

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES E. ARCHIE and U.S. POSTAL SERVICE,  
POST OFFICE, Denver, CO

*Docket No. 03-614; Submitted on the Record;  
Issued August 8, 2003*

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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 refused to reopen appellant's case for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On April 27, 2000 appellant, then a 46-year-old mailhandler, filed a claim alleging that he sustained neck, shoulder, upper extremity and back problems were due to employment factors.<sup>1</sup> Appellant claimed that his problems were caused or aggravated by the tasks required for "patching" mail, a duty which he had performed since 1987. He noted that he mostly sat in a chair and engaged in repetitive motions with his hands and upper extremities. Appellant indicated that he had to separate and sort mail, tear tape from mail and tape up mail in order to repair hundreds of articles of mail a work shift. He noted that, after handling the mail he was required to throw it into various containers. Appellant claimed that, since 1993, he sustained increased stress on his body because he had to perform his work in a chair, which was not ergonomically correct due to the fact that it was damaged. He noted that he also felt a sharp pain in his neck, shoulders and upper extremities when he bent down to pick up mail on April 25, 2000.<sup>2</sup>

By decision dated October 23, 2000, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a neck, shoulder,

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<sup>1</sup> Appellant's claim was originally filed as a traumatic injury claim concerning events at work on August 25, 2000. However, his claim was later expanded to constitute an occupational disease claim concerning events that occurred over an extended period of time. In the mid 1980s, appellant sustained employment-related Tailor's bunion and peroneural fibroma of the left foot with a consequential temporary aggravation of preexisting chronic low back pain. He began to work in a series of limited-duty positions around that time.

<sup>2</sup> In particular, appellant claimed that damage to the armrests of the chair and later the absence of the armrests altogether, prevented him from having sufficient support for his arms. The record contains documents in which the employing establishment indicated that the armrests of the chair needed to be repaired.

upper extremity or back condition in the performance of duty. By decision dated July 17, 2001 and finalized July 18, 2001, an Office hearing representative affirmed the Office's October 23, 2000 decision.<sup>3</sup> On July 22, 2002 appellant requested reconsideration and submitted additional medical evidence. By decision dated October 2, 2002, the Office denied appellant's request for merit review on the grounds that it was untimely and failed to show clear evidence of error in the Office's prior decisions.<sup>4</sup>

The Board finds that the Office properly refused to reopen appellant's case for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's October 2, 2002 decision denying appellant's request for a review on the merits of its July 18, 2001 decision. Because more than one year has elapsed between the issuance of the Office's July 18, 2001 decision and January 7, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 18, 2001 decision.<sup>5</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>6</sup> the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>8</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>9</sup>

In its October 2, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on July 18, 2001 and appellant's request for reconsideration was dated July 22, 2002, more than one year after July 18, 2001.

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<sup>3</sup> The Office hearing representative inadvertently framed the issue of the case as a traumatic injury claim, but actually analyzed the case as an occupational injury claim.

<sup>4</sup> It should be noted that the Office incorrectly asserted in this decision that appellant's claim was a traumatic injury claim concerning only the events of April 25, 2000.

<sup>5</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>6</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”<sup>10</sup> Office procedures provide that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>13</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>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</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 decision.<sup>17</sup>

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant’s application for review showed clear evidence of error, which would warrant reopening appellant’s case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office’s prior decision was in error.

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<sup>10</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein 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 (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case....”

<sup>12</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>13</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>14</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>15</sup> See *Leona N. Travis*, *supra* note 13.

<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, *supra* note 9.

Appellant submitted a June 11, 2002 report, in which Dr. Connor F. McBryde, an attending Board-certified orthopedic surgeon, indicated that he had treated him for right shoulder pain and possible impingement syndrome and degenerative process in 2000 and 2001. He stated: “To the extent that [appellant] lost his ergonomic chair as noted above and his need to do overhead lifting and lack of other inciting cause noted over almost two years of clinical follow-up, I would have to agree that [his] shoulder issues were aggravated by and likely the result of [his] work-related injury and should be considered as such.” Appellant also submitted a March 7, 2002 report, in which Dr. Wayne K. Gersoff, an attending Board-certified orthopedic surgeon, recommended right shoulder surgery (including debridement, subacromial decompression and rotator cuff repair), which was needed to alleviate the pain that occurred “as a result of repetitive use of his right arm at work.”

The Board finds that the evidence submitted by appellant, in support of his application for review, does not raise a substantial question as to the correctness of the Office’s decision and is insufficient to demonstrate clear evidence of error. While these reports are somewhat supportive of appellant’s claim, they are not of sufficient probative value to *prima facie* shift the weight of the evidence in his favor. Neither Dr. McBryde nor Dr. Gersoff provided any explanation of their opinion that appellant’s work duties caused or aggravated his claimed neck, shoulder, upper extremity and back problems.<sup>18</sup> Moreover, they did not provide any notable description of his work duties or detailed findings on examination or diagnostic testing, nor did either physician, particularly Dr. Gersoff, provide a complete and accurate factual and medical history of appellant’s claim.<sup>19</sup> Even if this evidence were interpreted to require additional development of the medical evidence, it does not contain sufficient evidentiary weight to clearly show that the Office erred in its prior decisions by denying appellant’s claim.

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<sup>18</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

<sup>19</sup> See *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history). Moreover, the evidence submitted by appellant in support of his reconsideration request was similar to the medical evidence that was previously submitted and considered by the Office. For example, he had previously submitted a November 3, 2000 report, in which Dr. James McGowan, an attending Board-certified orthopedic surgeon, had indicated that his right shoulder condition was work related. However he did not provide an explanation for this opinion.

The decision of the Office of Workers' Compensation Programs dated October 2, 2002 is affirmed.

Dated, Washington, DC  
August 8, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member