



fault in the creation of the overpayment.<sup>1</sup> The Board found that the Office of Personnel Management (OPM), not the Office, made the overpayment. The Board found that it was up to OPM to recoup the overpayment made pursuant to the retirement annuity. The findings of fact and conclusions of law are hereby incorporated by reference.<sup>2</sup>

By letter dated June 12, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. A. Creig MacArthur, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a report dated February 2, 2004, Dr. MacArthur indicated that he reviewed the records and performed a physical examination of appellant. He reported a normal examination of appellant's shoulder based upon range of motion and review of an x-ray interpretation. Dr. MacArthur also reported that there was no muscle wasting. He opined that there "may be a slight rotator cuff tear" based upon appellant's normal range of shoulder motion and lack of crepitation and "no apparent positive impingement signs." Dr. MacArthur found that appellant had no permanent impairment as a result of his accepted employment injury and was capable of working. He concluded that appellant no longer had any residuals due to his November 10, 1997 employment injury.

On February 19, 2004 the Office issued a notice of proposed termination of medical benefits on the grounds that Dr. MacArthur's February 2, 2004 report established no continuing residuals due to the accepted employment injury.

By decision dated March 24, 2004, the Office terminated appellant's medical benefits effective that date.

In letters dated November 22, 2004<sup>3</sup> and February 16, 2005,<sup>4</sup> appellant requested reconsideration of the termination of his benefits.

In an order dated April 1, 2005, the Board granted appellant's request to dismiss his appeal as he wished to seek reconsideration before the Office.<sup>5</sup>

On May 9, 2005 the Office received additional medical evidence from appellant.

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<sup>1</sup> 54 ECAB 586 (2003). This decision is not contained in the record.

<sup>2</sup> Appellant, then a 56-year-old motor vehicle operator, filed an occupational disease claim on December 3, 1997 alleging his right shoulder tendinitis was employment related. The Office accepted the claim for right shoulder cuff tear and authorized a February 25, 1998 surgery to repair the rotator cuff. Appellant retired from the employing establishment and began receiving a retirement annuity from OPM in June 1998. Appellant elected to receive benefits under Federal Employees' Compensation Act on February 17, 1999 and February 2, 2000. The Office combined appellant's file number 12-0149353, which accepted the condition of bilateral overuse syndrome of the hands with the current file number 12-0172927, as the master file number. Appellant was placed on the periodic rolls for temporary total disability by letter dated February 10, 1999.

<sup>3</sup> This letter was received by the Office on February 8, 2005.

<sup>4</sup> This letter was received by the Office on February 4, 2005.

<sup>5</sup> Appellant filed his request for an appeal before the Board on January 18, 2005.

In a letter dated May 12, 2005, the Office acknowledged appellant's November 24, 2004 letter requesting reconsideration of the termination of his benefits.

In a nonmerit decision dated August 26, 2005, the Office determined that appellant's May 9, 2005 request for reconsideration was untimely and failed to show clear evidence of error.

### **LEGAL PRECEDENT**

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.<sup>6</sup> The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>7</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>8</sup> The Office procedures state 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, if the claimant's application for review shows clear evidence of error on the part of the Office.<sup>9</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.<sup>12</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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

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<sup>6</sup> 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

<sup>7</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>8</sup> *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>9</sup> *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

<sup>10</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *See Leon J. Modrowski*, *supra* note 8; *Jesus D. Sanchez*, *supra* note 8.

<sup>14</sup> *See Leona N. Travis*, *supra* note 12.

and whether the new evidence demonstrates clear error on the part of the Office.<sup>15</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>16</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>17</sup>

### ANALYSIS

In its August 2, 2006 decision, the Office improperly determined that appellant filed an untimely request for reconsideration. It determined that appellant filed his reconsideration request on May 9, 2005, more than one year after the last merit decision of record, *i.e.*, the Office's March 24, 2004 decision terminating his compensation benefits.

The one-year time limitation begins to run on the date following the date of the original Office decision. Therefore, appellant had one year from March 24, 2004 to submit a timely request for reconsideration. The Office received appellant's November 11, 2004 request for reconsideration on February 8, 2005. At the time of appellant's reconsideration request, he had an appeal pending before the Board. On April 1, 2005 the Board granted appellant's request to dismiss his appeal so he could file a reconsideration request with the Office which determined that appellant filed a reconsideration request on May 9, 2005. Thus, the Office concluded that because the request was received on May 9, 2005, more than one year after the March 24, 2004 termination decision, the request was untimely.

However, the Board notes that the Office received two reconsideration requests from appellant within one year of the March 24, 2004 decision. The first was dated November 11, 2004, which was received on February 8, 2005, and the second dated February 16, 2005, which was received on February 4, 2006. He requested that his claim be reconsidered and submitted additional evidence. As he timely filed his request for reconsideration within one year of the March 24, 2004 termination decision, the Office improperly denied appellant's reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.

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<sup>15</sup> See *Nelson T. Thompson*, *supra* note 11.

<sup>16</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>17</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

**CONCLUSION**

The Board finds that appellant's November 22, 2004 letter, which was received on February 8, 2005 constituted a request for reconsideration which was timely as it was filed within one year of the March 24, 2004 decision. The Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 2, 2005 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 24, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board