

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

M.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

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**Docket No. 08-876
Issued: September 17, 2008**

Appearances:
Linda Temple, for the appellant
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 February 4, 2008 appellant filed a timely appeal of a November 7, 2007 decision of the Office of Workers' Compensation Programs, finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued May 17, 2004, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The case was before the Board on a prior appeal.¹ Appellant requested review of a June 1, 2006 Office decision finding his application for reconsideration untimely and that he failed to show clear evidence of error in a May 17, 2004 merit decision. In a September 13, 2007 order, the Board noted that some of the evidence referenced by the Office in its June 1, 2006 decision was not in the record transmitted to the Board. The case was remanded to the Office for proper assemblage of the case record.

By decision dated November 7, 2007, the Office determined that appellant's May 18, 2006 application for reconsideration was untimely and failed to show clear evidence of error in the May 17, 2004 decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act 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.² The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."³

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁷ 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).⁸

¹ Docket No. 07-1213 (issued September 13, 2007).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.605 (1999).

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 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, 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; or (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(b).

⁷ 20 C.F.R. § 10.607(a).

⁸ *See Leon D. Faidley, Jr.*, *supra* note 5.

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.⁹ 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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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 decision.¹⁶ 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.¹⁷

ANALYSIS

Appellant filed an occupational disease claim (Form CA-2) on October 30, 2000 alleging his duties as a letter carrier had contributed to a left shoulder and arm condition. The Office accepted the claim for a left shoulder strain on January 9, 2001. On May 6, 2003 appellant filed a claim for intermittent wage-loss compensation from August 12 to October 17, 2000. By merit decision dated May 17, 2004, the Office denied appellant's claim for wage-loss compensation during the period August 12 to October 17, 2000.

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ *See Leona N. Travis*, *supra* note 13.

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 5.

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

The application for reconsideration in this case was dated May 18, 2006. Since this is more than one year after the May 17, 2004 Office merit decision, it is untimely pursuant to 20 C.F.R. § 10.607(a).

As the application for reconsideration was untimely, appellant must demonstrate clear evidence of error on the part of the Office in its merit decision. He submitted a number of documents relating to light-duty job assignments, disciplinary actions, witness statements and grievance settlements. Appellant's argument appears to be that the employing establishment failed to provide him with "suitable work" during the period August 12 to October 17, 2000. The underlying issue is not, however, a refusal of suitable work. Appellant filed a claim for wage-loss compensation and it was his burden to submit medical evidence establishing an employment-related disability for the period claimed.¹⁸ The Office noted in its May 17, 2004 decision that the evidence must establish disability due to an employment-related condition.

Appellant did not establish clear evidence of error on the part of the Office in the denial of his claim for wage-loss compensation. The medical evidence submitted did not establish an employment-related disability for the period claimed. An attending orthopedic surgeon, Dr. J. Howard DeHoff, noted in a September 19, 2000 report that appellant carried mail and had been having left shoulder problems for six months. He indicated in a separate note dated September 19, 2000 that until September 29, 2000 appellant should not perform route work unless he could use a wheeled cart. Dr. DeHoff did not provide a rationalized opinion on causal relationship between disability and a diagnosed employment-related condition. There was no probative medical evidence establishing an employment-related disability for the period claimed.

As noted above, to warrant reopening the case on an untimely application for reconsideration, appellant must submit relevant evidence that clearly establishes error by the Office. He did not show clear evidence of error in denying his claim for wage-loss compensation from August 12 to October 17, 2000.

CONCLUSION

The application for reconsideration was untimely filed and failed to show clear evidence of error on the part of the Office.

¹⁸ See *Sandra D. Pruett*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 7, 2007 is affirmed.

Issued: September 17, 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