

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

F.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 07-1916
Issued: July 8, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 7, 2007 appellant filed a timely appeal of an April 6, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying his September 1, 2006 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 June 10, 1999 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 before the Board on three occasions. In a June 10, 1999 decision, the Board affirmed an Office hearing representative's May 10, 1996 decision, which affirmed the finding that appellant, forfeited his right to compensation for certain periods based

on his failure to report earnings and found that he was at fault in the creation of a \$60,492.05 overpayment.¹ The Board also affirmed the Office's October 24, 1996 decision which refused to reopen appellant's claim for a merit review pursuant to 5 U.S.C. § 8128(a). By decision dated April 6, 2004, the Board affirmed the Office's October 16, 2003 decision, which found that appellant's August 16, 1996 request for reconsideration was untimely filed and did not establish clear evidence of error with regard to the underlying issues of forfeiture and overpayment.² In an order dated June 18, 2004, the Board denied appellant's petition for reconsideration of its April 6, 2004 decision.³ By decision dated June 3, 2005,⁴ the Board affirmed the Office's July 7, 2004 decision, which denied appellant's April 26, 2004 request for reconsideration as it was untimely filed and failed to establish clear evidence of error with regard to the underlying issue of termination of his compensation benefits effective March 5, 1995.⁵ The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.⁶ The facts and the history relevant to the present issue are hereafter set forth.

By letter dated September 1, 2006, appellant requested reconsideration of the Office's July 7, 2004 decision. He contended that the Office failed to address an accompanying letter dated June 15, 1994 of an Office claims examiner who reviewed the employing establishment's June 2, 1994 investigative memorandum regarding appellant's conduct and determined that the issue of his entitlement to compensation must be resolved before forfeiture of his compensation could be considered in light of the Office's November 1977 loss of wage-earning capacity determination. Appellant, therefore, contended that there was no factual or legally sufficient reason for taking the adverse actions of forfeiture and termination of his compensation benefits. He submitted duplicate copies of his April 26, 2004 request for reconsideration and the Office's July 7, 2004 decision to demonstrate that the June 15, 1994 letter was not addressed by the Office. Appellant also submitted the Office's May 12, 2006 letter regarding his Freedom of Information Act (FOIA) request, summary logs related to the employing establishment's investigation and his March 13, 2007 letters to his congressman and the Office concerning the Office's delay in addressing his September 1, 2006 reconsideration request.

By decision dated April 6, 2007, the Office found that appellant's letter requesting reconsideration was dated September 1, 2006, more than one year after the last merit decision,

¹ Docket No. 97-1139 (issued June 10, 1999).

² Docket No. 04-311 (issued April 6, 2004).

³ Order Denying Petition for Reconsideration, Docket No. 04-311 (issued June 18, 2004).

⁴ Docket No. 05-179 (issued June 3, 2005).

⁵ In a February 9, 1995 decision, the Office terminated appellant's compensation benefits on the grounds that he no longer had any residuals or disability causally related to his accepted November 16, 1972 employment-related injury.

⁶ On November 16, 1972 appellant, then a 23-year-old distribution clerk, filed a traumatic injury claim alleging that on that date he hurt his back as a result of pulling sacks to and from sack chutes. The Office accepted the claim for right mid-trapezius strain and back strain. In November 1977, it found that the constructed position of general clerk represented appellant's wage-earning capacity. On March 6, 1987 appellant resigned from federal employment to seek other employment.

and was untimely. It found that appellant's request included information previously considered in its prior decisions. The Office further found that he did not submit evidence to establish clear evidence of error in the prior decision terminating his compensation effective March 5, 1995.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ 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.⁹

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.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 that 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 decision.¹⁶ The

⁷ 5 U.S.C. § 8128(a).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.607(b).

¹¹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

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

¹³ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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

¹⁶ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹⁷

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. 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.¹⁸

Appellant's September 1, 2006 letter requested reconsideration of the Office's July 7, 2004 decision, which denied his April 26, 2004 request for reconsideration as it was untimely filed and failed to establish clear evidence of error with regard to the underlying issue of termination of his compensation benefits.¹⁹ As his September 1, 2006 letter requesting reconsideration was made more than one year after the Office's February 9, 1995 merit decision, the Board finds that it was not timely filed.

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 termination of his compensation benefits on the grounds that he no longer had any residuals or disability causally related to his accepted November 16, 1972 employment-related injury. 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 the June 15, 1994 letter of an Office claims examiner who stated that the issue of appellant's entitlement to compensation must be resolved prior to a determination regarding his forfeiture of compensation in light of the Office's November 1977 loss of wage-earning capacity determination. He also submitted duplicate copies of his April 26, 2004 request for reconsideration and the Office's July 7, 2004 decision. Appellant submitted summary logs and letters from the Office regarding the employing establishment's investigation of his conduct and his FOIA request, and his letters to his congressman and the Office regarding the Office's delay in addressing his September 1, 2006 reconsideration request. This evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim. 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 letters, the Office's July 7, 2004 decision

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁸ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁹ It is noted that the most recent merit decision in this case regarding this issue is the Office's February 9, 1995 decision, which terminated appellant's compensation benefits effective March 5, 1995.

and summary logs do not raise a substantial question concerning the correctness of the Office's February 9, 1995 termination decision and therefore do not establish clear evidence of error.

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 April 6, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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