

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

ADOLPH C. BOWMAN, Appellant

and

**U.S. POSTAL SERVICE, MORGAN GENERAL
MAIL FACILITY, New York, NY, Employer**

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**Docket No. 04-2188
Issued: March 16, 2005**

Appearances:
Charles J. Carnes, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 7, 2004 appellant, through his representative, filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated August 27, 2004, 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 has elapsed from the last merit decision dated August 29, 2002 to the filing of this appeal on September 7, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In a July 5, 2001 decision, the Board found that the medical evidence of record was not sufficiently well rationalized and did

not contain the necessary background to relate appellant's date of injury on November 14, 1997 and the date of the first medical evidence in the record, September 18, 1998. The Board found that appellant had not established that he sustained a right rotator cuff tear as a result of a November 14, 1997 altercation with a coworker, which occurred in the performance of duty.¹ The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Thereafter, appellant through his representative, requested reconsideration and submitted additional factual and medical evidence. In a letter dated July 13, 2002, the Office requested that appellant submit treatment notes beginning with his first medical treatment following the November 14, 1997 employment injury. By decision dated August 29, 2002, the Office denied modification of its prior decision.

Appellant requested reconsideration of the August 29, 2002 decision on June 4 and 14, 2004. In support of his request, appellant alleged that he first sought medical treatment on December 5, 1997 that his physician did not believe that his injury was serious and that his injury went unnoticed as he was not required to use his right arm to perform his job duties. Appellant also submitted leave requests.

By decision dated August 27, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and did not contain clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁵ 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).⁶

¹ Docket No. 00-2815 (issued July 5, 2001).

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 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).

⁶ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

The Office's regulations require that an application for reconsideration must be submitted in writing⁷ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."⁸ The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."⁹

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.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's decision.¹⁶ 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.¹⁷

⁷ 20 C.F.R. § 10.606.

⁸ 20 C.F.R. § 10.605.

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Thankamma Mathews*, *supra* note 3 at 770.

¹¹ *Id.*

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 4 at 968.

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁷ *Gregory Griffin*, *supra* note 5.

ANALYSIS

Appellant requested reconsideration, through written applications dated June 4 and 14, 2004. Since appellant filed for reconsideration more than one year after the Office's August 29, 2002 merit decision, it properly determined that the request was untimely.

The underlying issue in this case is whether the medical evidence was sufficient to establish that appellant sustained an injury on November 14, 1997 as alleged. The Office and the Board accepted that the November 14, 1997, altercation occurred, but found that he failed to submit adequate medical evidence bridging the date of injury and the diagnosis of rotator cuff tear and supplying medical rationale in support of an opinion of a causal relationship between the diagnosis and employment incident.

Appellant's application for reconsideration included additional factual background in support of his request for reconsideration. This factual evidence consisting of appellant's statements and his leave requests cannot establish clear evidence of error on the part of the Office as it is relevant to the central issue in the case which is medical. The evidence does not *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.

CONCLUSION

The Board finds that appellant filed an untimely application for reconsideration and that as this application did not include evidence relating to the central disputed issue in the case, appellant did not establish clear evidence of error on the part of the Office.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member