

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AFORTUNADO REYES and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

*Docket No. 02-2144; Submitted on the Record;
Issued February 3, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On March 10, 1999 appellant, then a 35-year-old letter carrier, filed a notice of occupational disease, alleging that on or before February 28, 1999 he developed a right shoulder condition as a result of his federal employment. He submitted a treatment note from a nurse practitioner indicating possible tendinitis of the right shoulder and a note from an occupational therapist stating that he was being treated for rotator cuff pathology.

By decision dated June 14, 1999, the Office denied appellant's claim as he did not meet the requirements for establishing that he sustained an injury as alleged.

In an undated letter received on September 17, 1999, appellant requested reconsideration and submitted a list of work restrictions, a copy of an August 15, 1999 magnetic resonance imaging scan of the right shoulder indicating a possible tear of the rotator tendon, an August 6, 1999 report from Dr. Ajay Parghi, a treatment note from Dr. David Gonzalez, a Board-certified orthopedic surgeon, letters regarding appellant's request for light duty, reports from Dr. Gonzalez dated August 30 and October 5, 1999 and progress notes.

In a merit decision dated November 1, 1999, the Office denied modification of the June 14, 1999 decision.

By letter dated June 7, 2001 appellant requested reconsideration and submitted new evidence.

By decision dated July 5, 2001, the Office denied appellant's request as untimely since it was not dated within one year of the Office's last merit decision and did not establish clear evidence of error.

In an undated letter received on June 14, 2002, appellant requested reconsideration and submitted additional evidence.

By decision dated August 7, 2002, the Office denied appellant's request as untimely since the request was not received within one year of the Office's last merit decision and did not establish clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board on this appeal is the August 7, 2002 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on November 1, 1999, denying appellant's claim for a right shoulder condition, and the filing of appellant's appeal on August 20, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.² 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).³

In this case, the Office properly found, by its August 7, 2002 decision, that the one-year time limit for filing a request for reconsideration of the Office's November 1, 1999 decision expired on November 1, 2000, and that the undated request for reconsideration received on June 14, 2002 was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that 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.⁴ Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰

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.¹¹ 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.¹²

In this case, appellant submitted an operative report dated January 19, 2001, reports from Dr. Michael C. Schwartz, a Board-certified orthopedic surgeon, dated January 4, 2002, and progress notes from Dr. Gonzalez dated from August 30, 1999 to August 21, 2001. This evidence does not raise a substantial question as to the correctness of the Office's November 1, 1999 decision. The evidence submitted discusses appellant's progress after the surgery and his continued pain, weakness and lack of range of motion in his right shoulder, yet does not show that the Office committed an error in denying appellant's claim for a right shoulder condition in 1999. The Board finds that the evidence submitted does not establish clear evidence of error.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Jesus D. Sanchez*, *supra* note 3.

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² *Gregory Griffin*, *supra* note 4.

The August 7, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 3, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member