

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

D.B., Appellant	)	
	)	
and	)	Docket No. 07-2343
	)	Issued: February 25, 2008
U.S. POSTAL SERVICE, POST OFFICE,	)	
Long Beach, CA, Employer	)	
	)	

*Appearances:*  
Linda Temple, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 17, 2007 appellant, through his representative, filed a timely appeal from a January 18, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as untimely and insufficient to show clear evidence of error. As the last merit decision was issued on September 3, 2003, more than one year from the filing of the appeal, the Board lacks jurisdiction over the merits of this case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.<sup>1</sup>

**ISSUE**

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

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<sup>1</sup> 20 C.F.R. §§ 501.2(c) and 501.3.

## **FACTUAL HISTORY**

This case is before the Board for the second time. In the first appeal, the Board set aside the November 7 and April 16, 2001 Office decisions, finding that appellant failed to establish a back condition causally related to factors of his federal employment.<sup>2</sup> The Board found that the medical reports from appellant's attending physician, Dr. Barry B. Ceverha, a Board-certified orthopedic surgeon, were sufficient to require further development regarding whether he sustained a disc herniation at C5-6 caused or aggravated by his employment duties. The Board remanded the case, assigned file number 132006396, for further development.

On April 21, 2003 the Office referred appellant to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 13, 2003, Dr. Bleecker diagnosed a herniated C5-6 disc. He noted that appellant related a history of neck pain after lifting a mail hamper in 1999. Dr. Bleecker attributed the C5-6 herniated disc to the 1999 lifting incident.<sup>3</sup>

By decision dated September 3, 2003, the Office denied appellant's claim on the grounds that he did not establish that he sustained a herniated disc due to employment factors. It noted that he had not established the occurrence of the August 1999 lifting incident.

On October 28, 2004 appellant, through his representative, requested reconsideration. The representative contended that he had obtained a statement from a customer who saw appellant in pain on the day of the August 1999 incident.

On August 3, 2005 appellant filed an occupational disease claim alleging that he injured his neck and back due to factors of his federal employment. He indicated that he became aware of his condition and its relationship to employment in August 1999. Appellant stopped work on June 23, 2005 and returned to work on October 3, 2005. The Office assigned the claim file number 132135822.

In form reports dated August 3, 2005, Dr. Edward Jang, an internist, diagnosed arthritis and a torn ligament of the knee. He found that appellant was totally disabled from June 23 to October 3, 2005.

In correspondence dated August 10, 2005, the employing establishment related that appellant wanted to file an occupational disease claim "due to a past job-related injury from August 1999 that has caused some aggravation to his back and neck." The employing establishment noted that the Office denied appellant's claim for an August 1999 back injury.

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<sup>2</sup> *Darryl L. Block*, Docket No. 02-703 (issued October 23, 2002). On July 23, 2000 appellant, then a 43-year-old city mail carrier, filed an occupational disease claim alleging that he sustained problems with his left leg due to factors of his federal employment. Appellant indicated that he was first aware of his condition on August 30, 1999. Appellant stopped work on December 13, 1999. He underwent an anterior corpectomy with arthrodesis at C5-6 on June 26, 2000. Appellant returned to work in February 2002.

<sup>3</sup> In a supplemental report dated July 14, 2003, Dr. Bleecker again attributed the herniated disc to appellant's lifting of a hamper in 1999.

In a statement received by the Office on August 22, 2005, appellant provided a detailed description of his employment duties from September 12, 1988 to the present. He submitted a report dated May 5, 2005 from Dr. I. Grant Orlin, a general practitioner. Dr. Orlin noted that appellant stopped work from 1999 to 2001 and described his work duties since his return to work in 2001. He diagnosed recurrent cervical spine strain with left radiculopathy by electromyogram and C6-7 nerve root dysfunction, status post discectomy at C6-7 in 2001, thoracic spine strain and recurrent lumbar disc syndrome with left radiculopathy after a 1999 injury. Dr. Orlin attributed the diagnosed conditions to appellant's work duties for the past 16 years.

On November 17, 2005 the Office notified appellant that his August 3, 2005 occupational disease claim assigned file number 132135822, duplicated his occupational disease claim assigned file number 132006396. It informed him that he was not entitled to a decision with appeal rights in file number 132135822 as it was a duplicate claim. The Office deleted file number 132135822 and transferred the documents from that record to file number 132006396.

By letter dated November 17, 2006, appellant's representative noted that he had not received a decision from the Office on his October 28, 2004 reconsideration request. Counsel further asserted that appellant's August 3, 2006 occupational disease claim did not duplicate his claim as he attributed his condition to work factors after returning to work in 2001.

By decision dated January 18, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not show clear evidence of error. It further found that appellant's August 3, 2005 occupational disease claim duplicated his prior claim in file number 132006396 and thus he was not entitled to a decision on the claim with appeal rights.

### **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>4</sup> 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>5</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>6</sup> The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>6</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

evidence of error” on the part of the Office.<sup>7</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>12</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>13</sup> As appellant’s October 28, 2004 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.<sup>14</sup>

By letter dated October 28, 2004, appellant, through his representative, requested reconsideration. Counsel asserted that he had obtained a statement from a witness

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<sup>7</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

<sup>8</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> *Dorletha Coleman*, 55 ECAB 143 (2003); *Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>10</sup> *Id.*

<sup>11</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> *Robert F. Stone*, 57 ECAB \_\_\_\_ (Docket No. 04-1451, issued December 22, 2005).

<sup>14</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB \_\_\_\_ (Docket No. 05-1637, issued October 18, 2005).

acknowledging appellant in pain on the day of the August 1999 incident. The record, however, does not contain a witness statement or any other evidence supporting the reconsideration request. Consequently, appellant has not submitted any evidence or raised any legal argument sufficient to *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's last merit decision.<sup>15</sup>

The Board finds, however, that the Office erred in determining that appellant's August 3, 2005 occupational disease claim was a duplicate claim. Appellant stopped work in 1999 and returned to work in either 2001 or 2002.<sup>16</sup> He filed an occupational disease claim alleging that he injured his neck and back due to work factors. In a statement received by the Office on August 22, 2005, appellant described his employment duties from September 12, 1988 to the present. He further submitted a May 5, 2005 report from Dr. Orlin diagnosing cervical, thoracic and lumbar spine conditions and attributing the diagnosed conditions to his work duties up to the present. As appellant sustained new work exposure and alleged additional work factors as causing his condition, the Office improperly determined that his August 3, 2005 occupational disease claim was a duplicate claim.<sup>17</sup> Upon return of the case record, the Office should adjudicate his August 3, 2005 occupational disease claim.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's reconsideration request as it was untimely and failed to establish clear evidence of error.

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<sup>15</sup> See *Veletta C. Coleman*, *supra* note 6.

<sup>16</sup> The record is unclear regarding the date appellant returned to work.

<sup>17</sup> See 20 C.F.R. § 10.5(q).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 18, 2007 is affirmed.

Issued: February 25, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board