



## **FACTUAL HISTORY**

On May 25, 1995 appellant, then a 51-year-old express mail expeditor, filed a claim alleging that he sustained injuries to his fingers and hands, neck, shoulders, low back, left hip and left leg as a result of his federal employment. The Office accepted his claim for low back strain and subsequently expanded its acceptance to include disc herniation at L4-5, discectomy and foraminotomy at L5-S1, cervical strain and aggravation of cervical spondylosis. Appellant received compensation for temporary total disability on the periodic rolls.

In a decision dated October 1, 1999, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work. The Office found that the weight of the medical evidence rested with the opinion of the referee medical specialist, who reported that appellant was partially disabled with restrictions and was able to work in the offered position. The Office addressed appellant's reasons for refusing the position and found that the evidence he submitted failed to overcome the weight of the report of the referee medical specialist.

In a letter dated January 4, 2002, appellant requested a schedule award. The Office advised appellant in a letter dated January 7, 2002 that the termination of his compensation under 5 U.S.C. § 8106(c) precluded his entitlement to further compensation, including a schedule award.

On August 18, 2002 appellant requested reconsideration of the Office's October 1, 1999 decision and its January 7, 2002 letter. He charged the Office with deliberate unlawfulness in concert with the employing establishment. Appellant alleged that the job was no longer available when the Office terminated his compensation. He alleged that the job offer would have violated the collective bargaining agreement. Appellant argued that the Office of Personnel Management had approved his application for disability retirement, something it could not have done if the employing establishment actually had a job available. He argued that the job offer failed to include the physical requirements of the offered position. Appellant argued that the Office did not consider his qualifications to perform such work. He argued the probative value of the medical evidence. Appellant argued that the Office erroneously terminated his compensation without establishing that his disability had ceased or was no longer related to the employment, as Board precedent required. He argued that the referee medical specialist did not have a proper factual background. Appellant argued that his refusal of the offered position was reasonable and justified. He argued that his physician had submitted a well-reasoned report within the 30-day period provided. Appellant argued that the Office violated federal regulations and the compensation statute, as proper medical evidence showed him to be totally disabled as of October 1, 1999. He further argued his entitlement to a schedule award. Appellant submitted exhibits to support his arguments.

In a decision dated November 13, 2002, the Office denied a review of the merits of appellant's claim. The Office found that appellant's August 18, 2002 request for reconsideration was untimely and failed to present clear evidence of error in the Office's October 1, 1999 decision.

On April 23, 2003 the Board issued an order remanding the case, finding that appellant's August 15, 2002 request for reconsideration was timely as to the Office's January 7, 2002 decision. The Board remanded the case to the Office for application of the appropriate standard of review.

In a decision dated August 6, 2003, the Office denied a review of the merits of appellant's claim. The Office found that appellant's August 18, 2002 request for reconsideration was untimely and failed to present clear evidence of error in the Office's October 1, 1999 decision. The Office noted that its January 7, 2002 letter was not a formal decision and provided appellant with no appeal rights.

### **LEGAL PRECEDENT**

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>1</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 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>2</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>3</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>4</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>5</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>6</sup> This entails a limited review by the Office of how the

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.607 (1999).

<sup>3</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>4</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>5</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>6</sup> See *Travis*, *supra* note 4.

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>7</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>8</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 abused its discretion in denying a merit review in the face of such evidence.<sup>9</sup>

### ANALYSIS

The Office's January 7, 2002 letter is not a final decision of the Office. Section 10.126 of the Office's regulations provides that a decision of the Office shall contain findings of fact and a statement of reasons. Further, a decision is accompanied by information about the claimant's appeal rights.<sup>10</sup> The Office's January 7, 2002 letter was merely informational in nature, a reply to appellant's January 4, 2002 request for a schedule award. The Office explained as a matter of fact that the scope of the penalty provision of 5 U.S.C. § 8106(c). The January 7, 2002 letter was not a decision and afforded appellant no appeal rights. The Board's April 23, 2003 order to the contrary was in error.

The most recent decision on the merits of appellant's claim is the Office's October 1, 1999 decision terminating his compensation pursuant to 5 U.S.C. § 8106(c). As appellant's August 18, 2002 request for reconsideration comes more than one year after this decision, his request is untimely. The question for determination, therefore, is whether this request for reconsideration presents clear evidence of error in the Office's October 1, 1999 decision.

In support of his request for reconsideration, appellant argued that the Office failed to appropriately determine that the position offered by the employing establishment was suitable work. Specifically, appellant argued that the job offer required him to perform supervisory duties, that the job offer failed to include the physical requirements, that the reports of the impartial medical examiner, Dr. John D. Warbritton, a Board-certified orthopedic surgeon, were not sufficiently rationalized to constitute the weight of the medical opinion evidence, and that the August 19, 1999 report of his attending physician, Dr. James B. Reynolds, was entitled to the weight of the medical opinion evidence and that the reports of Dr. Clarence Boyd, a Board-certified orthopedic surgeon and second opinion physician, were not sufficient to create a conflict with the reports of Dr. Reynolds. Appellant also resubmitted several documents already included in the record and submitted a series of treatment notes from Dr. Reynolds.

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<sup>7</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>8</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

<sup>10</sup> 20 C.F.R. § 10.126 (1999).

Appellant's arguments are insufficient to establish clear evidence of error on the part of the Office. Appellant did not describe specific insufficiencies in the Office's physician's examination or reports. Instead, he disagreed with the conclusions and asserted that the opinions of his physician should be entitled to the weight of the medical evidence. Section 8123(a) of the Act,<sup>11</sup> provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>12</sup> The evidence in the record establishes that the Office followed proper procedures in determining that there was a conflict of medical opinion and in relying on the opinion of the impartial medical examiner to resolve the conflict. As appellant has failed to establish any specific deficiencies in either the report of the second opinion physician or in the specialist, his arguments lack a reasonable color of validity and are insufficient to establish clear evidence of error on the part of the Office.

Appellant has also argued that the offered position was not suitable as it did not specify the work requirements and as he was to act in a supervisory capacity. The position offered by the employing establishment specifically indicates that appellant was required to sit up to six hours a day, to walk up to two hours a day, stand for no more than four hours a day, and provided additional requirements regarding appellant's lifting, twisting, kneeling and climbing. As the offered position provides the physical duties required, appellant's argument does not establish clear evidence of error. This argument does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.

Appellant's assertion that the limited-duty position required him to perform supervisory function is disingenuous. The evidence in the record establishes that the limited-duty position is essentially appellant's date-of-injury position with the required physical restrictions. As appellant was not forbidden from expediting express mail prior to his injury, there is no reasonable color of validity to his argument that his injury limits his discretion in assisting fellow employees in expediting express mail.

In regard to the additional medical evidence submitted by appellant regarding his continued medical treatment, 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's decision. The medical evidence submitted was not of such a clear and convincing nature to create a conflict and therefore could not be sufficient to establish clear evidence of error.

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<sup>11</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>12</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

**CONCLUSION**

The Board finds that the Office properly denied appellant's August 18, 2002 request for reconsideration of the merits of his claim. The request was untimely and failed to present clear evidence of error in the Office's October 1, 1999 decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member