

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

C.M., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Dayton, OH, Employer

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**Docket No. 05-1581
Issued: November 9, 2006**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 7, 2005 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 November 14, 1994 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

This is the third appeal before the Board. By decision dated August 11, 1994, the Board reversed the April 27 and November 30, 1992 decisions of the Office on the grounds that it improperly terminated compensation based on a refusal of suitable work. The Board found that

the Office failed to advise appellant that the reasons he offered for refusing the offered position were insufficient. On October 21, 1994 the employing establishment offered appellant the job of modified manual distribution clerk.¹ By decision dated November 14, 1994, the Office terminated compensation on the grounds that appellant had refused an offer of suitable work.

By letter dated May 12, 2004, appellant requested reconsideration of the November 14, 1994 decision. Appellant asserted that the emotional condition accepted by the Office in 2003 was the reason he did not accept the offered position. In a decision dated June 28, 2004, the Office determined that appellant's request for reconsideration was untimely. The Office further determined that appellant's request for reconsideration failed to show clear evidence of error in the November 14, 1994 suitable work termination decision. By decision dated January 24, 2005, the Board found that appellant's request for reconsideration was untimely as it was filed more than one year after the November 14, 1994 Office decision and that he failed to establish clear evidence of error on the part of the Office. The complete facts of this case are set forth in the Board's January 24, 2005 decision and herein incorporated by reference.²

By letter dated May 19, 2005, appellant's attorney requested reconsideration. Appellant submitted reports dated February 28 and May 17, 2005 from Dr. H. Owen Ward, Ph.D., a clinical psychologist. On February 28, 2005 Dr. Ward stated that appellant was being treated for an adjustment disorder with depressed mood and had recently experienced emotional and behavioral symptomatology commensurate with this diagnosis. This resulted in moderate functional impairment socially and occupationally. Dr. Ward stated that appellant had responded positively to psychological treatment and exhibited mild to moderate improvement in overall functioning. On May 17, 2005 he stated that the Office had erred in its 1992 decisions finding that appellant lacked reasonable grounds to refuse the employing establishment's job offer. Dr. Ward opined that contemporaneous medical records indicated appellant's emotional condition developed from stressors at work beginning in 1982-1983 which were aggravated by his physical injury in December 1987 and exacerbated into major depression with psychotic, paranoid feature in approximately 1990-1991. He concluded that the Office had issued its decision in this case without considering the presence of these prominent work-related stressors, which appeared to be the precipitating cause of his mental illness. Dr. Ward stated that the Office decisions were limited to the effect of the physical injuries on appellant's work capacity, although the back injury was an exacerbating factor for further decompensation.

By decision dated June 7, 2005, the Office denied appellant's request for reconsideration without a merit review, finding the request untimely and not establishing clear evidence of error. It noted 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 incorrect.

¹ On October 29, 2003 the Office accepted an emotional condition, exacerbation of depressive disorder, as a consequence of his employment injury.

² Docket No. 04-2020 (issued January 24, 2005).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ 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.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

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.⁸ 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.⁹

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 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).

⁶ 20 C.F.R. § 10.607(b).

⁷ *See* cases cited *supra* note 2.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ The Board makes 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.¹⁶

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office issued its most recent merit decision in this case on November 14, 1994. Appellant requested reconsideration on May 19, 2005; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's May 19, 2005 request for reconsideration failed to show clear evidence of error. Appellant noted that the Office had accepted, as of October 29, 2003, an exacerbation of a depressive disorder as a consequence of his 1987 back injury. Dr. Ward, however, did not consider the suitability of the offered position or appellant's condition at the time it was offered in 1994. A determination that an offered position is medically suitable is based on medical evidence at the time the position is offered and includes consideration of nonemployment-related conditions as well as employment related.¹⁷ Appellant asserted that the reason he did not accept the position was due to his emotional condition. He failed, however, to submit any medical evidence with respect to his inability to perform the modified manual distribution clerk position as of November 14, 1994 due to an emotional condition. As the Board

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ See *Janice S. Hodges*, 52 ECAB 379 (2001).

noted in its January 24, 2005 decision, a review of the medical evidence of record does not establish that the Office erred in finding the offered position was medically suitable. Dr. Ward's May 17, 2005 report provided a medical opinion pertaining to appellant's condition in 1992 it was not contemporaneous with the offer of the position and the termination of benefits in 1994. No other evidence was received by the Office. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the medical evidence and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient 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.

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 May 19, 2005. As appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on June 7, 2005.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2005 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: November 9, 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