

FACTUAL HISTORY

This is the second appeal in this case. By decision dated May 14, 2004, the Board affirmed the May 21, 2002 and February 14, 2003 decisions of the Office finding that appellant failed to establish that he sustained an injury in the performance of duty on March 1, 2002 in his capacity as a cemetery caretaker.² The Board found that the degree of discrepancy between the statements of appellant, the employing establishment and witnesses, as well as the various medical reports, “cast serious doubt that the incident occurred at the time, place and in the manner alleged.” The history of the case as set forth in the prior Board decision is hereby incorporated by reference.

On November 21, 2006 appellant filed a request for reconsideration of the merits of his claim. He submitted a September 12, 2006 magnetic resonance imaging (MRI) scan of his right shoulder which diagnosed acromioclavicular joint arthritis, possible impingement syndrome, infraspinatus tendinopathy and mild bicipital fluid. Appellant also submitted a report from Dr. Peter C. Altner, a Board-certified orthopedic surgeon, who examined him on October 19, 2006. Dr. Altner reported that appellant gave a history of injury occurring in March 2002 while digging a grave. He stated that appellant had limitations in the active range of motion in his right shoulder but that a full examination was not possible because appellant claimed that there was too much pain. Dr. Altner stated that there were no visual signs of atrophy in appellant’s right arm. He noted that appellant had difficulty accepting the diagnosis indicated by the MRI scan and wanted to seek a second opinion.

By decision dated February 28, 2007, the Office denied appellant’s request for reconsideration on the grounds that it was untimely filed and did not present 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 Federal Employees’ Compensation Act.³ 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.⁴ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the final merit decision was in error.⁵ The Office’s implementing procedures

² *Id.* On March 22, 2002 appellant, then a 46-year-old cemetery caretaker, filed a traumatic injury claim, Form CA-1, alleging that he felt a sharp pain in his back while pulling a vault and shoveling dirt out of a grave on March 1, 2002. The employing establishment controverted the claim, stating that appellant had provided inconsistent information about the cause of his injury and failed to report it for three weeks. On May 21, 2002 the Office denied appellant’s claim on the grounds that appellant had failed to establish that an employment incident had occurred as alleged. On February 14, 2003 the Office hearing representative affirmed the May 21, 2002 decision.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); *Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth at section 10.607,⁶ if the claimant's application for review shows clear evidence of error. 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.⁷

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 in the most recent merit decision. To show clear evidence of error, the evidence submitted 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 decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error.⁸

ANALYSIS

On November 21, 2006 appellant filed a request for reconsideration of the merits of his claim. This request was untimely submitted to the Office, as it was filed more than one year after the most recent merit decision, which was issued by the Board on May 14, 2004.⁹ The issue is whether appellant demonstrated clear evidence of error on the part of the Office in denying his claim for compensation.

The Board finds that appellant has not established clear evidence of error. The Office found that appellant did not establish that he sustained an injury to his back on March 1, 2002. It found unexplained inconsistencies in the factual record which cast serious doubt on the validity of the claim. Moreover, the medical evidence was conflicting as to the time, place and the manner of injury. In the November 21, 2006 request for reconsideration, appellant did not submit the type of positive, precise and explicit new evidence which manifests on its face that the Office committed an error in denying his claim. He submitted a September 12, 2006 report of an MRI scan and October 19, 2006 report of Dr. Altner who diagnosed his current shoulder condition and repeated the medical history as initially reported. The Board finds that these reports do not resolve the discrepancies in the factual or medical evidence or establish that the Office's previous decisions were erroneous.

⁶ 20 C.F.R. § 10.607.

⁷ *Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

⁹ The one-year time limitation on reconsideration requests begins to run subsequent to any merit decisions on the issues, including any such decision of the Board. *Odell Thomas*, 42 ECAB 405 (1991); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

The Board, therefore, finds that appellant did not meet the burden of proof to demonstrate clear evidence of error on the part of the Office hearing representative in affirming the denial of his claim.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 28, 2007 is affirmed.

Issued: December 3, 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