

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

T.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 08-517
Issued: July 3, 2008**

Appearances:
Appellant, pro se
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 December 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 30, 2007 nonmerit decision which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 5, 1995 and the filing of this appeal on December 11, 2007, 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 refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. On October 15, 1992 appellant, then a 32-year-old janitor, filed an occupational disease for an eye condition. On March 16, 1992 he

was told to clean the windows but it was too late in the day to clean the windows because of the sunlight. Appellant noted that, after attempting to clean the windows, he requested sick leave because he could not see well at this time. By decision dated February 22, 1993, the Office denied appellant's claim, finding that fact of injury was not established. By decision dated October 20, 1993, and made final on October 22, 1993, an Office hearing representative found the medical evidence did not establish that appellant sustained an eye condition related to his employment. By decision dated January 5, 1995, the Board affirmed these decisions, finding that appellant had not established that he sustained an eye condition in the performance of duty.¹ Following this decision on the merits by the Board, appellant filed numerous requests for reconsideration which were denied by the Office, without conducting a merit review, affirmed by the Board.² The facts and the history of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On June 18, 2007 appellant again requested reconsideration, arguing that the evidence was sufficient to show a worsening of his vision as a result of the March 16, 1992 employment incident. He contended that he was a disabled veteran who had vision problems when hired by the employing establishment, that he was forced to clean the lobby windows on March 16, 1992 at a time of day when there was glare from the sun and, after he began cleaning the windows, he developed headaches, burning in his eyes and could barely see. Appellant took an ambulance to the Veterans Hospital that day. He argued that the medical evidence supported that he sustained an injury to his eyes on that date. Appellant also argued that new medical evidence showed that he had a job-related injury on March 16, 1992.

Appellant submitted numerous documents previously of record at the time of the Office's prior decisions. He also resubmitted medical evidence previously considered, a portion of a brochure for employers with regard to the Americans with Disabilities Act, witness statements, and a copy of his March 16, 1992 leave slip. Appellant also submitted new evidence with his request for reconsideration. In an October 21, 1996 report, Dr. Carl Patterson, a clinical psychologist, noted that he saw appellant for psychotherapy. He indicated, "The stress caused by [appellant's] job duties which seems to have exacerbated his disability which he had when he went to work for the [employing establishment] and the psychosocial stressors of losing a job, and becoming employed caused a major depressive episode, which continues to date." In a March 20, 2007 progress note, Dr. Syed Mizanur Rahman indicated that he treated appellant on that date for impaired vision and right hand pain. He indicated that appellant listed a history of an injury in March 1992 that occurred while he was cleaning a window at the employing establishment.

By decision dated October 30, 2007, the Office denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error.

¹ Docket No. 94-646 (issued January 5, 1995).

² See Docket No. 97-808 (issued November 18, 1998) (*Order Denying Petition for Reconsideration* issued November 29, 1999); Docket No. 97-609 (December 14, 1998).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time or on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁶

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ The Board makes an independent

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 662, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹⁰

ANALYSIS

In its October 30, 2007 decision, the Office found that appellant failed to file a timely application for review. The most recent merit decision of record is the Board's decision of January 5, 1995. Appellant requested reconsideration on June 18, 2007, which was over 12 years after the last merit decision. The Office properly found that appellant's June 18, 2007 request for reconsideration was not timely filed.

The Board finds that appellant did not submit any evidence with his reconsideration request sufficient to *prima facie* shift the weight of the evidence in his favor. Appellant's arguments stated in his request for reconsideration were considered and rejected by the Office and the Board in prior decisions. Most of the evidence submitted with appellant's reconsideration request was duplicative of the evidence previously considered together with copies of prior decisions and pleadings in this case. The only new evidence submitted by appellant was the October 21, 1996 report by Dr. Patterson and the March 20, 2007 report by Dr. Rahman. The Board notes that Dr. Patterson was a clinical psychologist whose opinion is not of any weight in establishing whether appellant had an eye condition causally related to his federal employment. Dr. Rahman, who saw appellant 15 years after the alleged incident, merely noted that he treated appellant for vision problems and that appellant gave a history of an employment-related injury to his eyes in March 1992. He did not provide a medical opinion linking appellant's complaints to that injury. Appellant has not established clear evidence of error and the Office properly denied his reconsideration request.¹¹

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ *Robert G. Burns*, 57 ECAB 657 (2006).

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2008
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