

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

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**V.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 07-614  
Issued: August 6, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 26, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated July 3, 2006, which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated March 27, 2002<sup>1</sup> to the filing of this appeal on December 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.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for consideration of the merits under section 8128(a) on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error by the Office.

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<sup>1</sup> This was a merit decision of the Board dated March 27, 2002 (Docket No. 00-2644). The most recent merit decision of the Office was the December 15, 1999 decision. This decision was also issued more than one year prior to the date of the most recent appeal to the Board.

## **FACTUAL HISTORY**

This is the fourth appeal before the Board in this case. Appellant, a 23-year-old mail handler, filed a traumatic injury claim on October 16, 1980 alleging that on that date he injured his back when he slipped on a chain while lifting a heavy mailbag and fell striking his lower back on the concrete floor. The Office accepted his claim for traumatic lumbosacral paravertebral myofascitis and contusions of the right scapula, buttock and lumbosacral area. Appellant stopped work on October 16, 1980 and returned to a limited-duty position on January 5, 1981. He resigned from the employing establishment on February 25, 1981. The Office expanded appellant's claim on June 29, 1983 to include the conditions of herniated discs at L3-4 and L5-S1. The Office entered him on the periodic rolls on August 12, 1983. By decision dated October 20, 1992, the Office reduced appellant's compensation benefits based on his capacity to earn wages in a constructed position of electronic technician apprentice. Appellant requested review by the Board and in a decision and order dated February 2, 1996, the Board reversed the Office's decision reducing appellant's compensation benefits.<sup>2</sup>

By decision dated December 28, 1998, the Office terminated appellant's compensation benefits finding that he had no disability or medical residuals due to his October 16, 1980 employment injury based on the report of Dr. John Keating, a Board-certified orthopedic surgeon, designated as the impartial medical specialist. The Branch of Hearings and Review affirmed this decision on May 3, 1999. Appellant requested reconsideration of this decision repeatedly and the Office affirmed its decision on October 28, 1999, January 20, March 9 and 26 and June 5, 2000. The Office also issued final decisions addressing appellant's pay rate for compensation purposes. In a decision and order dated March 27, 2002, the Board found that the Office had properly calculated appellant's pay rate for compensation benefits and that he had not established his entitlement to further compensation benefits due to his October 16, 1980 employment injury.<sup>3</sup> The Board affirmed the Office's October 28, 1999, January 20, March 9 and 29 and June 5, 2000 decisions.

Appellant continued to disagree with the decisions of the Office and the Board regarding his pay rate for compensation purposes as well as his right to continuing compensation benefits. The Office declined to reopen appellant's claim for consideration of the merits on March 10, April 1, 10 and 23, 2003. By decision and order dated April 9, 2004, the Board affirmed the Office's April 1, 10 and 23, 2003 decisions as well as the March 10, 2003 decision.<sup>4</sup> The Board found that appellant's argument that he was entitled to a recurrent pay rate lacked a reasonable color of validity. In regard to his continuing compensation benefits, the Board found that appellant's arguments that Dr. Keating did not provide an appropriately rationalized report, that his report was not based on an appropriate history of injury as he did not receive an accurate statement of accepted facts, that the employing establishment improperly provided him with an investigative memorandum and that he did not review appellant's job description did not

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<sup>2</sup> Docket No. 94-2407 (issued February 2, 1996).

<sup>3</sup> Docket No. 00-2644 (issued March 27, 2002).

