United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 06-1415**
	)	**Issued: February 28, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Colorado Springs, CO, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 13, 2006 appellant filed a timely appeal from an April 4, 2006 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. Because more than one year has elapsed from the last merit decision dated February 11, 2005 to the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly determined that appellant's March 10, 2006 request for reconsideration was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On January 16, 2001 appellant, then a 59-year-old city carrier, sustained an employment-related right shoulder strain. He did not stop work until August 2001 when he underwent authorized arthroscopic surgery by Dr. David S. Matthews, a Board-certified orthopedic surgeon. Appellant returned to limited duty on September 4, 2001. On April 4, 2002 he was granted a

schedule award for a 15 percent permanent impairment of his right upper extremity. Dr. Matthews submitted a duty status report dated January 22, 2002 in which he provided restrictions that appellant could only intermittently lift five pounds with his right upper extremity, could not drive a postal vehicle and could not review mail. In a February 25, 2002 work restriction evaluation, he advised that appellant could intermittently lift 10 pounds, could occasionally reach above his shoulder with his right upper extremity, and could drive a motor vehicle. On March 28, 2002 the employing establishment offered appellant a position based on Dr. Matthews' February 25, 2002 report. Appellant refused the offered position, stating that it did not comport with Dr. Matthews' January 22, 2002 report. On April 8, 2002 Dr. Matthews approved the physical requirements of the offered position.

By letter dated February 24, 2004, the Office advised appellant that the position offered was suitable. He was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[1] and given 30 days to respond. On March 25, 2004 the employing establishment offered appellant a modified position as a sales and service distribution associate. He did not respond to the 30-day letter. In a March 31, 2004 decision, the Office terminated appellant's wage-loss compensation on the grounds that he declined an offer of suitable work. By letter dated March 31, 2004, appellant informed the employing establishment that he had been working a limited-duty job since February 2002. In a letter dated March 19, 2004, stamped received by the Office on April 2, 2004, Dr. Matthews advised the Office to follow the January 22, 2002 restrictions. On April 4, 2004 appellant accepted the March 25, 2004 job offer "under protest." In an April 7, 2004 report, Dr. Matthews approved the March 25, 2004 job offer.

On April 17, 2004 appellant requested a hearing that was held on November 16, 2004. He testified that he had never refused to appear for work but never worked the position offered on March 28, 2002. Appellant argued that Dr. Matthews' January 22, 2002 restrictions should have been followed. He stated that he was afraid that with the March 2002 offer, he might have had to review mail.

By decision dated February 11, 2005, an Office hearing representative affirmed the March 31, 2004 decision. Appellant retired on October 31, 2005. On March 10, 2006 he requested reconsideration, stating "I never refused to work and I never failed to report for work and I never stopped working in the new position." By decision dated April 4, 2006, the Office denied appellant's reconsideration request on the grounds that his request was untimely filed and he failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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.[2] When an application for review is untimely, the Office undertakes a

[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[3] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of Office regulations,[4] if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[6]

ANALYSIS

The Board finds that as more than one year had elapsed from the date of issuance of the February 11, 2005 decision, appellant's request for reconsideration on March 10, 2006 was untimely filed.[7] The Board also finds that appellant failed to establish clear evidence of error with his request because his argument on reconsideration does not raise a substantial question as to the correctness of the Office's March 31, 2004 decision which terminated his compensation benefits on the basis that he rejected suitable employment.

In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] The Board finds that appellant's argument on reconsideration does not rise to the level contemplated by this standard. In his March 10, 2006 letter, appellant contended that his refusal of the job offer was warranted as the physical requirements listed did not conform to his medical restrictions. Moreover, he noted that he did not have a copy of Dr. Matthews approval of the job offer. These contentions, however,

[3] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[4] 20 C.F.R. § 10.607.

[5] *Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

[6] *Nancy Marcano*, 50 ECAB 110 (1998).

[7] *Supra* note 3.

[8] *Nancy Marcano, supra* note 6.

do not establish clear evidence of error. The evidence reflects that appellant's physician approved the physical requirements of the job offer. As stated above, in order to establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] The Board finds that appellant's arguments are not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant or raise a substantial question as to the correctness of the Office decision.[10]

The Board therefore finds that the Office properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error. It correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

CONCLUSION

The Board finds that, as appellant's reconsideration request was not timely filed and he failed to establish clear evidence of error, the Office properly denied a merit review of his claim in its April 4, 2006 decision.[11]

[9] *Nancy Marcano, supra* note 6.

[10] *Id.*

[11] The Board notes that appellant submitted evidence to the Office subsequent to its March 22, 2006 decision. The Board cannot consider this evidence, however, as its review of the case is limited to that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 4, 2006 be affirmed.

Issued: February 28, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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