



## **FACTUAL HISTORY**

This case has previously been before the Board on appeal. On November 5, 1992 appellant, then a 41-year-old senior attorney, filed a traumatic injury alleging that he injured his neck and low back when he fell over backwards from a chair on August 3, 1992 in the performance of duty. The Office accepted his claim for a herniated cervical disc. Appellant returned to work on January 4, 1993. The Office authorized wage-loss compensation for intermittent periods of disability. Appellant underwent a lumbar fusion on September 1, 1993. The Office denied his claim for a schedule award on May 2, 1994 and February 1, 1995. Appellant requested review by the Board and by decision dated June 26, 1997,<sup>1</sup> the Board remanded his claim for additional development of the medical evidence. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

By decision dated March 12, 1998, the Office granted appellant a schedule award for five percent impairment of his left upper extremity. It amended this decision on October 29, 1998 to grant appellant a schedule award for an additional 25 percent impairment of his right upper extremity.

On April 22, 2005 appellant filed a recurrence of disability claim alleging that he lost time from work beginning March 16, 2005 due to his increasing arm, shoulder and hand pain due to his August 3, 1992 employment injury. He sought medical treatment on March 16, 2005 from Dr. Keith D. Osborn, a Board-certified orthopedic specialist, who diagnosed cervical radiculopathy. Appellant claimed 49 hours of sick leave from March 16 through April 15, 2005. He underwent a cervical myelogram on April 11, 2005.

In a letter dated September 28, 2005, the Office requested additional factual and medical evidence in support of appellant's claim for a recurrence of disability. It allowed 30 days for a response. By decision dated November 2, 2005, the Office denied appellant's claim for recurrence of disability finding that he failed to submit sufficient medical evidence.

Appellant requested reconsideration on November 7, 2005. In a report dated October 20, 2005, Dr. Osborn stated that appellant required surgery on May 13, 2005 due to his previous anterior cervical fusion. By decision dated November 29, 2005, the Office vacated the November 2, 2005 decision and stated that appellant's claim was open for medical treatment.

Appellant underwent a cervical magnetic resonance imaging scan on March 19, 2005. Dr. Osborn examined appellant on March 23 and April 18, 2005. Appellant filed a claim for compensation on March 7, 2006 requesting compensation for intermittent wage loss from March 21 through September 28, 2005. In support of his claim, he submitted a report dated May 18, 2007 from Dr. Osborn stating that due to "severe neck and arm pain" prior to the May 13, 2005 cervical fusion appellant was unable to work March 21, 22, 29 and 30; April 6, 7, 12, 15 and 27; and May 3, 4, 11 and 12, 2005.

In a letter dated October 17, 2007, the Office requested additional medical evidence in support of appellant's alleged dates of disability. Dr. Osborn submitted a report dated

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<sup>1</sup> Docket No. 95-2110 (issued June 26, 1997).

November 9, 2007 and stated that appellant missed intermittent days from work due to pain from March 16 to May 13, 2007. He stated that he did not examine appellant on each of the dates in question and that his condition was such that would typically result in missed time from work. On November 26, 2007 the Office authorized compensation payments for March 23, April 11 and 12 and May 9, 2005 and from May 13 to September 28, 2005.

By decision dated November 26, 2007, the Office denied appellant's claim for compensation on March 21, 22, 29 and 30, April 6, 7, 15 and 27 and May 3, 4, 11 and 12, 2005.

On December 19, 2007 appellant requested reconsideration of the Office's November 2, 2005 decision. He stated that he was submitting a report dated December 14, 2007 from Dr. Osborn.

By decision dated January 16, 2008, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely and did not contain clear evidence of error.

### **LEGAL PRECEDENT -- ISSUE 1**

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment, which caused the illness. The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>2</sup>

Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant filed a claim for compensation and requested wage-loss compensation for intermittent periods between March 21 through September 28, 2005. The Office authorized compensation payments for March 23, April 11 and 12 and May 9, 2005 and from May 13 to September 28, 2005. It denied the requested wage-loss compensation on March 21, 22, 29 and 30 April 6, 7, 15 and 27 and May 3, 4, 11 and 12, 2005.