<sup>4</sup> The Board issued a decision on September 2, 2003, Docket No. 03-1405, which was vacated by an order dated December 22, 2003.

establish clear evidence of error on the part of the Office in relying on Dr. Keating's report to resolve a conflict of medical opinion evidence and terminate appellant's compensation and medical benefits. The Board further found that appellant had not established clear evidence of error on the part of the Office due to the alleged failure of the Office to inform him of his right to have his physician present during the second opinion examination or to the alleged failure of the Office to provide appellant with 30 days to respond to the notice of proposed termination. The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Dr. Linda J. Sidwell, a Veterans Administration physician, completed a report on June 6, 2005 and noted appellant's history of a cranial gunshot wound on January 19, 1976. She noted that as a result of this injury appellant was paralyzed in the left arm and below the waist and was hospitalized for four months. Dr. Sidwell noted the history of his accepted employment injury. She diagnosed residuals of cranial gunshot wound including seizure disorder, chronic daily headaches, intermittent migraine headaches, depression, alcohol abuse and left upper extremity weakness. Dr. Sidwell further diagnosed chronic low back pain with evidence of herniated disc at L3-4 and L5-S1 causing motor functional disability of the left hip, left knee and left ankle.

In a report dated June 22, 2005, Dr. Sanford Selcon, a Board-certified internist, noted appellant's history of injury and performed a physical examination of his back. He found marked paravertebral muscle spasm and tenderness in appellant's back as well as left lower extremity paralysis. Dr. Selcon diagnosed chronic low back pain with radiculopathy causing paralysis of the left lower extremity.

Dr. Allen Hassan, a Board-certified family practitioner and law school graduate, completed a report on June 28, 2005 and reviewed the medical reports in the record. He concluded that appellant was entitled to further compensation benefits from the Office.

Appellant disagreed with the Office's decisions regarding termination of his compensation benefits on October 19, 2005 and alleged that Dr. Keating failed to establish that his employment-related injuries had ceased or resolved, that the Office had discriminated against him based on his race, that the Office failed to inform appellant that Dr. Keating was designated as an impartial medical specialist, that the Office failed to inform him that he could object to the selection of Dr. Keating, that the Office terminating appellant's compensation benefits before allowing him an opportunity to respond and that the Office failed to inform him of the nature of the conflict of medical evidence in his claim. Appellant requested reconsideration on June 12, 2006 and alleged that he was entitled to a merit review at any time based on the acceptance of his claim in 1983. He mentioned the additional medical evidence submitted and alleged that his employment contributed to his current conditions. On June 27, 2006 appellant alleged that he did not return to work in a suitable light-duty position in January 5, 1981 as stated in the statement of accepted facts.

By decision dated July 3, 2006, the Office denied appellant's claim for merit review on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.<sup>5</sup>

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>6</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>7</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.<sup>9</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>10</sup>

The Office's regulations require that an application for reconsideration must be submitted in writing<sup>11</sup> and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."<sup>12</sup> The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."<sup>13</sup>

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<sup>5</sup> The Board notes that on appeal appellant requested review of a December 5, 2006 decision of the Office. However, the Board notes that the record contains an informational letter with no appeal rights dated December 5, 2006 and does not contain a reviewable decision dated after July 3, 2006. Therefore, the Board's review of the record is limited to the evidence before the Office at the time of the July 3, 2006 decision. 5 U.S.C. § 501.2(c).

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>8</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>9</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon., denied*, 41 ECAB 458 (1990).

<sup>10</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 7 at 769; *Jesus D. Sanchez*, *supra* note 8 at 967.

<sup>11</sup> 20 C.F.R. § 10.606.

<sup>12</sup> *Id.* at § 10.605.

<sup>13</sup> *Id.* at § 10.607(b).

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.<sup>14</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>15</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>16</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>17</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> The Board must make 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.<sup>21</sup>

### ANALYSIS

On July 9, 2006 appellant requested reconsideration of the May 3, 1999 merit decision terminating his compensation benefits. As he filed his reconsideration request more than one year from the Office's May 3, 1999 merit decision, the Board finds that the Office properly determined that this request was untimely.

The underlying merit issue in this case is whether the Office met its burden of proof to terminate appellant's compensation benefits. The Board must make an independent determination of whether the Office committed clear error in declining to reopen appellant's claim for merit consideration of whether his benefits were properly terminated. In his July 9, 2006 request for reconsideration, appellant alleged racial discrimination. The Board notes that

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<sup>14</sup> *Thankamma Mathews*, *supra* note 7 at 770.

