

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

A.F., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Philadelphia, PA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-239
Issued: August 1, 2006**

Appearances:
A.F., pro se
Amanda Matey, Law Clerk, for the Director

Oral Argument July 13, 2006

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2005 appellant filed an appeal of a September 19, 2005 decision of the Office of Workers' Compensation Programs, 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 last merit decision dated January 16, 2001 to the filing of this appeal on November 28, 2005, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of appellant's claim.

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 previously. In a February 5, 2003 decision, the Board affirmed a November 16, 2001 Office decision, which denied appellant's request for

reconsideration.¹ The law and the facts of the previous Board decision are incorporated herein by reference.

Subsequent to the Board's February 5, 2003 decision, appellant submitted correspondence to the Office dated August 22, September 9 and November 13, 2003 and by letter dated July 15, 2004 submitted what he deemed an argument not previously considered. By decision dated August 23, 2004, the Office denied this reconsideration request on the grounds that it was untimely filed and he failed to present clear evidence of error. In letters dated May 31 and July 11, 2005, appellant again corresponded with the Office and on August 17, 2005 requested reconsideration. He submitted statements in support of this request, generally arguing that the evidence was sufficient to establish his claim, specifically contending that his limited duty was withdrawn on May 31, 1995 when he was ordered to work outside his physical limitations. Appellant further contended that a Form CA-2 recurrence claim submitted on December 12, 2000 was not a duplicate of the CA-2 form filed on February 22, 1997. By decision dated September 19, 2005, the Office denied appellant's reconsideration request on the grounds that his request was untimely filed and he failed to present clear evidence of error. The Office noted that his argument as to whether his limited-duty job exceeded his restrictions had been discussed in multiple previous decisions.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² 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.³ 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.⁴

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. 03-307.

² 5 U.S.C. §§ 8101-8193.

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

⁴ *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.⁵

ANALYSIS

The only decision before the Board is the September 19, 2005 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 January 16, 2001 and appellant's request for reconsideration dated August 17, 2005, his request for reconsideration was untimely.⁶

The Board further finds that appellant failed to establish clear evidence of error. 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.⁷ In the case at hand, with his reconsideration request appellant did not submit any new evidence but submitted correspondence in which he generally alleged that the evidence established his recurrence claim and argued that a limited-duty assignment was improperly withdrawn on August 24, 1995 when he was ordered to work outside his physical limitations.

The arguments appellant submitted with his reconsideration request did not establish clear evidence of error. His general arguments did not raise a fundamental question as to the correctness of the Office's January 16, 2001 decision.⁸ In the January 16, 2001 decision, in denying modification, the Office found that appellant did not meet his burden of proof to establish that he was assigned job duties outside his limited-duty restrictions when he stopped work on August 24, 1995. Thus, appellant's argument in this regard was cumulative. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim.⁹ The Board, therefore, finds that in this case appellant's argument regarding withdrawal of a limited-duty assignment does not constitute a basis for reopening this case. Consequently, appellant 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.¹⁰

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 arguments to ascertain

⁵ *Nancy Marcano*, 50 ECAB 110 (1998).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.*

⁸ *Nancy Marcano*, *supra* note 5.

⁹ See *Shirley Rhynes*, 55 ECAB ____ (Docket No. 04-1299, issued September 9, 2004); *James A. England*, 47 ECAB 115 (1995).

¹⁰ *Cresenciano Martinez*, *supra* note 4.

whether he demonstrated clear evidence of error, correctly determined that he did not and denied his untimely request for a merit reconsideration on that basis.¹¹

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 September 19, 2005 be affirmed.

Issued: August 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹¹ *Nancy Marciano, supra* note 5. Appellant also alleged that a Form CA-2a claim filed on December 15, 2000 was not a duplicate of that filed on February 22, 1997. The instant claim was adjudicated by the Office under file No. 030208190 for a claim filed on May 31, 1995 for a back injury sustained that day. The claim was accepted on December 4, 1995 for a lumbosacral strain and appellant subsequently filed a CA-2a form on February 22, 1997, claiming a recurrence of disability beginning August 25, 1995. The December 15, 2000 CA-2a form also claimed a recurrence of disability on August 25, 1995 and would thus be a duplicate claim.