



and forefinger while attempting to start 11 employing establishment vehicles in subzero weather. The Office accepted his claim for frostbite of the right fingers.

On April 18, 1985 appellant filed a claim for a schedule award (Form CA-7). After further development of the medical record, the Office issued a September 25, 1995 decision granting appellant a schedule award for an eight percent permanent impairment of his right hand. By letter dated June 30, 1996, appellant requested reconsideration.

In an October 3, 1996 decision, the Office denied appellant's request for modification based on a merit review of his claim. The Office found that the medical evidence submitted by appellant in support of his request for reconsideration was insufficient to establish that he was entitled to more than an eight percent permanent impairment for which he had already received a schedule award. By letter dated June 9, 1997, appellant requested reconsideration.

The Office issued a decision on July 11, 1997 granting appellant a schedule award for an additional 27 percent permanent impairment of the right hand based on the opinion of an Office medical adviser. Appellant requested reconsideration by letter dated December 9, 1999 and submitted medical evidence in support thereof.

In a December 21, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. On August 28, 2000 appellant filed a Form CA-7 for an additional schedule award for his right hand.

By decision dated June 3, 2002, the Office denied appellant's claim for an additional schedule award because he failed to establish that his diagnosed conditions of right cervical polyradiculopathy, bilateral ulnar nerve neuropathy, right carpal tunnel syndrome and tendinitis of the right thumb and three fingers were causally related to the accepted January 19, 1994 employment injury.

In a letter dated June 27, 2004, appellant requested reconsideration. In this letter he requested that the Office approve the request of Dr. Robert W. Piston, his attending Board-certified orthopedic, to perform surgery for his right carpal tunnel syndrome. He expressed fear of further damage or injury to his right hand. Appellant stated that he had difficulty with picking up small objects due to the loss of feeling and that he had to use his left hand. He also stated that he suffered loss of strength in his right hand and that he had to use both hands. Appellant indicated that, since his January 1994 employment injury, he could no longer work as a part-time professional bass guitar player since he could not feel the strings. He further indicated that he had missed only one day of work since his employment-related injury and that he continued to perform his work duties which caused him stress and frustration since he experienced difficulty in performing them.

Appellant's request for reconsideration was accompanied by a duplicate copy of the Office's June 3, 2002 decision. He submitted Dr. Piston's June 10, 2004 medical report in which he indicated that he had been treating appellant since November 17, 1994. Dr. Piston provided a history of appellant's January 19, 1994 employment injury and medical treatment. He noted that the May 22, 2003 electromyogram (EMG) study performed by Dr. Roberto O. Salcedo, a Board-

certified neurologist, demonstrated evidence of bilateral carpal tunnel syndrome that was severe on the right and mild on the left and right sensory motor ulnar neuropathy appearing to be across the wrist. Dr. Piston stated that the progression of change was directly related to appellant's accepted work-related injury. He found that appellant's resulting employment-related frostbite, numbness, tingling, Raynaud's phenomenon and altered use of the hand created an environment that caused severe and profound carpal tunnel syndrome as well as ulnar nerve neuropathy and Guyon's Canal at the wrist. Dr. Piston stated that appellant had not improved and the objective data showed progression. Appellant also submitted Dr. Piston's May 1, 2001 duty status report in which he provided appellant's physical restrictions and diagnosed employment-related frostbite to the right hand. He also provided other disabling conditions which included double crush syndrome with carpal tunnel syndrome, cervical and ulnar neuropathy and right thumb tendinitis.

Following the receipt of appellant's request for reconsideration and supporting documents, the Office received a May 21, 2004 report from Timothy W. Sypolt, a registered occupational therapist, in which he provided a history that appellant suffered from frostbite in 1993 while working outside. He noted appellant's medical treatment and complaints of pain and social and functional limitations. Mr. Sypolt reported his findings on physical and neurological examination and stated that appellant had severe sensory deficits of the right hand. He also stated that there appeared to be a decrease in his sensation as compared to approximately one year ago. Mr. Sypolt opined that appellant appeared to continue to be at risk for injury secondary to the profound sensory deficit in his right hand and noted that his right hand strength was extremely limited relative to his left hand. The Office also received Dr. Piston's June 19, 2004 report which indicated that appellant was status postoperative carpal tunnel and that he had ulnar nerve neuropathy based on a history of frostbite and a duplicate copy of his June 10, 2004 report.

By decision dated July 26, 2004, the Office denied appellant's request for reconsideration because it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>3</sup>

Section 10.607(a) of the Office's implementing regulation states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of

---

<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> 20 C.F.R. § 10.607(a).

error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must be 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 abused its discretion in denying merit review in the face of such evidence.<sup>11</sup>

### ANALYSIS

In this case, the Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>12</sup>

The last merit decision in this case was issued by the Office on June 3, 2002 which found that appellant was not entitled to more than a 35 percent permanent impairment of his right hand for which he already received a schedule award. As his June 27, 2004 letter requesting

---

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>6</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>7</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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

<sup>10</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>12</sup> *Larry L. Litton*, 44 ECAB 243 (1992).

reconsideration was made more than one year after the Office's June 3, 2002 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that he did not sustain more than a 35 percent permanent impairment of his right hand for which he already received a schedule award. The Board notes that this issue is medical in nature.

Dr. Piston's reports provided several diagnoses relating to appellant's right hand which included frostbite, numbness, tingling, Raynaud's phenomenon and altered use of the hand resulting in carpal tunnel syndrome, ulnar nerve neuropathy and Guyon's Canal at the wrist. His reports also provided a diagnosis of double crush syndrome with carpal tunnel syndrome, cervical nerve neuropathy and right thumb tendinitis. Dr. Piston's reports, however, are not sufficient to shift the weight of the evidence in favor of the claim as they did not specifically address whether appellant sustained any additional permanent impairment of the right hand due to the diagnosed conditions.

Further, the report of Mr. Sypolt, a registered occupational therapist, which found that appellant had severe sensory deficits of the right hand and that he appeared to be at risk for injury secondary to the profound sensory deficit in his right hand is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. An occupational therapist is not considered to be a "physician" under the Act and, therefore, Mr. Sypolt is not competent to give a medical opinion.<sup>13</sup>

The Board, therefore, finds that the medical records submitted by appellant do not raise a substantial question as to the correctness of the Office's determination that he was not entitled to a schedule award for more than a 35 percent permanent impairment of his right hand for which he already received a schedule award.

Appellant's request for approval of Dr. Piston's surgery request, his fear of future injury and difficulty with performing certain work and personal activities are not relevant to the issue in this case whether the medical evidence establishes that he has more than a 35 percent permanent impairment of the right hand for which he already received a schedule award.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

---

<sup>13</sup> 5 U.S.C. § 8101(2); see generally *Thomas R. Horsfall*, 48 ECAB 180 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 15, March 10 and 29, 2004 and November 18, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 6, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member