

filed and failed to show clear evidence of error in the Office's September 30, 1998 decision denying his claim for compensation.²

On November 4, 2003 appellant again requested reconsideration. He stated: "You already have in your possession all records. Nothing new. No AB-1 enclosed with letter." In a decision dated January 21, 2004, the Office denied this request on the grounds that it raised neither substantive legal questions nor included new and relevant evidence. The Board set aside this decision because the Office applied the wrong standard of review. Appellant's November 4, 2003 request was untimely, as more than one year had elapsed since the Office's September 30, 1998 merit decision, yet the Office applied the less onerous standard of review reserved for timely requests.³

In a decision dated August 26, 2004, the Office denied appellant's November 4, 2003 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error in the Office's September 30, 1998 merit decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."⁴

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most

² On February 13, 1998 appellant, then a 58-year-old motor vehicle operator, filed a claim for compensation benefits for a traumatic left wrist injury occurring on January 9, 1979 when he was lifting bottles of water in a warehouse. On August 27, 1998 the Office requested additional information to support his claim, including a physician's opinion on the relationship of his diagnosed condition to federal employment. In a decision dated September 30, 1998, the Office noted that appellant's explanation for not filing his claim within the statute of limitations was not sufficient because he did not submit a medical report from his doctor. The Office denied the claim "as you have not met the requirements for establishing that you sustained an injury as alleged."

³ Docket No. 04-0782 (issued July 15, 2004). The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

⁴ 5 U.S.C. § 8128(a).

recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

ANALYSIS

As the Board found on the prior appeal, appellant filed his November 4, 2003 request for reconsideration in an untimely manner. The appeal rights attached to the Office's September 30, 1998 merit decision clearly notified him that he had one year from the date of that decision to make any request for reconsideration.⁶ That time limitation expired on September 30, 1999. Appellant's November 4, 2003 request for reconsideration is, therefore, over three years late.

Further, appellant made no attempt in his November 4, 2003 request for reconsideration, to demonstrate that the Office's decision on September 30, 1998 was erroneous. He offered no argument persuasively revealing any fatal error in the Office's denial of his claim and he submitted no evidence that, on its face, would demonstrate such an error.⁷ Appellant's empty request for reconsideration is by definition insufficient to warrant, at this late date, a reopening of his case for review and readjudication of its merits.

The "clear evidence of error" standard for untimely requests is intended to be a difficult one.⁸ Because it is not easily met appellant's difficulty in obtaining reconsideration by the Office is understandable. But if he is to succeed with any further request, he must persuasively demonstrate by clear and convincing argument or evidence, how the grounds upon which the Office denied his claim were erroneous.

CONCLUSION

The Office properly denied appellant's November 4, 2003 request for reconsideration.

⁵ 20 C.F.R. § 10.607 (1999).

⁶ The September 30, 1998 appeal rights notified appellant as follows: "If you have more evidence or legal arguments which you believe apply to your case, you may ask the district Office to reconsider this decision. Such a request must be made in writing within one year of the date of this decision."

⁷ Appellant later submitted a statement, dated January 28, 2004, describing injuries he sustained in 1975, 1976 and 1979 and asking for compensation. This statement in no way establishes that the Office improperly denied his February 13, 1998 claim for compensation.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b (May 1991).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member