

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

SALVATORE C. MARASSA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Forest Park, IL, Employer**

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**Docket No. 04-757
Issued: May 2, 2005**

Appearances:
Salvatore C. Marassa, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 28, 2004 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated January 15, 2004 which denied his claim for reconsideration on the merits, finding that it was untimely filed and did not demonstrate clear evidence of error. Because more than one year has elapsed from the last Office merit decision dated August 10, 1996 to the filing of this appeal on January 28, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On September 24, 1987 appellant, then a 28-year-old mail handler, filed a claim for compensation for an occupational disease of left carpal tunnel syndrome. His claim was ultimately accepted for left carpal tunnel syndrome, and he received appropriate compensation benefits. He returned to light duty on November 5, 1988 and worked until March 16, 1989 when he ceased work. In a March 10, 1999 decision, the Board found that the evidence did not establish that appellant was required to work outside his restrictions or that he was totally disabled for his light-duty work and hence was not entitled to compensation for his work stoppage on March 16, 1989.¹ The facts and history of the case are set forth in this Board decision. Appellant was fired from the employing establishment on June 9, 1989 for not reporting for duty.

In an October 22, 2002 decision the Board affirmed the Office's March 14 and November 29, 2001 and March 5, 2002 decisions that refused to reopen appellant's case for further review of the merits of his claim.²

By letter dated August 10, 2003, appellant requested reconsideration of his case under 5 U.S.C. § 8128(a). He followed up with letters in support of his reconsideration request dated November 30 and December 3, 2003. In his appeal letter and subsequent writings, appellant argued that the Office erred in finding the custodial worker position to be suitable because, in reinstating the prior suitable work determination after his March 16, 1989 work stoppage, the Office failed to confirm that the position was still available, it failed to advise him that his reasons for abandoning the job were not adequate and it failed to give him 15 days more within which to accept the position. Appellant admitted that he had returned to suitable limited-duty work on November 5, 1988, worked successfully for about five months, and stopped working on March 17, 1989, claiming that he was being worked over his restrictions. Appellant alleged that the Office violated 5 U.S.C. § 8106(c)(2).

By decision dated January 15, 2004, the Office found that the arguments presented with appellant's request for reconsideration were either irrelevant and duplicative and did not establish clear evidence of error.

¹ Docket No. 97-670 (issued March 10, 1999).

² Docket No. 02-1032 (issued October 22, 2002).

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.”

The Office, through regulations, 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(a) 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 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).³

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.⁴ 20 C.F.R. § 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 [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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

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

⁴ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ *See Leona N. Travis*, *supra* note 6.

the new evidence demonstrates clear error on the part of the Office.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

In the present case, the most recent merit decision was the Board's decision and order issued on March 10, 1999. Appellant's August 10, 2003 request for reconsideration was thus not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Board finds that the arguments submitted in appellant's August 10, 2003 request for reconsideration do not demonstrate clear evidence of error. He is incorrect in stating that 5 U.S.C. § 8106(c) was invoked for refusal of suitable work. Instead, as can be seen in the Board's March 10, 1999 decision, appellant's claim for a recurrence of disability beginning March 16, 1989 was adjudicated and denied.

CONCLUSION

The Board finds that appellant's August 10, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

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

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 3.

¹¹ *Gregory Griffin*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 15, 2004 is affirmed.

Issued: May 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member