

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

R.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newark, NJ, Employer**

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**Docket No. 06-1570
Issued: December 27, 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 June 5, 2006 appellant filed a timely appeal from a March 22, 2006 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. Because more than one year has elapsed from the last merit decision dated March 11, 2002 to the filing of this appeal on June 5, 2006. 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 determined that appellant's December 27, 2005 and January 30, 2006 requests for review were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been before the Board on three prior occasions. By decision dated September 25, 2000, the Board found that appellant failed to establish that he sustained an injury

in the performance of duty, but that the Office erred in denying his reconsideration request.¹ Following remand, the Office reviewed the case on the merits and issued a November 17, 2000 decision finding that the medical evidence did not establish that appellant sustained a back injury causally related to his federal employment. He requested reconsideration and, in a January 30, 2001 decision, the Office denied his request for merit review. Appellant then appealed to the Board. In a March 11, 2002 decision, the Board affirmed the November 17, 2000 and January 30, 2001 decisions.² On April 4, 2002 appellant filed a petition for reconsideration of the Board's decision and, in an order dated January 22, 2003, the Board denied this request.³

On April 5, September 4 and 28, 2004 and January 6, 2005 appellant requested reconsideration and submitted additional medical evidence. By decision dated January 19, 2005, the Office found that appellant's reconsideration requests were untimely filed and failed to demonstrate clear evidence of error. On February 24 and March 1, 2005 appellant again requested reconsideration and submitted additional medical evidence. In a decision dated May 31, 2005, the Office denied his reconsideration request. On August 8, 2005 appellant filed an appeal with the Board. In a December 5, 2005 decision, the Board affirmed the January 19 and May 31, 2005 decisions.⁴ On December 12, 2005 appellant filed a petition for reconsideration with the Board. The Board denied his request. The law and facts of the previous Board decisions are incorporated herein by reference.

Subsequent to the Board's December 5, 2005 decision, on December 27, 2005 and January 30, 2006 appellant requested reconsideration with the Office, arguing that it erred in failing to have him examined by a physician pursuant to section 8123 of the Federal Employees' Compensation Act.⁵ He submitted a grievance settlement agreement dated February 16, 1999 and medical evidence consisting of Veterans Administration (VA) reports dated from October 5 to November 15, 1996 and treatment notes from a Dr. Shaw⁶ dated October 9 and 15, 1998. In a March 22, 2006 decision, the Office denied appellant's request on the grounds that his request was untimely filed and he failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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.⁷ When an application for review is untimely, the Office undertakes a limited review to

¹ Docket No. 99-1320.

² Docket No. 01-1716.

³ The Board notes that the issue date is incorrectly stamped on the order denying petition for reconsideration and should be January 22, 2003 rather than January 22, 2002.

⁴ Docket No. 05-1684.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ The physician is not otherwise identified.

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

determine whether the application presents clear evidence that the Office's final merit decision was in error.⁸ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of Office regulations,⁹ if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

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 it 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 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.¹¹

ANALYSIS

The Board finds that, as more than one year had elapsed from the date of issuance of the March 11, 2002 Board merit decision, appellant's requests for reconsideration on December 27, 2005 and January 30, 2006 were untimely filed. The one-year time limitation on reconsideration requests begins to run subsequent to any merit decisions on the issues, including any such decision of the Board.¹²

The Board also finds that appellant failed to establish clear evidence of error with these requests. On reconsideration, appellant argued that the Office erred by not having a physician examine him pursuant to section 8123 of the Act. Section 8123(a) authorizes the Office to require an employee who claims disability as a result of federal employment to undergo a physical examination, as it deems necessary.¹³ The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁹ 20 C.F.R. § 10.607.

¹⁰ *Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

¹¹ *Nancy Marcano*, 50 ECAB 110 (1998).

¹² *Odell Thomas*, 42 ECAB 405 (1991).

¹³ 5 U.S.C. § 8123(a); see *Steven P. Anderson*, 51 ECAB 525 (2000).

are matters within the province and discretion of the Office.¹⁴ The Office, therefore, did not err in failing to have appellant examined by a physician.¹⁵

Appellant also submitted treatment notes from Dr. Shaw dating from 1998, reports from the VA hospital dating from October 5 to November 15, 1996 and a copy of a grievance settlement agreement dated February 16, 1999. 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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ The settlement agreement is irrelevant to this case as the merit issue is whether appellant has established that his claimed condition was caused by employment factors. The medical reports from Dr. Shaw and the VA hospital had been reviewed by the Office and the Board in previous decisions. Thus, these reports do not raise a substantial question concerning the correctness of prior Office decisions. 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. 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 argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.¹⁷

CONCLUSION

The Board finds that, as appellant's reconsideration requests were not timely filed and he failed to establish clear evidence of error, the Office properly denied a merit review of his claim in its March 22, 2006 decision.¹⁸

¹⁴ See *Lynn C. Huber*, 54 ECAB 281 (2002).

¹⁵ *Id.*

¹⁶ *Nancy Marcano*, *supra* note 11.

¹⁷ *Id.*

¹⁸ The Board notes that appellant submitted evidence to the Office subsequent to its March 22, 2006 decision. The Board cannot consider this evidence, however, as its review of the case is limited to that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2006 be affirmed.

Issued: December 27, 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