

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES FULLER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 04-2283
Issued: December 21, 2005**

Appearances:
Joyce Fuller, for the appellant
James Gordon, Esq., for the Director

Oral Argument November 22, 2005

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2004 appellant filed a timely appeal of an August 27, 2004 decision of an Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. §§ 501.3(d)(2), the Board's jurisdiction is limited to Office final decisions issued within one year of the filing of the appeal. The Board has jurisdiction over the August 27, 2004 decision but not the underlying merits of the case.

ISSUE

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

FACTUAL HISTORY

On May 16, 2000 appellant, then a 36-year-old mail processor, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained a

right shoulder injury as a result of repetitive motion. Appellant became aware of the condition on May 3, 2000. On July 13, 2000 the Office accepted a right shoulder strain.¹

On August 10, 2000 appellant filed a Form CA-1 alleging that on August 9, 2000 he sustained a right shoulder injury when a coworker tapped on his shoulder. In a form report (Form CA-20) dated August 15, 2000, Dr. John Trowbridge, an orthopedic surgeon, provided a history that appellant was struck on the shoulder by a coworker and he diagnosed acute rotator cuff sprain. Dr. Trowbridge checked a box “yes” that the condition was employment related.

By decision dated November 22, 2000, the Office denied the claim for compensation. The Office found that the medical evidence did not provide an accurate history of the August 9, 2000 incident and the physician did not explain how the diagnosed rotator cuff tear was caused by a tap on the shoulder. Appellant requested a review of the written record by letter received on December 4, 2000. He noted that the medical evidence did not contain a diagnosis of rotator cuff tear.

In a decision dated May 21, 2001, an Office hearing representative affirmed the November 22, 2000 decision. The hearing representative found that the medical evidence was not sufficient to establish an injury caused by the August 9, 2000 incident. By letter dated September 7, 2001, appellant requested reconsideration of his claim. The medical evidence submitted included a June 6, 2001 report from Dr. Trowbridge, who diagnosed a rotator cuff syndrome.

In a decision dated April 22, 2002, the Office reviewed the case on its merits and denied modification. Appellant requested reconsideration and the Office found in an October 1, 2002 report that the request for reconsideration was repetitious and not sufficient to warrant merit review of the claim

On January 21, 2004 appellant again requested reconsideration of his claim. Appellant argued that there were errors in the development of his claim, such as: his injury was a consequential injury and was a recurrence of disability, the Office should have further developed the record and provided a complete statement of accepted facts and that the Office improperly referred to a rotator cuff tear.

In a decision dated August 27, 2004, the Office determined that appellant’s request for reconsideration was untimely. The Office denied the request for reconsideration on the grounds that it did not show clear evidence of error by the Office.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.² The

¹ A statement of accepted facts dated July 8, 2004 indicated that the accepted injuries with respect to the right shoulder also included sprain/strain of the acromioclavicular joint.

² 20 C.F.R. § 10.607(a).

Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees Compensation Act.³

The Office, however, may not deny an application for review solely on the grounds 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.⁴ Office regulations and procedure 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.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 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

³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides: "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." *Id.* at Chapter 2.1602.3c.

⁶ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ *See Leona N. Travis*, *supra* note 7.

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

ANALYSIS

The underlying issue in the case is a medical in nature -- whether the medical evidence established an injury causally related to the August 9, 2000 tapping on the right shoulder incident. The Office found that the medical evidence did not contain a reasoned medical opinion based on a complete background on the issue of casual relationship. Appellant did not submit new medical evidence establishing error by the Office. As noted, the evidence would have to be of such probative value that it *prima facie* shifts the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. Although appellant argued that the claims for injury on May 3 and August 9, 2000 should have been administratively combined at an earlier date, he did not cite to any medical evidence in either claim that was of such probative value that it establishes clear evidence of error in the Office's denial of his claim.

On reconsideration appellant argued that the Office had committed errors regarding his claim. He indicated, for example, that he believed the claim should be considered a consequential injury or a recurrence of disability. The claim, however, was that a new employment incident on August 9, 2000 caused an injury to his shoulder. Since there was an intervening employment incident, this is a claim for a new injury.¹² Appellant filed a claim for a new injury and the Office properly developed the claim as a claim for a new injury.

According to appellant, the Office erred in referring to a rotator cuff tear in its November 22, 2000 and April 22, 2002 decisions. Appellant's physicians did not diagnose a rotator cuff tear, but rather a rotator cuff sprain. The denial of the claim, however, was based on the lack of probative medical evidence establishing any right shoulder condition causally related to the August 9, 2000 employment incident. The Office hearing representative, for example, did not discuss a rotator cuff tear in the May 21, 2001 decision. Any reference to a rotator cuff tear does not establish clear evidence of error in the denial of the claim.

With respect to appellant allegations of error regarding the failure to prepare a statement of accepted facts and further develop the record, it is appellant's burden of proof to submit medical evidence establishing a diagnosed condition causally related to employment.¹³ Further, development of the record may be required when a claimant has submitted probative evidence on the relevant issue. In this case, the Office found that the medical evidence was of diminished probative value to the issue presented. The Board finds that appellant did not establish clear evidence of error in this regard.

The Board has considered the evidence of record and the arguments raised on reconsideration and finds that appellant did not establish clear evidence of error in the denial of the claim. Accordingly, the Office properly denied appellant's untimely request for reconsideration.

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997) (even if the same part of the body previously injured is involved, a new employment incident or renewed exposure to work factors requires the filing of an appropriate new claim).

¹³ See *Gloria J. McPherson*, 51 ECAB 441, 446 (2000).

CONCLUSION

The Board finds that appellant's reconsideration request was untimely and failed to show clear evidence of error by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2004 is affirmed.

Issued: December 21, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board