

treatment) dated August 24, 2003 from an emergency room physician provided a history that appellant fell while pushing a meat cart and diagnosed bilateral shoulder pain. In a letter dated November 5, 2003, the Office advised appellant that he must submit additional factual and medical evidence to establish the claim.

By decision dated December 10, 2003, the Office denied the claim for compensation. The Office found that appellant had not established an incident as alleged or submitted sufficient medical evidence to establish an injury in the performance of duty.

On January 16, 2004 appellant submitted a notice of recurrence of disability (Form CA-2a). In a narrative statement, he provided additional details regarding the August 24, 2003 employment incident. Appellant stated that his foot went into an open drain while backing up with a meat cart and he fell and twisted.

By letter dated April 1, 2004, the Office advised appellant that he needed to pursue his appeal rights from the December 10, 2003 decision before a claim for a recurrence of disability could be considered. On September 7, 2004 he submitted additional medical evidence. In a report dated September 8, 2003, Dr. George Companioni, an orthopedic surgeon, diagnosed rotator cuff strain/tendinitis.

On November 1, 2004 appellant submitted an August 18, 2004 report from Dr. Steven Field, an orthopedic surgeon. He provided a history of an August 24, 2003 incident and noted an automobile accident in June 2002, a fall at work in 2002, and a recent accident of August 2003 that caused problems with the right knee and ankle. Dr. Field provided results on examination and diagnosed cervical spondylosis with bulging discs C5-6, bilateral shoulder impingement syndrome, L4-5 left disc disease, status post anterior cruciate ligament repair and multiple lipoma removals. He opined that appellant had a 25 percent impairment rating under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On November 16, 2004 the Office received an October 26, 2004 request for a review of the written record. By decision dated November 22, 2004, the Office denied the request for a review of the written record on the grounds that it was untimely and appellant could pursue reconsideration. Appellant filed a appeal with the Board on March 17, 2005, stating that he wanted the Board to review a March 10, 2005 decision. The appeal was dismissed by order dated August 10, 2005 as the Board found there was no Office decision dated March 10, 2005.¹

Appellant requested reconsideration of his claim in a letter received by the Office on October 19, 2005. The date of the letter was reported as October 30, 2005 and the date of the decision was August 10, 2005. He submitted a brief report from Dr. Field dated October 13, 2005. Dr. Field noted that he had diagnosed cervical spondylosis, shoulder impingement syndrome and lumbar disc disease. He stated, "I believe that while he had preexisting injuries related to his skeletal system, the job injury of August 24, 2003 aggravated these preexisting injuries relegating him to the disabled status that he now has."

¹ Docket No. 05-955 (issued August 10, 2005).

By decision dated November 18, 2005, the Office determined that the application for reconsideration was untimely. The Office further determined that the evidence did not show clear evidence of error by the Office in the December 10, 2003 decision.

Appellant again requested reconsideration in an undated letter received by the Office on January 24, 2006. He submitted a December 15, 2005 report from Dr. Devang Padalia with a diagnosis that included C5-6 disc herniation with bilateral upper extremity radiculopathy. The report is unsigned and indicated that it was not reviewed by Dr. Padalia. Appellant also resubmitted the reports from Dr. Field.

By decision dated February 8, 2006, 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 manifest on its face that the Office committed an error.⁷ Evidence which does not raise a

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).

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

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

Although appellant submitted additional evidence at intermittent times following the December 10, 2003 merit decision denying his claim, he did not request reconsideration of his claim until October 19, 2005. There is no evidence in the record of any prior written submissions that would constitute an application for reconsideration pursuant to the Office's regulations.¹² Since the requests for reconsideration were not submitted within one year of the December 10, 2003 decision, they are untimely.

Appellant did submit additional factual detail regarding the August 24, 2003 employment incident. In order to establish clear evidence of error, however, he must establish not only that an incident occurred as alleged, but submit medical evidence that is of such probative value that it *prima facie* shifts the weight of the evidence to appellant. Dr. Field provided several diagnoses, including cervical spondylosis, shoulder impingement syndrome and lumbar disc disease. His October 13, 2005 report provided a brief opinion that a fall at work on August 24, 2003 aggravated appellant's condition, but this is of limited probative value without additional detail and medical reasoning. A medical opinion in this case must clearly explain how the employment incident aggravated a specific condition, and discuss the nature, extent and duration of aggravation based on the medical evidence. The Board finds that the medical evidence is not of sufficient probative value in this case to establish clear evidence of error in the denial of the claim. Accordingly, the Office properly denied the application for reconsideration.

CONCLUSION

Appellant's requests for reconsideration were untimely and failed to show clear evidence of error.

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 See 20 C.F.R. §§ 10.605 and 10.606.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 8, 2006 and November 18, 2005 are affirmed.

Issued: July 27, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board