

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

---

**R.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
San Diego, CA, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-622  
Issued: September 30, 2009**

*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 January 2, 2009 appellant filed a timely appeal from an October 1, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As there is no merit decision within one year of the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

**ISSUE**

The issue is whether the Office properly denied appellant's September 9, 2008 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

On appeal, appellant contends that he cooperated fully with a vocational rehabilitation effort.

## **FACTUAL HISTORY**

The Office accepted that on November 2, 2005 appellant, then a 57-year-old clerk mail processor, sustained a cervical strain in a work-related motor vehicle accident.<sup>1</sup> Dr. Noah C. Johnson, an attending osteopathic physician Board-certified in family practice, held appellant off work through April 2006 due to dizziness and cervical spine pain.

On April 11, 2006 the Office referred appellant to a vocational rehabilitation counselor for vocational testing, job counseling and placement services. The counselor tried to telephone appellant but could not reach him. She then sent him a letter advising him of a May 2, 2006 initial appointment. Appellant did not attend the appointment nor contact the counselor.

In May 3 and 8, 2006 letters, the vocational rehabilitation counselor instructed appellant to attend a May 16, 2006 appointment or call to explain why he could not. She advised him that if he did not attend the appointment, the Office could suspend his compensation. Appellant failed to attend the May 16, 2006 appointment or contact the counselor.

By notice dated May 17, 2006, the Office advised appellant that he had failed to cooperate with the vocational rehabilitation counselor. It afforded him 30 days to contact both his claims examiner and the counselor, explaining the reasons for noncompliance. The Office stated that, if appellant continued to refuse to participate in vocational rehabilitation, his monetary compensation benefits could be reduced to zero under the penalty provision of 5 U.S.C. § 8113. Appellant did not contact his claims examiner or the vocational rehabilitation counselor as of June 20, 2006.

In a May 17, 2006 letter, Dr. Johnson stated that appellant could not work or drive a government vehicle due to dizziness from the November 2, 2005 accident. He recommended a neurosurgical evaluation. Dr. Johnson held appellant off work through July 3, 2006.

By decision dated June 21, 2006, the Office reduced appellant's compensation to zero effective that day under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 as he failed to cooperate with preliminary vocational rehabilitation efforts.

Appellant was separated from the employing establishment effective January 31, 2007 as he had not worked in one year.

In an August 28, 2008 letter received by the Office on September 9, 2008, appellant requested reconsideration. He contended that Dr. Johnson would not allow him to participate in vocational rehabilitation until after a neurosurgical consultation and testing. Appellant stated that he wished to return to work. He requested back pay and reinstatement of health insurance benefits.

---

<sup>1</sup> In December 2006, the Office assigned appellant a medical management field nurse. On January 16, 2006 it closed the effort due to appellant's refusal to contact the field nurse. The Office obtained March 1 and April 1, 2006 second opinion reports from Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, who opined that appellant could perform light duty.

In a July 18, 2006 report, Dr. Johnson held appellant off work through September 4, 2006 pending a neurosurgical evaluation. He submitted progress notes and physical therapy prescriptions through September 2008, releasing appellant to full duty as of May 20, 2008. Dr. Ian M. Purcell, an attending Board-certified neurologist, submitted reports from December 2006 to June 2008 diagnosing a vestibular disorder and postconcussive headaches. He released appellant to full duty as of June 23, 2008. Appellant also provided physical therapy notes, test results and imaging studies obtained from December 2006 to May 2007.

By decision dated October 1, 2008, the Office denied appellant's September 9, 2008 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that appellant's September 9, 2008 request was not made within one year of the June 21, 2006 decision, the most recent merit decision. The Office found that the medical evidence submitted in support of the request did not demonstrate clear evidence of error by the Office in reducing his compensation to zero.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is 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>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.<sup>7</sup> Office regulations states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>8</sup>

---

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

<sup>6</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 4.

<sup>7</sup> *Thankamma Mathews*, *supra* note 3.

<sup>8</sup> 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</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. The Board must make 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>14</sup>

### ANALYSIS

In its October 1, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision is dated June 21, 2006. Appellant's request for reconsideration was received by the Office on September 9, 2008, more than two years after the most recent merit decision. Accordingly, his request for reconsideration was not timely filed.

The Board finds that appellant's September 9, 2008 letter does not raise a substantial question as to whether the Office's June 21, 2006 decision was in error and therefore, it is insufficient to establish clear evidence of error by the Office. The medical evidence submitted in support of appellant's request for reconsideration is also insufficient to establish evidence of error by the Office. The medical reports, test results and imaging studies do not address appellant's failure to cooperate with the preliminary steps of vocational rehabilitation from April to June 2006. Therefore, they are irrelevant to the critical issue in the case at the time of the June 21, 2006 decision. Irrelevant evidence is insufficient to demonstrate clear evidence of error.<sup>15</sup>

---

<sup>9</sup> *Thankamma Mathews, supra* note 3.

<sup>10</sup> *Leona N. Travis, 43 ECAB 227 (1991).*

<sup>11</sup> *Jesus D. Sanchez, supra* note 4.

<sup>12</sup> *Leona N. Travis, supra* note 10.

<sup>13</sup> *Nelson T. Thompson, 43 ECAB 919, 922 (1992).*

<sup>14</sup> *Gregory Griffin, supra* note 5.

<sup>15</sup> *Thankamma Mathews, supra* note 3.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift raises a substantial question as to the correctness of the Office's June 21, 2006 decision. On appeal, he asserted that he fully cooperated with the Office's vocational rehabilitation effort, but such assertion by appellant did not demonstrate clear evidence of error in the Office decision.

**CONCLUSION**

The Board finds that appellant's September 9, 2008 request for reconsideration was untimely filed and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 1, 2008 is affirmed.

Issued: September 30, 2009  
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