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<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

The record does not contain evidence that appellant sought medical treatment on the dates denied by the Office. The medical evidence addressing these dates consists of Dr. Osborn's May 18, 2007 report diagnosing "severe neck and arm pain" prior to the May 13, 2005 cervical fusion and stating that due to this condition appellant was unable to work March 21, 22, 29 and 30, April 6, 7, 12, 15 and 27; May 3, 4, 11 and 12, 2005. On November 9, 2007 Dr. Osborn stated that appellant missed intermittent days from work due to pain from March 16 to May 13, 2007. He stated that he did not examine appellant on each of the dates in question and that his condition was such that would typically result in missed time from work. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>4</sup> Dr. Osborn did not provide a specific description of appellant's symptoms including objective findings, in support of his conclusion that appellant was unable to work on the dates in question. Instead he merely stated that appellant's condition could typically result in intermittent periods of disability prior to the surgery. Without any detailed medical opinion evidence explaining why appellant was intermittently unable to work on the dates, in question, appellant has not met his burden of proof and the Office properly denied his claim.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Federal Employees' Compensation Act<sup>5</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> It, through, 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 application for review is filed within one year of the date of that decision.<sup>8</sup> If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.<sup>9</sup> In the absence of this evidence, Office procedures state that date of the reconsideration request letter should be used to determine

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<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>7</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>8</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>9</sup> 20 C.F.R. §§ 10.607; 10.608(b).

timeliness.<sup>10</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>11</sup>

The Office's regulations require that an application for reconsideration must be submitted in writing<sup>12</sup> and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."<sup>13</sup> The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."<sup>14</sup>

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>15</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>16</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>17</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>18</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>19</sup> 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.<sup>20</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

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

<sup>11</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 6 at 769; *Jesus D. Sanchez*, *supra* note 7 at 967.

<sup>12</sup> 20 C.F.R. § 10.606.

<sup>13</sup> *Id.* at § 10.605.

<sup>14</sup> *Id.* at § 10.607(b).

<sup>15</sup> *Thankamma Mathews*, *supra* note 6 at 770.

<sup>16</sup> *Id.*

<sup>17</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>18</sup> *Jesus D. Sanchez*, *supra* note 7 at 968.

<sup>19</sup> *Leona N. Travis*, *supra* note 17.

<sup>20</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

a substantial question as to the correctness of the Office's decision.<sup>21</sup> The Board must make 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>22</sup>

### **ANALYSIS -- ISSUE 2**

Appellant requested reconsideration of the Office's November 2, 2005 decision in a letter dated December 19, 2007. This request was not made within a year of the November 29, 2005 merit decision, the decision in which the Office vacated the November 2, 2005 decision and stated that appellant's claim was open for medical treatment. Therefore, appellant's request for reconsideration was not timely. The Board notes that the November 29, 2005 decision was not adverse as the Office found that appellant had submitted sufficient medical evidence to establish that he required additional medical treatment as a result of his August 3, 1992 employment injury.

In his untimely request for reconsideration, appellant disagreed with the Office's findings regarding his periods of compensable disability. He stated that he was submitting a report dated December 14, 2007 from Dr. Osborn. The record does not contain this report. The arguments submitted by appellant are not relevant to the November 29, 2005 merit decision. The arguments cannot form a basis for reopening this decision for review of the merits and the Office properly denied appellant's request.

### **CONCLUSION**

The Board finds that appellant did not submit sufficient medical opinion evidence to establish any additional period of disability. The Board further finds that appellant's request for reconsideration was untimely and did not warrant review of the November 29, 2005 merit decision.

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<sup>21</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>22</sup> *See Gregory Griffin, supra* note 8 at 458, 466 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 16, 2008 and November 26, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 7, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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