

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, FAIRFAX POST
OFFICE, Fairfax Station, VA, Employer**

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**Docket No. 08-1576
Issued: December 9, 2008**

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 May 12, 2008 appellant filed a timely appeal from the February 6, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 22, 2007 and the filing of this appeal on May 12, 2008, 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), but has jurisdiction over the nonmerit issue.

ISSUE

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

FACTUAL HISTORY

On September 13, 1999 appellant, then a 38-year-old rural letter carrier, filed a recurrence claim (Form CA-2a) alleging that he sustained a recurrence of disability on June 4,

1999 due to his accepted October 7, 1996 employment injury.¹ On September 9, 2004 the Office informed appellant that his recurrence claim had been found to be a new injury and was being adjudicated as a traumatic injury claim. Appellant was advised as to the evidence required to support his traumatic injury claim.

By decision dated October 20, 2004, the Office found the evidence of record insufficient to establish fact of injury. Specifically, it found the evidence insufficient to establish that the alleged incident occurred as alleged. The Office also found that the record contained no medical evidence diagnosing a medical condition causally related to the alleged incident.

On November 17, 2004 appellant requested an oral hearing before an Office hearing representative, which was held on August 24, 2005. By decision dated November 9, 2005, the Office hearing representative affirmed the denial of appellant's claim. The Office hearing representative found that the record contained no rationalized medical evidence establishing a diagnosis causally related to appellant's employment.

In a letter dated November 17, 2006, appellant's counsel requested reconsideration. By decision dated January 22, 2007, the Office denied appellant's request for modification of the denial of his claim.

In a November 12, 2007 report, Dr. Rashid M. Khan, an examining Board-certified physiatrist, diagnosed chronic low back pain, possible lumbosacral radiculopathy, right knee internal derangement and possible lumbosacral disc pathology. Under history, he reported that appellant initially injured his back on October 7, 1996, a right knee employment injury in 1997 and that in 1999 his back pain worsened with pain radiating down to his right leg.

In progress notes dated November 26, 2007, Dr. Eric G. Dawson, a treating physician, related that appellant continued to have back spasm, stiffness with numbness, pain, burning and tingling. He noted the objective evidence demonstrated L5 and S1 nerve impingement.

On January 22, 2008 appellant requested reconsideration. The postmark on the envelope contained the date January 23, 2008.

In a decision dated February 6, 2008, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office in denying her survivor's claim. Accordingly, it declined to review the merits of his claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the

¹ The October 7, 1996 injury was assigned file number xxxxxx963. The Office assigned file number xxxxxx875 to the June 4, 1999 alleged injury.

² 5 U.S.C. § 8101 *et seq.*

application for reconsideration.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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.⁷

ANALYSIS

The one-year time limitation begins to toll the day the Office issued its January 22, 2007 decision, as this was the last merit decision in the case.⁸ Appellant's latest request for reconsideration was dated January 22, 2008 with a postmark of January 23, 2008. As the postmark date of his request is more than one year after issuance the January 22, 2007 decision, appellant's request for reconsideration was untimely filed. The Office therefore properly found appellant's request for reconsideration untimely filed. Because appellant filed his request more than one year after the Office's January 22, 2007 merit decision, he must demonstrate clear evidence of error on the part of the Office in denying his claim.⁹

³ 20 C.F.R. § 10.605.

⁴ *Id.* at § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

⁷ *See Alberta Dukes*, *supra* note 6.

⁸ *See V.B.*, 58 ECAB ____ (Docket No. 07-1320, issued September 26, 2007); *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

⁹ 20 C.F.R. § 10.607(b). *See S.D.*, 58 ECAB ____ (Docket No. 07-1120, issued September 24, 2007).

In accordance with internal guidelines and with the Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). The Office reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly establish that the Office's prior decision was in error.

The evidence submitted on reconsideration, a November 26, 2007 progress note by Dr. Dawson and a November 12, 2007 by Dr. Khan, do not establish clear evidence of error by the Office. As noted, the evidence submitted must be relevant to the issue which was decided by the Office. Appellant's claim was denied on the grounds that the medical evidence did not establish a causal relationship between his diagnosed condition and the June 4, 1999 employment incident. Accordingly, the evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. In his November 12, 2007 report, Dr. Khan diagnosed chronic low back pain, possible lumbosacral radiculopathy, right knee internal derangement and possible lumbosacral disc pathology and noted that appellant sustained employment injuries in 1996, 1997 and 1999. Dr. Dawson, in progress notes dated November 26, 2007, diagnosed appellant's L5 and S1 nerve impingement based upon the objective evidence. Neither physician discussed the June 4, 1999 employment injury or provided any supporting rationale explaining how appellant's condition was caused by the June 4, 1999 employment incident. Accordingly, their reports are insufficient to establish clear evidence of error in the Office's January 22, 2007 merit decision. Appellant has submitted no other evidence sufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision.

The Office reviewed the evidence appellant submitted 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 the Office properly denied appellant's request for reconsideration, as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2008 is affirmed.

Issued: December 9, 2008
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