ms. Bridge, the claims examiner, who issued the October 6, 1994 decision terminating his benefits, was biased against him and had a pecuniary interest in denying him benefits. He maintained that she placed inaccurate information in his case record and that he consequently filed two EEO complaints against her. Appellant noted that Ms. Bridge had knowledge of his adversarial actions against her prior to issuing her October 6, 1994 decision. He further indicated that the Supreme Court prohibited a decision maker who was criticized by a claimant from rendering a decision. Appellant additionally alleged that the employing establishment wrongfully prohibited him from using information from his EEO complaint which would establish bias in his claim.

Appellant's argument that he was denied due process and a fair hearing because of bias by the claims examiner raises a constitutional question. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.¹⁵ As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant.¹⁶ The federal courts retain jurisdiction over decisions under the Federal Employees' Compensation Act where there is a charge of a violation of a clear statutory

¹¹ *Id.*

¹² *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹³ *Veletta C. Coleman*, *supra* note 7.

¹⁴ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹⁵ *See Johnson V. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

¹⁶ *See Dianna L. Smith*, 56 ECAB ____ (Docket No. 04-2256); *Vittorio Pittelli*, 49 ECAB 181 (1997).

mandate or where there is a constitutional claim.¹⁷ The Board, therefore, lacks jurisdiction to review the merits of appellant's argument.

The Board notes, however, that subsequent to the allegedly biased October 6, 1994 decision, appellant received *de novo* reviews of the merits of his claim by both a hearing representative and the Board. In addressing violations of procedural due process under the Act, the Board has held that the opportunity for a hearing or reconsideration by the Office, together with the Board's review on appeal, constitutes meaningful post-deprivation processes whereby the government can address procedural errors.¹⁸ In this case, after the Office terminated appellant's compensation in its October 1994 decision, he had the opportunity to respond by requesting a hearing or reconsideration. He requested a hearing and subsequently a review of his claim by the Board and, thus, had two separate *de novo* reviews of the merits of his claim after the decision rendered by the allegedly biased claims examiner.

The letters and other documentary evidence submitted by appellant in support of his request for reconsideration either duplicated evidence already contained in the case record or are relevant to his allegations of bias by the claims examiner. The evidence submitted regarding bias by the claims examiner is not relevant to the issue at hand, which is whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁹ Additionally, as noted above, the Board is not the proper forum to determine a constitutional claim such as that raised by appellant.²⁰

The evidence and arguments submitted in support of appellant's untimely reconsideration request are either duplicative, irrelevant to the issue of whether he established error by the Office in terminating his compensation on the grounds that he refused an offer of suitable work or relevant to a constitutional argument outside the Board's jurisdiction and, thus, insufficient to establish clear evidence of error. To establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the merits of the Office's decision.²¹ The evidence submitted and arguments raised on reconsideration failed to meet this standard and, thus, the Office properly denied merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

¹⁷ *Woodruff v. U.S. Department of Labor*, 954 F.2d 634 (11th Cir. 1992); *Harry D. Butler*, 43 ECAB 859 (1992).

¹⁸ *See Lan Thi Do*, 46 ECAB 366 (1994).

¹⁹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

²⁰ *See Harry D. Butler*, *supra* note 17.

²¹ *See Veletta C. Coleman*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2004 is affirmed.

Issued: December 22, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board