

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

MOHAMMED I. LAKHANI, Appellant)
)
and) **Docket No. 06-872**
) **Issued: June 23, 2006**
U.S. POSTAL SERVICE, POST OFFICE,)
Santa Ana, CA, Employer)
)
)
)

Appearances:
Mohammed I. Lakhani, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 1, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 3, 2006 which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated August 11, 2004 and the filing of this appeal, 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 is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 56-year-old postal clerk, filed a Form CA-2 claim for benefits on December 16, 2003, alleging that he developed a stress fracture in his right foot causally related to factors of his employment. By letter dated January 22, 2004, the Office advised appellant that

it required additional factual and medical evidence, including a comprehensive medical report, in support of his claim.

By decision dated April 9, 2004, the Office denied appellant's claim on the grounds that he did not submit medical evidence sufficient to establish that the claimed right foot condition was causally related to his federal employment.

On May 19, 2004 appellant requested reconsideration.

By decision dated August 11, 2004, the Office denied the claim, finding that appellant failed to establish that he sustained an injury in the performance of duty.

On October 12, 2004 appellant requested reconsideration. He did not submit any additional medical evidence in support of his claim.

By decision dated December 6, 2004, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated November 30, 2005, appellant requested reconsideration. No additional factual or medical evidence accompanied the request.

By decision dated January 3, 2006, the Office denied appellant's request for reconsideration without a merit review, finding appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle an employee to a review of an Office decision as a matter of right.² This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁵

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁶ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.⁷

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which 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 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.¹² 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's decision.¹³ The Board makes

³ 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 point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁴ 20 C.F.R. § 10.607(b).

⁵ See cases cited *supra* note 2.

⁶ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, *supra* note 2.

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 2.

an independent determination of whether an appellant 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.¹⁴

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on August 11, 2004. Appellant requested reconsideration on November 30, 2005; thus, his reconsideration request was untimely as it was outside the one-year time limit.

The Board finds that appellant's November 30, 2005 request for reconsideration failed to show clear evidence of error. Appellant did not submit any additional factual or medical evidence with his request sufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, appellant has failed to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.¹⁵

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated November 30, 2005. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on January 3, 2006.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁵ The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).