

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

B.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Duluth, GA, Employer**

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

**Docket No. 10-1206
Issued: October 20, 2010**

Appearances:
Joe Emerson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2010 appellant filed a timely appeal from the September 29, 2009 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed between the last Office merit decision dated September 8, 2004 and the filing of the appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

¹ By order dated July 14, 2010, the Board denied appellant's request for oral argument.

FACTUAL HISTORY

This case was previously before the Board. By decision dated June 6, 2005, the Board affirmed Office's decisions dated March 15 and September 8, 2004, which found that appellant failed to meet his burden of proof to establish that his disability from December 3, 2002 to February 3, 2003 was causally related to the accepted October 20, 2000 employment injury.² The facts of the case as set forth in the prior decision are incorporated by reference.

Following the Office's September 8, 2004 decision, appellant submitted evidence, including medical reports from Dr. Susan M. Butler-Sumner, a family practitioner, noting his ongoing work status and restrictions. In reports dated January 30 and August 25, 2006 and January 23, 2007, Dr. Butler-Sumner noted treating appellant since 2001 for a back injury in a motor vehicle accident at work. She stated that appellant's back condition was work related. Appellant would have symptoms for the rest of his life as arthritis and degenerative disc disease due to his injury continued to progress. Dr. Butler-Sumner also advised that back injuries had many long lasting complications and that chronic pain "always results in depression." Appellant also submitted compensation claims (Form CA-7) and a recurrence of disability (Form CA-2) for the period December 9, 2006 through February 20, 2007.³

In an August 10, 2009 fax, received by the Office on that date, appellant's congressional office forwarded appeal information including an August 7, 2009 appeal form and an August 9, 2005 letter to the Board regarding appeal No. 04-417, in which appellant requested reconsideration.⁴ Appellant alleged several errors in his case. He asserted: a decision on his claim should have been made within 60 days, but it took six months; that his claim was not adequately reviewed by the Board; he never received wage-loss compensation for his temporary permanent disability; and his doctor had removed him from work and questioned a statement regarding the amount of money expended on his claim.

By decision dated September 29, 2009, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵

² Docket No. 05-417 (issued June 6, 2005), *order denying petition for recon.* (issued September 23, 2005).

³ In February 26, 2007 and April 27, 2009 letters, the Office notified appellant that his claim for compensation was denied in April 2003 and that subsequent decisions affirmed the denial. The Board notes, however, that appellant requested compensation for a different period of time than that previously adjudicated by the Office. Under its procedures the Office should issue a decision on appellant's request for compensation benefits for the period December 9, 2006 through February 20, 2007. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.2(a)(2) (March 1997).

⁴ See *supra* note 2. This letter was the response to the Director's answer to appellant's petition for reconsideration in appeal No. 05-417.

⁵ 20 C.F.R. § 10.607(a).

The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

The Office may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ The Office's procedures provide 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 application for review shows clear evidence of error on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁴

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.¹⁵

⁶ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ *Pete F. Dorso*, 52 ECAB 424 (2001).

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁶ However a right to reconsideration within one-year accompanies any merit decision on the issues, including a decision issued by the Board.¹⁷ The most recent merit decision is the Board's June 6, 2005 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration from the Office.

Appellant requested reconsideration in an August 7, 2009 appeal form that was received on August 10, 2009. With his request, appellant submitted an August 9, 2005 letter to the Board regarding a petition for reconsideration in his previous appeal.¹⁸ The August 9, 2005 letter did not purport to be a request for reconsideration before the Office and the evidence does not show any earlier submission of this letter to the Office as part of a request for reconsideration before the Office.¹⁹ Accordingly, appellant's request for reconsideration received on August 10, 2009 is untimely as it was made more than one year after the Board's June 6, 2005 decision, the last merit decision of record.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. The Board notes that appellant did not submit any evidence with his reconsideration request sufficient to shift the weight of the evidence in his favor. Appellant raised arguments previously considered by the Board in the prior appeal.²⁰ None of his allegations support that the previous decision in appellant's case was issued in error as it does not raise a substantial question as to the correctness of the most recent merit decision which determined that he had not met his burden of proof in establishing that disability from December 4, 2002 to February 3, 2003 was causally related to the accepted employment injury of October 20, 2000. Medical evidence from Dr. Butler-Sumner submitted after the Office's September 8, 2004 decision, did not specifically address the period at issue or explain why such evidence raised a substantial question as to the correctness of the Office decision. As noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²¹ The Office properly found that the evidence did not establish clear evidence of error. It properly denied appellant's reconsideration request.

¹⁶ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB (2008); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004); *Robert F. Stone*, 57 ECAB 292 (2005); *Larry J. Lilton*, 44 ECAB 243 (1992).

¹⁸ *See supra* note 2.

¹⁹ For example, there is no evidence that this letter was previously duly mailed to the Office in the ordinary course of business. *See Joseph G. Cutrufello*, Docket No 97-2546 (issued June 21, 1999).

²⁰ The Board's prior decision became final upon the expiration of 30 days from the date of its decision. 20 C.F.R. § 501.6(d) (2008).

²¹ *See Leona N. Travis*, *supra* note 10.

Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's decision.

On appeal, appellant questions why his reconsideration was found to be untimely, whether the Office properly considered his claim and asserts that his work injury caused a permanent injury that has left him unable to perform the duties for which he was hired. As noted, he did not file a timely request for reconsideration with the Office from the September 8, 2004 decision or establish clear evidence of error by the Office. Consequently, it properly denied his reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board