

returned to work on November 28, 2002 in a light-duty position. The Office accepted the claim for a right shoulder contusion.

On June 20, 2003 appellant filed a recurrence of disability (Form CA-2a) alleging that he was disabled as of May 5, 2003. Appellant indicated that the date of the recurrence was March 22, 2003. He stated that the recurrence of disability happened on that date “from reaching and straining the already injured area.” The Office determined that appellant was claiming a new injury and created a new case file.¹ Appellant underwent surgery on July 25, 2003 for a C3-4 herniated disc.

In a report dated September 16, 2003, Dr. Tim Nice, an orthopedic surgeon, provided a history of the November 24, 2002 injury and opined that it had caused numerous complications. He stated that the injury had aggravated a neck condition, a mild thoracic outlet injury, and bilateral carpal and cubital tunnel syndrome.

By decision dated October 21, 2003, the Office denied the claim for compensation. The Office found that the medical evidence did not discuss new work factors on March 22, 2003 and did not contain a reasoned medical opinion on causal relationship between a condition and the work factors.

In a report dated October 27, 2003, Dr. Nice reviewed his treatment of appellant and stated that the work injury of November 24, 2002 was misdiagnosed as a contusion. Dr. Nice opined that the correct diagnosis was C3-4 stenosis, and aggravation of carpal tunnel, cubital tunnel and left trigger thumb, as well as mild thoracic outlet syndrome. Appellant underwent right ulnar surgery on December 16, 2003.

By decision dated January 26, 2004, the Office reviewed the case on its merits and denied modification of the October 21, 2003 decision. The Office found that the medical evidence was insufficient to warrant modification.

The Office further developed the record with respect to whether appellant continued to have residuals of the accepted right shoulder contusion and referred appellant to Dr. Sheldon Kaffen, an orthopedic surgeon. In a May 13, 2004 report, Dr. Kaffen opined that the employment injury had aggravated preexisting degenerative disc disease and arthritis of the cervical spine. He opined that appellant could work with restrictions. The Office accepted aggravation of degenerative disc disease and aggravation of cervical arthritis. By letter dated June 15, 2004, the Office also requested that Dr. Nice submit a report regarding disability commencing May 5, 2003.

In a report dated August 10, 2004, Dr. Nice opined that appellant was unable to use his right upper extremity and was disabled for work. He stated that appellant had a neurologic deficit in his right upper extremity. In a letter dated January 20, 2005, appellant’s representative indicated that she was submitting evidence in response to the June 15, 2004 request for

¹ The record contains a memorandum stating that the case files were administratively doubled, with the original case file as the master. The Board notes that the record sent to the Board contains two separate files and both files were reviewed for this decision.

additional medical evidence and appellant hoped that with the submission of such evidence he would not need an oral hearing. Appellant submitted a report dated January 4, 2005 in which Dr. Nice stated that appellant was taken out of work on May 5, 2003 with continuing pain in the right shoulder, and he did not feel comfortable releasing appellant back to work because of ongoing weakness in the right upper extremity. He noted that appellant underwent a discectomy and fusion at C3-4 on July 25, 2003.

In a letter dated January 21, 2005, and postmarked November 22, 2005, appellant requested reconsideration. He resubmitted the August 10, 2004 and January 4, 2005 reports from Dr. Nice, and the July 25, 2003 surgical report.

By decision dated December 12, 2005, the Office determined that appellant's request for reconsideration was untimely. The Office further determined that the request for reconsideration 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 reconsideration within one year of the date of that decision.² The 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 reconsideration solely on the grounds that the application was not timely filed. When an application for reconsideration 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 reconsideration 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

² 20 C.F.R. § 10.607(a).

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).

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

ANALYSIS

The application for reconsideration in this case was dated January 21, 2005. The date of the application, however, is determined by the postmark of the application for reconsideration if the Office retains evidence of the postmark. The postmark of the January 21, 2005 letter was dated November 22, 2005, and it was stamped as received by the Office on December 1, 2005. Although appellant suggests on appeal that the Office misplaced the letter, there is no evidence to support an earlier mailing. The record does include a January 20, 2005 letter from appellant's representative, but the letter did not request reconsideration or otherwise indicate it was an attempt to exercise the appeal right of reconsideration of the January 26, 2004 merit decision.

The date of the application for reconsideration is therefore the postmark date, November 22, 2005. Since this is more than one year after the last merit decision on January 26, 2004, it is untimely. The issue then is whether the evidence establishes clear evidence of error by the Office.

As noted above, the clear evidence of error standard is a difficult standard requiring the evidence be sufficient to *prima facie* shift the weight of the evidence to appellant. The underlying merit issue was a medical issue of whether appellant had established an aggravation of his condition by employment factors on or about March 22, 2003.¹² Appellant resubmitted medical reports from Dr. Nice and July 2003 surgery reports, which do not address the relevant issue. The application for reconsideration and the accompanying evidence do not demonstrate clear evidence of error in this case. Accordingly, the Office properly denied the application for reconsideration.

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.

¹² Appellant argued on appeal that the Office should not have developed the recurrence of disability claim as a claim for a new injury. This argument may be raised with the Office and a decision with regard to a recurrence of disability requested, but the underlying merit decisions in this case are based on a claim for a new injury.

CONCLUSION

Appellant's November 22, 2005 application for reconsideration was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 12, 2005 is affirmed.

Issued: July 6, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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