

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIE E. RUSHING, JR. and U.S. POSTAL SERVICE,  
POST OFFICE, Chicago, IL

*Docket No. 03-1468; Submitted on the Record;  
Issued August 7, 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 denied appellant's November 23, 2002 request for reconsideration.

On August 4, 1989 appellant, then a 37-year-old supervisor of mails, filed an occupational disease claim alleging that his back condition, which he first became aware of in March 1987, was a result of his federal employment. The Office accepted his claim for aggravation of preexisting spondylolisthesis at L5-S1 with L5 spondylosis and spina bifida occulta. He sustained recurrences of disability on February 15, 1988 and June 26, 1989. Appellant received compensation for wage loss.

On May 28 and October 30, 1996 appellant filed claims alleging that he sustained a recurrence of disability beginning April 23, 1996 as a result of his 1987 employment injury. In a decision dated August 12, 2000, the Office denied his claim of recurrence on the grounds that he submitted no reasoned medical opinion to support that the recurrence was causally related to the accepted employment injury. On September 6, 2001 an Office hearing representative affirmed the Office's decision.

In a letter dated November 23, 2002, appellant requested reconsideration. He stated that this was his second request for reconsideration. The first, appellant explained, was made in person at the district Office on September 6, 2002, at which time he submitted to the clerk in charge a detailed medical narrative. He attached a copy of the August 26, 2002 medical report, together with a treatment note dated August 24, 2002.

In his August 26, 2002 report, Dr. Samuel J. Chmell, appellant's orthopedic surgeon, stated that he treated appellant in 1996, following a low back injury that occurred at work. He stated that appellant had an underlying condition of spondylolisthesis at L5-S1, a condition that was aggravated, made symptomatic and worsened by injuries at work, including the accepted employment injury. Appellant sustained a subluxation and a disc protrusion at L5-S1 and then at

L4-5 due to the low back work injury. This caused radiculopathy to the lower extremities. Dr. Chmell reported:

“These opinions are based upon a reasonable degree of medical and orthopedic surgical certainty. As a result of [appellant’s] 1996 injury, he had to miss work from April 23 through September 6, 1996. He was fully incapacitated for duty over this period of time due to his work injury that is an aggravation of his spondylolisthesis. [Appellant] was under my care and treatment at that time.

“I think that the most appropriate treatment for [appellant’s] low back condition at this time would be surgery as I have described in my [enclosed] office note.”<sup>1</sup>

The record indicates that the Office received Dr. Chmell’s report and treatment note on September 3, 2002 and then again on September 6, 2002.

In a decision dated February 19, 2003, the Office denied appellant’s November 23, 2002 request for reconsideration as untimely and found that it failed to present clear evidence of error. The Office found that the medical evidence contained no rationalized opinion showing a material change in the underlying condition during the period claimed and no discussion of how clinical findings were medically connected to the work injury.

The Board finds that the Office properly denied appellant’s November 23, 2002 request for reconsideration.

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>2</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application

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<sup>1</sup> On November 22, 2002 the Office advised appellant that a second opinion was warranted on whether the requested surgery was medically necessary due to his accepted condition and that he would be receiving a separate notice advising when and where the examination would take place. Because the Office is currently developing the medical evidence on whether to authorize the requested surgery, the Board has no jurisdiction to review that issue. 20 C.F.R. § 501.2(c) (the Board’s jurisdiction is limited to deciding appeals from final decisions of the Office). The Board also has no jurisdiction to consider the articles referenced in appellant’s letter of appeal. *Id.* (the Board’s review of a case shall be limited to the evidence that was before the Office at the time of its final decision).

<sup>2</sup> 5 U.S.C. § 8128(a).

only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>3</sup>

Appellant's November 23, 2002 request for reconsideration is untimely. The most recent decision on the merits of his claim is the hearing representative's September 6, 2001 decision affirming the Office's denial of recurrence. Appellant had until September 6, 2002, therefore, to submit a timely request for reconsideration. Although he stated that he personally submitted Dr. Chmell's August 26, 2002 report and August 24, 2002 treatment note to the district Office on September 6, 2002 and although the record shows that the Office received this evidence on September 3 and 6, 2002, regulations specify that an application for reconsideration, including all supporting documents, must be in writing.<sup>4</sup> It appears from the record that appellant submitted no written request for reconsideration on September 3 or 6, 2002. The only written request that appears in the record is his November 23, 2002 request, which was filed outside the one-year limitation. The Office properly found that appellant's request was untimely. The question for determination is whether the request presents clear evidence of error in the denial of his claim of recurrence.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>6</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</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>9</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>10</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 must grant a merit review in the face of such evidence.<sup>11</sup>

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<sup>3</sup> 20 C.F.R. § 10.607 (1999).

<sup>4</sup> *Id.* at § 10.606.

<sup>5</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>8</sup> *See Leona N. Travis*, *supra* note 6.

<sup>9</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *See Gregory Griffin*, 41 ECAB 458, 466 (1990).

As the Office noted, in its February 19, 2003 decision, Dr. Chmell did not support total disability from April 23 through September 6, 1996 with clinical findings showing a material change in appellant's condition during that period, nor did he explain how those findings were connected medically to the accepted work injury. Although generally supportive of appellant's claim of recurrence, Dr. Chmell's August 26, 2002 report is of diminished probative value and for that reason fails to demonstrate clear evidence of error in the Office's decision. Further, Dr. Chmell stated that appellant was disabled from April 23 through September 6, 1996 "as a result of his 1996 injury." Appellant's employment injury dates to 1987, with accepted recurrences in 1988 and 1989. As the Office has accepted no employment injury in 1996, Dr. Chmell's reference thereto suggests that he did not base his opinion on an accurate background.<sup>12</sup>

Appellant's untimely request for reconsideration does not establish, on its face, that the decision to deny his claim of recurrence was erroneous. He is not entitled to a merit review of his claim.

The February 19, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
August 7, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>12</sup> See *Connie Johns*, 44 ECAB 560 (1993) (holding that a physician's opinion on causal relationship must be one of reasonable medical certainty supported with affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background). See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).