

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

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**E.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Dallas, TX, Employer**

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**Docket No. 08-1099  
Issued: June 18, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 4, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 21, 2008 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 between the last merit decision dated August 22, 1996 and the filing of this appeal on March 4, 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.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

On November 28, 1995 appellant, then a 51-year-old former mail handler, filed a claim for an emotional condition. He first became aware that the condition was related to his employment on September 10, 1986. The employing establishment controverted the claim,

noting that the claim was not filed within three years of the alleged injury. It further noted that appellant did not list an injury or cause. The employing establishment indicated that appellant last worked on March 31, 1976.

By decision dated August 22, 1996, the Office denied appellant's claim for compensation for the reason that it was not timely filed. It noted that written notice of the injury was provided on November 28, 1995 and that appellant was aware or should have been aware of a relationship between the employment factors and his condition by September 10, 1986. The Office also found that appellant's immediate supervisor did not have actual knowledge of the alleged employment-related injury within 30 days of its occurrence.

On October 1, 1997 appellant appealed this determination to the Board. By decision dated October 20, 1997, the Board dismissed appellant's appeal as it was not timely filed.<sup>1</sup>

In a letter dated October 22, 2007, appellant requested reconsideration and stated that he was injured when mail sacks fell on top of him, thereby injuring his back and neck. He stated that some coworkers "call[ed] my supervisor" after this occurred and that he went to the nurse's office who advised that he needed treatment from a physician. Appellant noted that the injury occurred on September 10, 1986. By letter dated January 20, 2008, he again requested reconsideration.

By decision dated February 21, 2008, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time or on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."<sup>2</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>3</sup>

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<sup>1</sup> Docket No. 97-2175 (issued October 1, 1997).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>4</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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>5</sup>

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>6</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>7</sup> This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>8</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.<sup>9</sup>

### ANALYSIS

In its February 21, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on August 22, 1996, denying his claim for an emotional condition. Appellant's request for reconsideration was dated October 22, 2007. His request for reconsideration was dated and received over 11 years after the decision of August 22, 1996. Accordingly, appellant's request for reconsideration is not timely filed within one year of the Office's August 22, 1996 decision.

The Board also finds that appellant did not submit any evidence with his reconsideration request sufficient to *prima facie* shift the weight of the evidence in his favor and thus appellant has not established clear evidence of error. In his October 22, 2007 letter requesting reconsideration, appellant related that he injured his back and neck on September 10, 1986 when mail sacks fell on top of him, that coworkers called his supervisor and that he then sought medical treatment. The Office denied appellant's claim for an emotional condition because it was not timely filed. Specifically, the Office noted that appellant became aware or should have become aware of his condition by September 10, 1986, yet he did not file his claim until

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<sup>4</sup> 20 C.F.R. § 20.607(b); *Fidel E. Perez*, 48 ECAB 662, 665 (1997).

<sup>5</sup> *Annie L. Billingsley*, *supra* note 3.

<sup>6</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

November 28, 1995, nine years later. Additionally, it found that appellant's supervisor did not have actual knowledge within 30 days of the injury. The Office noted that appellant's claim was therefore not timely filed because it was not filed within three years of the alleged injury, as required by the Act. Appellant did not submit any evidence on reconsideration tending to show that his claim for an emotional condition was timely filed. The Board notes that the contention on reconsideration was not relevant to the claim for an emotional condition as it appears to be related to a traumatic injury which is not currently before the Board. Therefore, the Board finds that appellant has not established clear evidence of error and the Office properly denied his reconsideration request.

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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