

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

R.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 07-1343
Issued: March 25, 2008**

Appearances:
Sylvia R. Johnson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 21, 2007 appellant, through his representative, filed a timely appeal of a February 8, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 1, 2004 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

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

FACTUAL HISTORY

This case has previously been on appeal twice before the Board. In a December 1, 2004 decision,¹ the Board affirmed an Office hearing representative's November 12, 2003 decision

¹ Docket No. 04-860 (issued December 1, 2004).

which reduced appellant's compensation effective May 6, 2003 on the grounds that a constructed position of protective signal operator represented his wage-earning capacity.² The Board found that the constructed position was available in appellant's commuting area and within his vocational skills, and his attending orthopedic surgeon, Dr. David Wren, Jr., opined that he could perform the duties of the position. On December 30, 2004 appellant filed a petition for reconsideration of the Board's decision and requested an oral argument. In an order dated August 5, 2005, the Board denied appellant's petition for reconsideration and request for an oral argument. The Board found that it had previously considered his arguments on reconsideration in its December 1, 2004 decision. It further found that an oral argument on appellant's request for reconsideration would delay the finality of its decision and would not serve the interest of justice. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³ The facts and the history relevant to the present issue are hereafter set forth.

By letter dated August 25, 2006, Sylvia R. Johnson, appellant's representative, advised the Office that appellant's September 2, 2004 request for reconsideration of the hearing representative's November 12, 2003 decision had not been processed. She noted that the records in appellant's case record were not in sequential order and that a brief in support of the reconsideration request and accompanying evidence were spread throughout the case record.⁴ Ms. Johnson requested that the Office verbally contact the claims examiner handling appellant's request about this situation so that all the evidence would be included in the case record at the time of review.

In an October 3, 2006 letter, the Office advised Ms. Johnson that the Board was in custody of appellant's case file at the time of his September 2, 2004 request for reconsideration. It noted that on February 11, 2004 he appealed the November 12, 2003 decision to the Board on February 11, 2004 and that he filed his September 2, 2004 reconsideration request while the case was under review by the Board. The Office advised Ms. Johnson that appellant could not have more than one petition in process at the same time. She was advised to follow the appeal rights that accompanied the Board's December 1, 2004 decision.

In an October 11, 2006 letter, Ms. Johnson disagreed with the Office's statement that only one petition could be heard at one time. She stated that the Office was allowed to process new decisions while earlier decisions were being processed. Ms. Johnson contended that

² The Board notes that appellant appealed the Office's November 12, 2004 decision to the Board on February 13, 2004.

³ On March 21, 1991 appellant, then a 45-year-old loading and sorting machine operator, filed a claim alleging that he experienced pain in his shoulders and neck, numbness in both hands and tingling in his elbow as a result of coding mail. The Office accepted the claim for bilateral carpal tunnel syndrome, cervical strain and right shoulder bursitis.

⁴ In support of his September 2, 2004 request for reconsideration, appellant submitted descriptions of customer service, alarm dispatcher and monitoring positions. He also submitted letters from employers identifying available positions at their companies which included alarm and monitoring positions. In a July 22, 2004 letter, Brinks Home Security stated that monitoring operator positions were available in Irving, Texas but none of these positions were available in California.

appellant's September 2, 2004 request for reconsideration was entitled to review by the Office as it was timely filed.

By letter dated November 7, 2006, the Office reiterated to Ms. Johnson that the Board and the Office do not have concurrent jurisdiction over the same issue in a case and, thus, appellant's September 2, 2004 request for reconsideration was null and void. It noted that the last merit decision was issued by the Board on December 1, 2004. The Office stated that if appellant wished to appeal this decision, the only remaining option was to request reconsideration based on the argument that it erred in applying the facts or the law in his case.

In a December 2, 2006 letter, Ms. Johnson again requested that the Office address appellant's September 2, 2004 request for reconsideration of the November 12, 2003 decision.

By letter dated December 8, 2006, the Office advised Ms. Johnson to submit a new reconsideration request. It stated that the new request would be addressed based on the date it was filed and not on the September 2004 date.

The Office received Dr. Wren's January 9, 2007 medical report which found that appellant had bilateral carpal tunnel syndrome, shoulder adhesive capsulitis and chronic cervical sprain/strain. Dr. Wren opined that he was disabled from his previous job.

By letter dated January 14, 2007, Ms. Johnson reiterated her prior contention that appellant's September 2, 2004 reconsideration request was timely filed because the Office can process a case while it is before the Board.

In a January 31, 2007 letter, the Office explained to Ms. Johnson that it was not stating that appellant was not entitled to request reconsideration because he had previously appealed to the Board. Rather, it stated that, due to the amount of time that had elapsed since the issuance of the last merit decision in the case, it could only conduct a limited review of his case to determine whether clear evidence of error had been established and, if so, then it could further consider the evidence in the case.

By decision dated February 8, 2007, the Office found that appellant's letter requesting reconsideration was dated December 2, 2006, more than one year after the November 12, 2003 decision and was untimely. It further found that his prior September 2, 2004 request for reconsideration of the November 12, 2003 decision was not timely filed as he had already appealed this decision to the Board on February 11, 2004 and thus, it was null and void based on Board precedent. The Office found that appellant did not submit evidence to establish clear evidence of error in the prior decision finding that the constructed position of protective signal operator represented his wage-earning capacity.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.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 be manifest on its face that the Office committed an error.¹⁰ Evidence that 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 *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.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

⁹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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

¹⁴ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for reconsideration. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁶

The last merit decision in this case was issued by the Board on December 1, 2004. The Board affirmed the Office's November 12, 2003 finding that the constructed position of protective signal operator represented appellant's wage-earning capacity. As his December 2, 2006 letter requesting reconsideration was made more than one year after the Board's December 1, 2004 merit decision, the Board finds that it was not timely filed. The Board further finds that appellant's contention that his September 2, 2004 request for reconsideration of the November 12, 2003 decision was timely filed is without merit. The Board notes that prior to appellant's September 2, 2004 reconsideration request, he appealed the November 12, 2003 decision to the Board on February 13, 2004 and as stated, the Board issued a decision addressing his appeal in its December 1, 2004 decision. It is well established that the Board and the Office may not have concurrent jurisdiction over the same issue on appeal.¹⁷ Although there is no evidence of record that the Office issued a decision regarding appellant's September 2, 2004 request for reconsideration, any such decision would be null and void as the case was pending before the Board on the same issue.¹⁸

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's finding that the constructed position of protective signal operator represented his wage-earning capacity. Appellant has not established clear evidence of error by the Office in this regard. He did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

Appellant submitted descriptions of customer service, alarm dispatcher and monitoring positions and letters from employers regarding the availability of alarm and monitoring positions. The submission of factual evidence does not show clear evidence of error because it is not relevant to the main issue in the present case, which is medical in nature and should be resolved by the submission of medical evidence. The Board, therefore, finds that the position descriptions and letters do not *prima facie* shift the weight in favor of appellant's claim.

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁷ *Douglas E. Billings*, 41 ECAB 880 (1990).

¹⁸ *Id.* at 895-96.

Dr. Wren's January 9, 2007 report stated that appellant had bilateral carpal tunnel syndrome, shoulder adhesive capsulitis and chronic cervical sprain/strain. He opined that appellant was disabled from his previous job. This evidence is insufficient to *prima facie* shift the weight of evidence in favor of appellant's claim.

For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board