

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

E.G., Appellant)

and)

U.S. POSTAL SERVICE, GENERAL MAIL)
FACILITY, New York, NY, Employer)

**Docket No. 06-2148
Issued: February 22, 2007**

Appearances:
Paul Kalker, Esq., for the appellant
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 September 20, 2006 appellant filed a timely appeal of an August 9, 2006 decision of the Office of Workers' Compensation Programs finding that his request for reconsideration was untimely and failed to show clear evidence of error. The most recent decision on the merits of the claim was dated December 31, 2002. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal. The Board does not have jurisdiction over the merits of the claim on this appeal.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 16, 1999 appellant filed a traumatic injury claim (Form CA-1), alleging that on May 20, 1999 he sustained a back injury while lifting trays of mail. By decision dated

January 27, 2000, the Office denied the claim on the grounds that he had not established that the employment incident occurred as alleged or submitted probative medical evidence. The Office noted that appellant failed to notify his supervisor on or about May 20, 1999 of a work-related injury and initially reported on an employing establishment form that his injury was not employment related.

Appellant requested reconsideration of his claim which was denied by merit decision dated July 1, 2000. The Office also denied modification by merit decisions dated February 20 and December 31, 2002.

In a letter dated March 2, 2006, appellant requested reconsideration of his claim. He argued that he did timely report a work-related injury and his version of the alleged incident should be accepted as factual. Appellant alleged that he was forced to continue working despite his injury and was not provided with the appropriate claim forms. He argued that he submitted sufficient medical evidence to meet his burden of proof. Appellant submitted a September 25, 2005 report from Dr. Ahmed Elemam, a physiatrist, who diagnosed chronic low back pain due to disc herniation, lumbar radiculopathy and myofascitis. He concluded that appellant had a partial and permanent disability. Appellant also submitted a December 23, 2005 report from Dr. David Green, a chiropractor, who diagnosed a lumbar subluxation based on a June 29, 2005 magnetic resonance imaging (MRI) scan. Dr. Green opined that the May 20, 1999 accident caused a permanent lumbar condition that interfered with appellant's ability to perform daily activities and duties.

By decision dated August 9, 2006, the Office determined that appellant's application for reconsideration was untimely. The Office found that the evidence submitted did not establish clear evidence of error by the Office and did not warrant reopening the case for merit review.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for

¹ 5 U.S.C. § 8128(a).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁴ 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

review is filed within one year of the date of that decision.⁵ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁷ In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ 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.¹⁵

⁵ 20 C.F.R. § 10.607(a).

⁶ See *Leon D. Faidley, Jr.*, *supra* note 2.

⁷ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The last merit decision in this case was dated December 31, 2002. Appellant submitted an application for reconsideration dated March 2, 2006. Since the application for reconsideration was filed more than one year after the last merit decision, it is untimely pursuant to 20 C.F.R. § 10.607(a).

The underlying claim for compensation was denied on the grounds that appellant had not established either requirement for fact of injury: (1) an employment incident occurred at the time, place and in the manner alleged; and (2) medical evidence on causal relationship between a diagnosed injury and the employment incident.¹⁶ On reconsideration appellant alleges that the evidence is sufficient to establish an employment incident as alleged on May 20, 1999. The Office, however, had considered the contemporaneous evidence and found there were inconsistencies that cast doubt as to whether the incident occurred as alleged.¹⁷ This included a review of employing establishment forms completed by appellant and statements from supervisors. Appellant alleged that he timely notified his supervisor and the Office should accept the incident as alleged, but he did not submit probative evidence establishing clear evidence of error in the finding that the incident did not occur at the time, place and in the manner alleged. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence must *prima facie* shift the weight of the evidence in favor of the claimant. Appellant did not show clear evidence of error in the Office's finding as to the occurrence of an employment incident on May 20, 1999.

Since appellant did not show clear evidence of error with respect to the employment incident, he did not show clear evidence of error in the denial of the claim. The medical evidence, therefore, will not be addressed at this time.

CONCLUSION

The Office properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹⁶ See, e.g., *Caroline Thomas*, 51 ECAB 451 (2000).

¹⁷ It is well established that a claimant cannot establish fact of injury if there are inconsistencies that cast doubt as to whether the incident occurred as alleged. *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2006 is affirmed.

Issued: February 22, 2007
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