

FACTUAL HISTORY

On June 13, 2000 appellant, then a 52-year-old letter carrier, filed an occupational disease claim alleging that, as a result of the heavy use of his hands and arms in his federal employment, he developed rotator cuff syndrome in his left shoulder and carpal tunnel syndrome in both hands and wrists. The Office accepted appellant's claim for carpal tunnel syndrome and left shoulder tendinitis.

On June 8, 2001 appellant filed a claim for a schedule award. By decision dated February 12, 2002, the Office found that, as appellant had zero percent impairment, he was not entitled to a schedule award for the lower extremity. This decision was reissued on February 21, 2002, which found that appellant was not entitled to a schedule award for the upper extremities.

In an undated letter received by the Office on February 26, 2003, appellant requested reconsideration of the Office decision he received on February 25, 2002. In support thereof, appellant submitted numerous medical reports by Dr. James B. Boone, appellant's treating Board-certified orthopedic surgeon, including a March 12, 2002 report in which Dr. Boone indicated that appellant had 21 percent impairment. Other medical reports include a February 4, 2003 report from Dr. Boone who noted that appellant's shoulder still had some clicking and popping, with decreased range of motion by about 10 percent. Although he found that appellant had a positive Phalen's and Tinel's sign, he indicated that neurologic, motor, sensory, vascular and reflexes were fine. In an October 14, 2002 report, Dr. Boone indicated that a nerve conduction study indicated carpal tunnel syndrome in both hands, and no evidence of diabetic peripheral neuropathy. Appellant submitted an imaging report by Dr. James H. Algeo, Jr., a Board-certified internist, dated February 27, 2002, who indicated that there was tendinitis in the anterior margin of the distal supraspinatus tendon, with no dramatic change from previous study.

By decision dated March 7, 2003, the Office denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The imposition of a one-year time limitation, within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).¹ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office merit decision, for which review is sought.² Under this section, the proper procedure is to determine if the request was submitted by mail and then determine the mailing

¹ *Diane Matchem*, 48 ECAB 532 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² 20 C.F.R. § 10.607(a).

date. The postmark date is the best evidence of the mailing date and the Office is clearly in the best position to retain evidence of the postmark date in the record. When the Office does not retain the envelope or other evidence of the mailing date and the date of the reconsideration request cannot be ascertained,³ then “other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits” pursuant to section 10.607(a), may be used to establish the mailing date.

Section 10.607(c) 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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁵

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.⁶

ANALYSIS

The Board finds that this case is not in posture for decision. The most recent merit decision of the Office was issued on February 21, 2002. Accordingly, appellant had until February 21, 2003 to file his reconsideration request. The record shows that the Office received appellant’s request on February 26, 2003. However, there is no envelope or other indication in the record as to what date appellant’s request was mailed. Furthermore, the request itself is undated. The Office made no effort to obtain other evidence to ascertain the date of mailing. Accordingly, the Office did not follow its own procedures, which require that it ascertain the date that the request was mailed.⁷ The case will, therefore, be remanded to the Office to further develop the case and secure further evidence with regard to the mailing date, pursuant to section 10.607(a). Items that the Office may wish to consider include a copy of any certified mail receipt or affidavits.

³ Current Office procedures indicate that, if the postmark is not available, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

⁴ *Nancy Marcano*, 50 ECAB 110 (1998).

⁵ *Richard L. Rhodes*, 50 ECAB 259 (1999).

⁶ *Annie Billingsley*, 50 ECAB 210 (1998).

⁷ See Federal (FECA) Procedure Manual, *supra* note 3.

CONCLUSION

The case will be remanded to the Office to secure the necessary evidence to make an appropriate finding on whether the reconsideration request was timely. After such further development as the Office deems necessary, it should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2003 is vacated and this case is remanded for further development pursuant to this decision.

Issued: March 17, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member