

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

J. M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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

**Docket No. 06-651
Issued: December 11, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated April 4 and September 9, 2005, which denied his reconsideration requests on the grounds that they were untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision of the Office dated April 12, 1990 and the filing of this appeal on January 26, 2006 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue on appeal is whether the Office properly determined that appellant's requests for reconsideration dated January 29 and June 13, 2005 were not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This is the 12th appeal in the present case.¹ By decision dated October 20, 1980, the Board set aside an April 16, 1980 decision of the Office and remanded the case for resolution of a conflict in medical opinion regarding whether appellant had any disabling residuals causally related to his October 22, 1959 employment injury.² In a decision dated December 12, 1990, the Board affirmed the Office decisions dated July 19, 1989 and April 12, 1990, which denied modification of the termination of appellant's compensation benefits.³ In the 10th appeal,⁴ the Board found that appellant's requests for reconsideration dated June 10, 1997 and January 26, 1998, were untimely filed and did not demonstrate clear evidence of error. The Board also found that the Branch of Hearings and Review properly denied appellant's request for hearing on August 20, 1997. In the 11th appeal,⁵ the Board dismissed appellant's appeal on the grounds that there was no final decision issued within one year of the appeal. The facts and the circumstances surrounding the prior appeals are more fully set forth in the Board's prior decisions, which are hereby incorporated by reference.

In a letter dated January 29, 2005, appellant requested reconsideration. He stated that he was seeking reconsideration of an Office decision dated April 8, 1981, which terminated his compensation benefits.

By decision dated April 4, 2005, the Office denied appellant's application for reconsideration on the grounds that it was not timely and that he did not establish clear evidence of error by the Office.

In a letter dated June 13, 2005, appellant requested reconsideration. He contended that the Office erred in determining that he could do light-duty work and in reducing his compensation. Appellant indicated that his benefits were terminated because of a report from Dr. Sherwyn J. Wayne, a Board-certified orthopedic surgeon, who incorrectly noted that he had multiple/sclerosis. On October 22, 1959 and February 11, 1973 he sustained on-the-job injuries and lost time from work and ultimately stopped working due to these injuries. Appellant was treated by Dr. Lee Blount, Board-certified in general surgery and Dr. Leonard Newark, a Board-certified internist. He further noted that Dr. Newark provided two reports, one which determined that appellant could perform light-duty work and another report which indicated that appellant was totally disabled. Appellant indicated that he was referred to Dr. Wayne, who was an impartial medical specialist, who failed to obtain a health history, perform a complete examination, perform diagnostic tests or consult with other specialists to substantiate his

¹ On October 22, 1959 appellant, then a 27-year-old postal clerk, sustained a back injury which the Office accepted for chronic lumbosacral strain. He received compensation benefits for temporary total and partial disability until April 8, 1981. Appellant sustained a second employment-related lumbar strain in 1973.

² Docket No. 80-1120 (issued October 20, 1980).

³ Docket No. 90-1023 (issued December 12, 1990).

⁴ Docket No. 98-1665 (issued September 7, 1999).

⁵ Docket No. 04-685 (issued July 27, 2004).

findings. He indicated that Dr. Wayne determined that he was totally disabled from multiple sclerosis and no longer had any residuals of his work-related condition. Appellant disputed Dr. Wayne's findings and advised that there was no medical evidence which supported a diagnosis of multiple sclerosis.

By decision dated September 9, 2005, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and he did not establish clear evidence of error by the Office.

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.”⁶

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁷

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁸

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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's decision.⁹

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁹ *Annie L. Billingsley*, *supra* note 7.

Evidence that 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.¹¹ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹³

ANALYSIS

In its April 4, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision of record is the Board's December 12, 1990 decision, which affirmed the termination of appellant's compensation benefits. Appellant's request for reconsideration was dated January 29, 2005, which was more than one year after December 12, 1990. Similarly, appellant's June 13, 2005 reconsideration request was also untimely filed as it received more than one year after December 12, 1990. As appellant's reconsideration requests were outside the one-year time limit for requesting reconsideration, which began on December 12, 1990, appellant's requests for reconsideration were untimely.

As noted, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.

The Board notes that appellant did not submit any evidence with his reconsideration request sufficient to shift the weight of the evidence in his favor and concludes that appellant has not established clear evidence of error. In his January 29, 2005 letter, appellant advised that he was seeking reconsideration of an Office decision dated April 8, 1981, which terminated his compensation benefits and the modification of the decision made by the Office. While appellant addressed his disagreement with the Office's decision to terminate his compensation benefits, he did not establish clear evidence of error as his arguments do not raise a substantial question as to the correctness of the Office's decision. The Board notes that the underlying issue is medical in nature and that appellant submitted no new medical evidence sufficient to shift the weight of the evidence in his favor and establish that the Office erred in terminating his compensation benefits in 1980 or that he had any continuing disability causally related to the accepted work injury. Therefore, the Office properly found that appellant's statement and letter of January 29, 2005 did not establish clear evidence of error. The Office properly denied appellant's reconsideration request.

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

As regard to appellant's June 13, 2005 reconsideration request, he advised that the Office erred in determining that he could do light-duty work. He indicated that his benefits were terminated because of a report from Dr. Wayne who incorrectly noted that he had "M/S disease." Appellant indicated that Dr. Wayne, an impartial medical examiner, failed to take a health history, perform a complete examination, perform diagnostic tests or consult with other specialists to substantiate his findings. Appellant disputed Dr. Wayne's determination that he had no residuals from his work-related injury and that his disability was due to his nonwork-related condition of multiple sclerosis. The Board notes that appellant's reconsideration request addressed appellant's disagreement with the termination of his compensation benefits and with the findings of the impartial medical specialist. It does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision which found that appellant did not have continuing residuals of his accepted work-related injury. The issue for purposes of establishing clear evidence of error is whether appellant has established that the Office erred in terminating his compensation benefits in 1980 as he had continuing disability causally related to the accepted injury. Appellant submitted no new medical evidence to establish that the Office erred in terminating his compensation benefits in 1980 or that he had any continuing disability causally related to the accepted work injury. Therefore, the Office properly found that appellant's statement and letter of June 13, 2005 did not establish clear evidence of error. The Office properly denied appellant's reconsideration request.

CONCLUSION

The Board, therefore, finds that the Office properly determined that appellant's requests for reconsideration dated January 29 and June 13, 2005 were untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 9 and April 4, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 11, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board