

June 29, 2005. He stated that he reached to grab a letter and felt pain in his back, shoulder and neck.

By decision dated November 20, 2006, the Office denied the claim for compensation. It found the factual and medical evidence was insufficient to establish appellant's claim. Appellant requested a hearing before an Office hearing representative, which was held on March 22, 2007. The evidence submitted included treatment notes and a February 9, 2007 report from Dr. Douglas Kimmel, an osteopath, who stated that appellant had reported severe pain from his return to work activities and he was taken off work on July 27, 2005.

In a decision dated June 13, 2007, the hearing representative affirmed the November 20, 2006 decision. She found that the June 29, 2005 incident occurred as alleged but that the medical evidence was insufficient to establish the claim.

By letter dated August 18, 2008, appellant requested reconsideration of his claim. He submitted an April 18, 2008 report from Dr. Shailen Jalali, a Board-certified pain management specialist, who advised that he had treated appellant since 2003 and reviewed his medical treatment. Dr. Jalali stated that on June 29, 2005 "while casing mail," appellant stated that he felt pain in the shoulder and neck. He also noted a July 15, 2005 employment incident.¹ Dr. Jalali stated:

"I feel it is these incidences, the two occasions, June 29, 2005, when [appellant] was reaching up as well as on July 15, 2005, when he had worsened his pain condition as a result of the activities he was doing specifically at work. The positions that he was asked to place [appellant's] body in were causing these exacerbations. I do not feel that this was simply a worsening of his pain symptoms on its own, I feel that it is these activities at work that led to [appellant's] worsening pain symptoms. I feel that he continues to suffer from brachial plexopathy with associated neuropathic and myofascial pain symptoms. I also feel he suffers from cervical facet disease and disc degeneration as well. [Appellant] also has had problems with spinal stenosis in the cervical region as well."

By decision dated September 26, 2008, the Office found that appellant's application for reconsideration was untimely. It further determined that the application did not show clear evidence of error by the Office.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.² The employee shall exercise this right through a request to

¹ Appellant filed a claim for this injury, (OWCP File No. xxxxxx929) which is before the Board on another appeal (Docket No. 09-830).

² 5 U.S.C. § 8128(a).

the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”³

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹⁰ In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish

³ 20 C.F.R. § 10.605 (1999).

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

⁷ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law, (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁸ 20 C.F.R. § 10.607(a).

⁹ *See Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁷ The 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.¹⁸

ANALYSIS

The most recent merit decision in the case was the hearing representative's June 13, 2007 decision. The application for reconsideration was dated August 18, 2008. Since this is more than one year after the hearing representative's decision, it is untimely.

Under the principles noted above, to reopen the case for merit review appellant must show "clear evidence of error" by the Office. Appellant relies on an April 18, 2008 report from Dr. Jalali and contends that it establishes an aggravation of his condition by the June 29, 2005 incident. The Board finds that the report from Dr. Jalali does not show clear evidence of error. A rationalized medical opinion is an opinion based on a complete factual and medical background, supported by medical rationale explaining the nature of the relationship between a diagnosed condition and the identified employment incident.¹⁹ Dr. Jalali does not provide a detailed description of the June 29, 2005 employment incident, a medical history discussing the contemporaneous medical evidence or a clear diagnosis of an injury from the employment incident. He refers to "these activities at work" that led to worsening pain, without providing additional explanation. Dr. Jalali does not provide a rationalized medical opinion on causal relationship between a diagnosed condition and the June 29, 2005 employment incident. As noted above, the evidence must be of such probative value that it shifts the weight of the evidence in favor of appellant, he did not submit evidence sufficient to establish clear evidence of error.

¹⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁸ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁹ See *Jennifer Atkerson*, 55 ECAB 317 (2004).

On appeal, appellant argues that the medical evidence was sufficient to warrant reopening the case under the standard for a timely application for reconsideration.²⁰ He does not provide arguments as to why the application for reconsideration should be considered as timely filed. The August 18, 2008 application for reconsideration was untimely filed with respect to the June 13, 2007 merit decision. Appellant must establish clear evidence of error and for the reasons indicated, the Board finds that he did not establish clear evidence of error in this case.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely and failed to show clear evidence of error by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2008 is affirmed.

Issued: October 23, 2009
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

²⁰ *Supra* note 7.