

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANTHONY D'AMORE and U.S. POSTAL SERVICE,  
POST OFFICE, South Lake Tahoe, CA

*Docket No. 02-243; Submitted on the Record;  
Issued August 9, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

On June 16, 1998 appellant, then a 53-year-old rural letter carrier, was reaching behind the passenger seat of his vehicle to retrieve additional box holder flyers when he developed pain in his right shoulder. He underwent surgery on January 9, 1999 for repair of a torn right rotator cuff. The surgery also included diagnostic and surgical arthroscopy of the glenohumeral joint with partial synovectomy, subacromial bursectomy, partial acromionectomy, bicipital groove plasty and a Mumford-Gard procedure of the distal clavicle. The Office accepted appellant's claim for right shoulder strain and authorized the surgery. The Office paid compensation beginning January 9, 1999 for the hours that appellant did not work.

Appellant returned to work, four hours a day, two days a week on April 28, 1999. In a January 25, 2000 decision, the Office found that appellant's actual earnings as a modified rural letter carrier fairly and reasonably represented his wage-earning capacity. The Office terminated appellant's compensation because his actual wages met or exceeded the current wages of the job he held when injured.

Appellant subsequently took the test for a part-time flexible clerk position and was hired from the roster for a clerk position. However, the employing establishment concluded that appellant did not meet the expectations for the position and his employment was terminated on June 6, 2001.

On June 22, 2001 appellant filed a claim for compensation for the period beginning June 9, 2001. In an August 7, 2001 decision, the Office stated that compensation was not payable, based on the Office's January 25, 2000 decision. The Office indicated that if appellant felt that his wage loss was due to a new injury, he needed to complete an appropriate claim form for either a traumatic or occupational injury or for a recurrence of disability. In an August 15, 2001 letter, appellant requested reconsideration. He stated that, because he was unable to fully

recover from his shoulder injury, he transferred to a position as a part-time flexible clerk, effective April 21, 2001. Appellant indicated that his employment was terminated during the probationary period on the grounds that his performance was too poor. He commented that his shoulder condition was a major limitation on his ability to sort and case mail at the speed required of all clerks. Appellant indicated that he was also informed that he could not return to his duties as a modified rural letter carrier.

In an August 24, 2001 decision, the Office denied appellant's request as untimely and lacking in clear evidence of error in the Office's prior decision.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error to the extent that it was addressing the January 25, 2000 Office decision.

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>1</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in the implementing federal regulations<sup>2</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>3</sup> In *Leon D. Faidley, Jr.*,<sup>4</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The Office issued its last merit decision on January 25, 2000. As the Office did not receive the application for review until August 15, 2001, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review of the January 25, 2000 Office decision.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>5</sup>

In this case, appellant did not raise any dispute that the Office had erred in finding that he had no loss of wage-earning capacity as of January 25, 2000. He only argued that he

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.606.

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> 41 ECAB 104 (1989).

<sup>5</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

subsequently lost his employment at the employing establishment because his employment was terminated after a transfer to a new position and he was not allowed to return to his position as a rural letter carrier. Appellant did not file a claim for recurrence of disability but only sought compensation when the Office previously found that his disability had ceased. Appellant has not shown clear error in the Office's January 25, 2000 decision.

The record shows, however, that appellant filed a claim for a recurrence of disability on June 22, 2001, which the Office denied in an August 7, 2001 letter decision. In his August 15, 2001 reconsideration letter, appellant, in effect, was arguing that the loss of wage-earning capacity determination should be modified because of a material change in his medical condition. In this regard, appellant's request for reconsideration from the August 7, 2001 letter decision was timely and therefore should not have been reviewed on the basis that it was untimely. The case must therefore be remanded for consideration of appellant's timely request for reconsideration of the August 7, 2001 decision. After further development as it may find necessary, the Office should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated August 24, 2001 is hereby affirmed in part and remanded in part.

Dated, Washington, DC  
August 9, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member