



appellant a schedule award for an 11 percent impairment of his left upper extremity caused by his accepted back condition. On December 30, 2003 he underwent back surgery consisting of an anterior cervical discectomy and fusion.

By decision dated July 21, 2004, the Office terminated appellant's entitlement to wage-loss and schedule award compensation benefits effective July 23, 2004 on the grounds that he refused an offer of suitable work.<sup>1</sup>

On September 6, 2007 appellant requested reconsideration and submitted additional medical evidence.<sup>2</sup> In reports dated November 16, 2006 to May 14, 2007, Dr. Thomas J. Arkins, an attending neurosurgeon, provided findings on physical examination and described appellant's left arm discomfort and pain. He indicated that the cause of the left arm problems might be radiculopathy caused by his work-related herniated disc. In May 2007, appellant experienced an increase in left arm pain after performing some work at home above his head for a sustained period of time. Dr. Arkins indicated a possible aggravation of his employment-related back injury. Appellant submitted radiology reports dated November 16, 2006 to May 14, 2007 that described the condition of his cervical spine.

By decision dated November 29, 2007, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within one year of the last merit decision on July 21, 2004 and the medical evidence failed to show clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.<sup>6</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>7</sup>

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<sup>1</sup> The employing establishment offered appellant a modified letter carrier position on May 26, 2004.

<sup>2</sup> Appellant also submitted evidence previously of record.

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>5</sup> *Id.* at 768.

<sup>6</sup> 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB 247 (2005).

<sup>7</sup> *Thankamma Mathews*, *supra* note 4 at 769.

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.<sup>8</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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's decision.<sup>13</sup> 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.<sup>14</sup>

### ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated September 6, 2007. As this request was filed more than one year after the Office's July 21, 2004 merit decision, it is not timely.<sup>15</sup> The next issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

The Board finds that the Office properly denied appellant's untimely request for reconsideration on the grounds that the evidence failed to demonstrate clear evidence of error in the July 21, 2004 merit decision, terminating his compensation benefits on the grounds that he

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<sup>8</sup> 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>9</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>12</sup> *Leona N. Travis*, *supra* note 10.

<sup>13</sup> *Darletha Coleman*, *supra* note 11.

<sup>14</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>15</sup> Appellant asserts that he never received a copy of the July 21, 2004 termination decision. However, the record reflects that a copy of the decision was mailed to the correct address of record for appellant and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule." *Howard Y. Miyashiro*, 51 ECAB 253 (1999). As the record reflects that the Office mailed a copy of the July 21, 2004 decision to appellant's address of record, it is presumed that it arrived at his mailing address.

refused an offer of suitable work. In reports dated November 16, 2006 to May 14, 2007, Dr. Arkins described appellant's left arm discomfort and pain. In his May 2007 report, he noted that appellant had a significant increase in pain after performing some work at home above his head for a sustained period of time. Dr. Arkins indicated that the cause of the left arm problems might be radiculopathy caused by his work-related herniated disc. However, appellant's left arm condition in 2006 and 2007 is irrelevant to the July 21, 2004 merit decision issue of whether he was able to meet the physical requirements of the modified position offered to him on May 26, 2004. Dr. Arkins did not address the issue of whether appellant was medically capable of performing the modified job offered in May 2004. Therefore, his 2006 and 2007 reports do not raise a substantial question as to the correctness of the Office's July 21, 2004 termination decision and do not demonstrate clear evidence of error. The 2006 and 2007 radiology reports also did not address the issue of whether appellant refused an offer of suitable work in 2004. Therefore, these reports do not demonstrate clear evidence of error in the July 21, 2004 merit decision. For these reasons, the Office properly denied appellant's request for reconsideration.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 29, 2007 is affirmed.

Issued: July 11, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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