

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

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C.M., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Cincinnati, OH, Employer

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**Docket No. 08-550  
Issued: November 14, 2008**

*Appearances:*  
*Appellant, pro se*  
*No appearance, for the Director*

Oral Argument October 8, 2008

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On December 13, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 18, 2007 which denied his reconsideration request 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 November 14, 1994 and the filing of this appeal, 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).

**ISSUE**

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**FACTUAL HISTORY**

This is the fourth appeal before the Board. In an August 11, 1994 decision, the Board reversed the April 27 and November 30, 1992 decisions of the Office finding that it improperly terminated compensation based on appellant's refusal of suitable work. The Board found that the Office failed to follow established procedures in advising appellant that the reasons he

offered for refusing the offered position were insufficient. On October 21, 1994 the employing establishment offered appellant the job of modified manual distribution clerk.<sup>1</sup> By decision dated November 14, 1994, it terminated compensation on the grounds that appellant had refused an offer of suitable work.

By letter dated May 12, 2004, appellant requested reconsideration of the November 14, 1994 decision. He asserted that the emotional condition accepted by the Office in 2003 was the reason he did not accept the offered position. By decision dated June 28, 2004, the Office determined that appellant's request for reconsideration was untimely. It further determined that his request for reconsideration failed to show clear evidence of error in the November 14, 1994 suitable work termination decision. In a January 24, 2005 decision,<sup>2</sup> the Board found that appellant's request for reconsideration was untimely as it was filed more than one year after the November 14, 1994 Office decision and that he had failed to establish clear evidence of error on the part of the Office. Appellant requested reconsideration and again argued that the reason he did not accept the October 1994 job offer was because the job description was limited to the effect of the physical injuries on his work capacity and did not take into account the effects of his emotional condition. He submitted medical evidence indicating that the Office had issued its termination decision without considering the presence of work-related stressors which were the precipitating cause of his mental illness. By decision dated June 7, 2005, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error. In a decision dated November 9, 2006, the Board affirmed the Office's June 7, 2005 nonmerit decision.<sup>3</sup> The facts of this case are set forth in the Board's prior decisions and are incorporated herein by reference.

By letter dated September 30, 2007, appellant's attorney requested reconsideration. He asserted that the 1994 Office decision terminating compensation based on appellant's refusal to accept a suitable job offer was invalid because the Office did not consider the psychiatric element of the claim.

By decision dated October 18, 2007, the Office denied appellant's request for reconsideration without a merit review, finding the request was untimely and that he had not established clear evidence of error. It noted that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was incorrect.

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<sup>1</sup> On October 29, 2003 the Office accepted an emotional condition, exacerbation of depressive disorder, as a consequence of his employment injury.

<sup>2</sup> Docket No. 04-2020 (issued January 24, 2005).

<sup>3</sup> Docket No. 05-1581 (issued November 9, 2006).

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>5</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

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

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>6</sup> As one such limitation, it 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.<sup>7</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>9</sup> Office procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows “clear evidence of error” on the part of the Office.<sup>10</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> 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, it has stated that a claimant may obtain review of the merits of a claim by: (1) showing that it erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

<sup>7</sup> 20 C.F.R. § 10.607(b).

<sup>8</sup> *See* cases cited *supra* note 2.

<sup>9</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise, explicit and must be manifested on its face that the Office committed an error.<sup>12</sup> 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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> 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.<sup>15</sup> 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>16</sup> The Board makes an independent determination of whether an appellant 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>17</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on November 14, 1994. Appellant requested reconsideration on September 30, 2007; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's September 30, 2007 request for reconsideration failed to establish clear evidence of error. The Board notes that a review of the medical evidence of record does not establish that the Office erred in finding the offered position was medically suitable. Appellant did not submit any new medical evidence with his request for reconsideration. The September 30, 2007 letter from his attorney merely restated arguments previously rejected by the Board and the Office. Appellant has failed to demonstrate clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

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<sup>11</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> See *Jesus D. Sanchez*, *supra* note 5.

<sup>14</sup> See *Leona N. Travis*, *supra* note 12.

<sup>15</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>17</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

**CONCLUSION**

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated September 30, 2007. As appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on October 18, 2007.

**ORDER**

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

Issued: November 14, 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