<sup>15</sup> *Id.*

<sup>16</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>17</sup> *Jesus D. Sanchez*, *supra* note 8 at 968.

<sup>18</sup> *Leona N. Travis*, *supra* note 16.

<sup>19</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>20</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>21</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon.*, 41 ECAB 458, 466 (1990).

he has not submitted any detailed statements or substantive examples of discrimination on the part of the Office and that his mere allegation of discrimination is not sufficient to establish clear evidence of error on the part of the Office.

Appellant alleged procedural errors in the development of his claim such as the failure of the Office to inform him that Dr. Keating was designated as an impartial medical specialist, that the Office failed to inform him that he could object to the selection of Dr. Keating, that the Office terminating his compensation benefits before allowing him an opportunity to respond and that the Office failed to inform him of the nature of the conflict of medical evidence in his claim. As noted above, it is not sufficient that the evidence submitted on reconsideration establishes a clear procedural error, the evidence 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.<sup>22</sup> These allegations are not established, do not establish a clear procedural error and cannot establish clear evidence of error.

Appellant further alleged that he was entitled to a merit review at any time based on the acceptance of his claim in 1983. This argument lacks a reasonable color of validity as he has received numerous decisions with clearly stated appeal rights since the initial acceptance of his claim. Appellant is only entitled to request reconsideration beyond the current time limitation if the Office had not previously informed him of the limitation.<sup>23</sup>

Appellant alleged that he did not return to work in a suitable light-duty position in January 5, 1981 as stated in the statement of accepted facts. Whether or not his limited-duty position was suitable work is not relevant to appellant's claim for continuing compensation benefits and even if factually established would not establish clear evidence of error on the part of the Office.<sup>24</sup> Furthermore, the Office's statement that he returned to light-duty work in the statement of accepted facts does not have any bearing on the issue of whether appellant has any continuing disability or medical residuals as a result of his October 16, 1980 employment injury. Therefore, these allegations are not sufficient to establish clear evidence of error on the part of the Office.

Appellant also submitted new medical reports from Dr. Sidwell, a Veterans Administration physician, Dr. Selcon, a Board-certified internist, and Dr. Hassan, a Board-certified family practitioner. These reports noted appellant's history of employment injury. In regard to Dr. Hassan's June 28, 2005 report, he did not report any findings on physical examination and offered his legal opinion of the Office's obligations to appellant. This opinion is of limited probative value and cannot create a conflict with the findings of Dr. Keating, the impartial medical examiner. Dr. Sidwell and Dr. Selcon opined that appellant's current left leg symptoms were due to his accepted employment injury and provided findings on physical examination. However, there is no evidence that these physicians examined his diagnostic tests in determining that his accepted herniated disc resulted in his current left leg condition.

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<sup>22</sup> *Leon D. Faidley, Jr. supra* note 20.

<sup>23</sup> *See D'Wayne Avila*, 57 ECAB \_\_\_\_ (Docket No. 06-366, June 21, 2006).

<sup>24</sup> *Thankamma Mathews, supra* note 7 at 770.

Additional reasoning regarding the causal relationship between appellant's back injury and his current condition is necessary given the severity of his preemployment cranial gunshot wound. As these reports are not based on a detailed and accepted factual background and do not contain medical reasoning in support of the opinion of respective physicians, the reports are not sufficient to create a conflict with Dr. Keating's report. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion 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.<sup>25</sup> As these reports do not create a conflict of medical opinion evidence, the reports are not sufficient to establish clear evidence of error on the part of the Office.

### **CONCLUSION**

The Board finds that appellant has not submitted sufficient evidence to establish clear evidence of error of the part of the Office in terminating his compensation and medical benefits and the Office properly declined to reopen his claim for consideration of the merits.

### **ORDER**

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

Issued: August 6, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>25</sup> *Leon D. Faidley, Jr. supra* note 20.