

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

M.T., Appellant

and

U.S. POSTAL SERVICE, Berkley, CA, Employer

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**Docket No. 07-555
Issued: May 21, 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 21, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 1, 2006 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated September 19, 2005 to the filing of this appeal on December 21, 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(d)(2).¹

ISSUE

The issue on appeal is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ The record includes evidence received after the Office issued the November 1, 2006 decision. The Board cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On March 30, 2002 appellant, then a 34-year-old mail carrier, filed an occupational disease claim alleging that beginning May 17, 2001 he experienced pain in his lower back and legs which he attributed to lifting heavy loaded trays of mail. The Office accepted the claim for lumbosacral strain as a condition caused by factors of his federal employment on July 23, 2002.

On December 12, 2003 appellant filed a claim for compensation alleging that he was disabled from January 2 through December 12, 2003. On January 14, 2004 he filed a claim for compensation alleging that he was disabled and unable to work from January 2, 2003 through January 13, 2004.

By decision dated February 2, 2004, the Office denied appellant's claim for compensation on the basis that the evidence submitted was not sufficient to establish that he was totally disabled for his accepted condition during the claim time period.

In a letter dated April 5, 2004, appellant requested reconsideration. Additional medical evidence had been received by the Office after the February 2, 2004 decision.

By decision dated June 18, 2004, the Office issued a merit decision but declined to modify the prior decision.

In a June 13, 2005 letter, appellant requested reconsideration. Additional evidence had been received by the Office after the June 18, 2004 decision.

By decision dated September 19, 2005, the Office issued a merit decision which denied modification of the prior decision based on the insufficiency of the additional evidence.

Following the last merit decision dated September 19, 2005, the Office continued to receive "billing copies" of progress reports from appellant's treating physician, Dr. Vatche Cabayan, a Board-certified orthopedic surgeon. These progress reports did not address appellant's claimed period of disability, January 2 through December 12, 2003.

By letter dated September 19, 2006, appellant requested reconsideration. Appellant's request was postmarked September 29, 2006.

By decision dated November 1, 2006, the Office issued a nonmerit decision denying reconsideration on the grounds that the request for reconsideration was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulation, 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 limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

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.⁸ 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.⁹

To establish clear evidence of error, a claimant 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 manifest 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

⁴ 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."

⁵ 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; (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.

⁶ 20 C.F.R. § 10.607.

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). *See also* 20 C.F.R. § 10.607(b).

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

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

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

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.¹⁵ 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 improperly denied merit review in the face of such evidence.¹⁶

ANALYSIS

The Office issued a decision on November 1, 2006 denying reconsideration of its prior September 19, 2005 decision on the grounds that appellant's request for reconsideration was untimely filed. Applications for review of a decision must be filed within one year of the date of the decision; therefore, appellant had until September 19, 2006 to file his request.¹⁷ Appellant's request form was dated September 19, 2006. Appellant's request was postmarked September 29, 2006. The Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined by the postmark on the envelope.¹⁸ As the request for reconsideration was more than one year after the merit decision, it was properly found to be untimely pursuant to 10.607(a).

The Office must thereafter make a determination if clear evidence of error was demonstrated by the untimely request for reconsideration. Appellant did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error in denying wage-loss compensation during the claimed period in 2003. Appellant submitted progress reports pertaining to medical examinations performed in 2005 and 2006. The evidence was not relevant value as it did not provide any opinion as to appellant's condition during the claimed time period; therefore, there was no probative medical evidence to shift the weight of the evidence in favor of the appellant. Appellant did not submit evidence clearly showing that the Office's determination was improper. Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its September 19, 2005 decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

¹⁵ *Leon D. Faidley, Jr., supra* note 3.

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

¹⁷ 20 C.F.R. § 10.607.

¹⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004) ("[T]he application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed.")

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 1, 2006 is affirmed.

Issued: May 21, 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