

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

CRAIG L. MILLER, Appellant

and

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

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**Docket No. 04-2020
Issued: January 24, 2005**

Appearances:
Craig L. Miller, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 12, 2004 appellant filed a timely appeal of a June 28, 2004 decision of the Office of Workers' Compensation Programs, finding that his May 12, 2004 request for reconsideration was untimely and failed to show clear evidence of error by the Office in a November 14, 1994 decision. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board has jurisdiction over final decisions of the Office issued within one year of the filing of the appeal. Since this appeal was filed more than one year after the last merit decision dated November 14, 1994, the Board does not have jurisdiction to review the underlying merit issues of the claim.

ISSUE

The issue is whether the Office properly determined that appellant's May 12, 2004 request for reconsideration was untimely filed and failed to show clear evidence of error by the Office.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated August 11, 1994, the Board reversed the decisions of the Office dated April 27 and November 30, 1992 on the grounds that the Office improperly terminated compensation based on a refusal of suitable work. The Board found that the Office failed to follow established procedures in advising appellant that the reasons he offered for refusing the offered position were insufficient. The facts and the history of the case as provided in the Board's prior decision is incorporated herein by reference.¹

On October 21, 1994 the employing establishment reoffered appellant the position of modified manual distribution clerk. By decision dated November 14, 1994, the Office terminated compensation on the grounds that appellant had refused an offer of suitable work.

Appellant continued to be entitled to medical benefits and the Office developed the medical evidence with respect to a consequential emotional condition. In a report dated April 9, 2003, Dr. Mark Reynolds, a psychiatrist serving as a second opinion physician, provided a history and results of examination. In a supplemental report dated August 19, 2003, Dr. Reynolds opined that appellant's pain from the employment injury exacerbated his depressive disorder. By letter dated October 29, 2003, the Office advised appellant that it had accepted exacerbation of depressive disorder.

In a letter dated May 12, 2004, appellant requested reconsideration of the November 14, 1994 decision. Appellant stated that on October 29, 2003 the Office had accepted an emotional condition as a consequence of his employment injury and it was this condition that prevented him from accepting the offered position.

By decision dated June 28, 2004, the Office determined that appellant's request for reconsideration was untimely. The Office further determined that appellant's request for reconsideration failed to show clear evidence of error in the November 14, 1994 refusal of suitable work termination.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its

¹ Docket No. 93-1117 (issued August 11, 1994).

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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."

discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, the Office has stated that it 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 The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁸ In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which 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 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.¹⁴ 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 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.¹⁵

⁵ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

⁶ 20 C.F.R. § 10.607.

⁷ *See Leon D. Faidley, Jr., supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

¹⁵ *Leon D. Faidley, Jr., supra* note 3.

ANALYSIS

The decision terminating appellant's compensation was dated November 14, 1994. Appellant's request for reconsideration is dated May 12, 2004. As this is more than one year after the merit decision, it is untimely. The issue, therefore, is whether appellant has shown clear evidence of error by the Office in the November 14, 1994 decision.

On reconsideration, appellant noted that the Office had accepted, as of October 29, 2003, an exacerbation of a depressive disorder as a consequence of his December 15, 1987 back injury. Dr. Reynolds, the second opinion psychiatrist, did not discuss the offered position in 1994 or appellant's condition at that time. The acceptance of an employment-related emotional condition does not itself provide a relevant argument with respect to a refusal of suitable work. A determination that an offered position is medically suitable is based on medical evidence at the time the position is offered and includes consideration of nonemployment-related conditions as well as employment related.¹⁶ Appellant stated that the reason he did not accept the position was due to his emotional condition. He did not submit any medical evidence with respect to his inability to perform the modified manual distribution clerk position as of November 14, 1994 due to an emotional condition. A review of the medical evidence of record does not establish that the Office erred in finding the offered position was medically suitable. For example, the record contains a report dated March 17, 1992 from Dr. Letitia Van Benten, a psychologist, diagnosing paranoid state and affective depressive disorder, with a finding that appellant could not return to work. This report was issued more than two years prior to the November 14, 1994 termination of benefits and did not discuss the offered position or provide a reasoned opinion that appellant was unable to perform the position. As the Office noted, the record also contains a March 19, 1992 report from Dr. Carl Jenkins, a family practitioner, finding that appellant needed a psychological evaluation and could not return to work. Again, this report is not contemporaneous with the offer of the position and the termination of benefits, nor does it address the offered position and provide a reasoned medical opinion on the issue presented.

The May 12, 2004 request for reconsideration does not demonstrate clear evidence of error by the Office. Since appellant's request was untimely filed and did not demonstrate clear evidence of error, the Office properly denied the request for reconsideration without merit review of the claim.

CONCLUSION

The Board finds that the May 12, 2004 request for reconsideration was untimely as it was filed more than one year after the November 14, 1994 Office decision. In addition, appellant's argument that the offered position was medically unsuitable is not supported by the record and he has failed to establish clear evidence of error by the Office.

¹⁶ See *Janice S. Hodges*, 52 ECAB 379 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2004 is affirmed.

Issued: January 24, 2005
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member