

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

F.R., Appellant

and

**U.S. POSTAL SERVICE, LYNBROOK
STATION, Shreveport, LA, Employer**

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**Docket No. 06-1271
Issued: November 20, 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 May 8, 2006 appellant filed a timely appeal of an April 26, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration as untimely and failing to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated August 14, 2002 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

The Office accepted that appellant, then a 44-year-old city letter carrier, was involved in a motor vehicle accident on February 20, 1998 while driving an employing establishment truck. He sustained a cervical strain and mild concussion with vertigo. Appellant returned to limited-duty work on April 10, 1999.

On September 9, 2000 appellant filed a claim for a schedule award.

By letter dated September 12, 2001, the Office advised Dr. Paul D. Ware, an attending neurologist, to assess the extent of appellant's permanent impairment. It requested that he submit a detailed medical report which included, the date appellant reached maximum medical improvement, findings regarding range of motion and sensory changes, subjective complaints causing impairment and an impairment rating based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

In an April 2, 2002 medical report, Dr. Ware stated that appellant reached maximum medical improvement on March 14, 2002. Appellant had permanent residuals of his post-traumatic vertigo and post-traumatic headaches of a vascular or migraine type. Utilizing the A.M.A., *Guides* 253, Table 11-4, Dr. Ware determined that appellant had a Class 2 impairment of the vestibular system, which constituted a five percent impairment of the whole person. Regarding the nervous system, Dr. Ware determined that appellant's global pain behavior score was +10 based on the A.M.A., *Guides* 580, Table 18-5. He further determined that appellant had a total pain impairment of 30 percent based on the A.M.A., *Guides* 571, 584, Tables 18-2, 18-6. Dr. Ware stated that appellant's impairment was moderate. He concluded that appellant had a 35 percent impairment of total body functioning.

On August 1, 2002 an Office medical adviser reviewed the medical evidence, including the April 2, 2002 medical report of Dr. Ware. He found that appellant was not entitled to a schedule award for permanent impairment of the vestibular or nervous systems as they were not considered to be scheduled members under the Federal Employees' Compensation Act.

By decision dated August 14, 2002, the Office denied appellant's claim for a schedule award. It accorded determinative weight to the Office medical adviser's August 1, 2002 opinion in finding that appellant failed to submit medical evidence establishing that he sustained permanent or partial loss or use of a member or function of the body as provided under the Act.

In an August 13, 2004 letter, appellant requested that the Office "take time and have someone review my medical records again and see what can be done about my schedule award." He submitted a November 9, 1999 form report from Dr. Juanita G. McBeath, a Board-certified neurologist, who found that appellant sustained post-traumatic headaches due to the February 20, 1998 employment injury. Dr. McBeath also found that appellant sustained permanent effects due to the employment-related injury.

Appellant also submitted form reports from Dr. McBeath dated June 3, 1999 and January 11 and September 12, 2000. She diagnosed vertigo and post-traumatic headache causally related to the February 20, 1998 employment injury. Dr. Ware's progress notes from

December 17, 2003 through October 5, 2005 indicated that appellant's vertigo and headache conditions were improving despite the occurrence of a few vertigo attacks. In a letter dated March 23, 2006, appellant requested reconsideration of the Office's August 14, 2002 decision.

By decision dated April 26, 2006, the Office found that appellant's request for reconsideration was dated March 23, 2006, more than one year after the August 14, 2002 decision and was untimely. The Office found that appellant did not submit sufficient evidence to establish clear evidence of error in the prior decision rejecting his claim for a schedule award.

LEGAL PRECEDENT

Section 8128(a) of the Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.³ Pursuant to this section, if a request for reconsideration is submitted by mail, the application will be deemed timely if postmarked by the employing establishment within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date. Otherwise, the date of the letter itself should be used.⁴

Section 10.607(a) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.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.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of how the

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

⁵ 20 C.F.R. § 10.607(b).

⁶ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁸ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

⁹ *Leona N. Travis*, *supra* note 7.

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.¹⁰

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 decision.¹¹ The Board makes an independent determination of whether a claimant 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.¹²

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³

The most recent merit decision in this case was issued by the Office on August 14, 2002, which found that appellant was not entitled to a schedule award for his vestibular and nervous systems. The Board notes that, although the Office found that appellant's request for reconsideration was dated March 23, 2006, the record reflects that appellant also requested reconsideration by letter dated August 13, 2004. In the August 13, 2004 letter, he requested that the Office "take time and have someone review my medical records again and see what can be done about my schedule award" and submitted additional medical evidence responsive to the reason listed by the Office, in its August 14, 2002 decision, for denying his schedule award claim. The Board finds that the letter and its contents along with the evidence submitted in support thereof are sufficient to constitute a valid request for reconsideration.¹⁴ However, since appellant's August 13, 2004 and March 23, 2006 letters requesting reconsideration were both made more than one year following the Office's August 14, 2002 merit decision, the Board finds that they were untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's denial of his schedule award claim for impairment of his vestibular and nervous systems. Appellant submitted form reports from Dr. McBeath, which were already of record and reviewed by the

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁴ See 20 C.F.R. §§ 10.605, 10.606.

Office. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. The medical evidence submitted does not establish that he was entitled to a schedule award. The Office properly denied appellant's reconsideration request.

Dr. Ware's progress notes indicated that appellant's employment-related vertigo and headaches were improving despite the occurrence of a few episodes of vertigo. This evidence does not address whether appellant had permanent impairment of a scheduled member based on the A.M.A., *Guides*. The Board finds that Dr. Ware's progress notes are insufficient to shift the weight of the evidence in favor of appellant's claim. The Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that appellant's August 13, 2004 and March 23, 2006 requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 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