

FACTUAL HISTORY

On August 24, 2004 appellant, then a 41-year-old distribution clerk, filed an occupational disease claim alleging that he sustained a torn rotator cuff and possible herniated disc due to factors of his employment. He did not specify the employment factors that he believed were the cause of his condition. By decision dated October 5, 2004, the Office denied appellant's claim on the grounds that the evidence was not sufficient to establish that he sustained a medical condition causally related to factors of his employment.

On October 6, 2006 appellant requested reconsideration and submitted additional evidence. In a June 14, 2005 report, Dr. Ferdinand J. Liotta, an attending orthopedic surgeon, stated that appellant had a shoulder condition that was caused by overuse at work. He indicated that appellant was a postal worker who performed repetitive activities such as sorting mail. Dr. Liotta stated that appellant developed shoulder problems after an increase in his workload.

By decision dated October 25, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of 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.⁸ To establish clear evidence of error, a claimant must submit evidence relevant

² The Office stated that the basis for the decision was outlined in an enclosure which is not of record.

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁵ *Id.* at 768.

⁶ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁷ *Thankamma Mathews*, *supra* note 4 at 769.

⁸ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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's decision.¹³ 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.¹⁴

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated October 6, 2006. As this request was filed more than one year after the Office's October 5, 2004 merit decision, it is not timely.¹⁵ The remaining issue is whether appellant demonstrated clear evidence of error in the October 5, 2004 Office decision which denied his claim for an occupational disease due to the lack of medical evidence establishing causal relationship.

In support of his untimely request for reconsideration, appellant submitted copies of medical evidence that did not address the issue of causal relationship. As this evidence did not address the critical issue in this case, causal relationship between appellant's claimed medical conditions and factors of his employment, the evidence does not demonstrate clear evidence of error in the October 5, 2004 decision. Appellant also submitted evidence previously of record. This evidence was previously considered by the Office and it does not demonstrate clear evidence of error in the October 5, 2004 decision. Appellant submitted copies of reports from a physician's assistant. However, a physician's assistant does not qualify as a physician under the Act. Registered nurses, licensed practical nurses and physicians' assistants are not physicians as defined under the Act and their opinions are of no probative value.¹⁶ Consequently, these notes

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Darletha Coleman*, 55 ECAB 143 (2003).

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Darletha Coleman*, *supra* note 11.

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁵ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁶ See 5 U.S.C. § 8101(2) which provides: "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law"; see also *Roy L. Humphrey*, 57 ECAB ____ (Docket No. 05-1928, issued November 23, 2005).

from a physician's assistant are of no probative value and do not show clear evidence of error in the Office's October 5, 2004 decision. Appellant submitted a June 14, 2005 report from Dr. Liotta who stated that he had a shoulder condition that was caused by overuse at work. Dr. Liotta indicated that appellant was a postal worker who performed repetitive activities such as sorting mail. He stated that appellant developed shoulder problems after an increase in his workload. However, Dr. Liotta did not provide a specific diagnosis of appellant's shoulder condition. He did not explain the mechanism of injury, *i.e.*, how specific work activities caused a specific medical condition. Due to these deficiencies, this report does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's October 5, 2004 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

On appeal, appellant argues that he submitted a timely reconsideration request within one year of the October 5, 2004 decision. He submitted a copy of a postal receipt stamped as received by the Office on September 27, 2005. The receipt is addressed to the Office and is labeled "Reconsideration Request." The record shows that appellant telephoned the Office on July 7, 2006, stating that he had previously submitted a reconsideration request. On July 21, 2006 the Office advised appellant that a review of the record revealed no copy of a reconsideration request. The Office advised him to submit a copy of the reconsideration request, along with the original certified mail receipt. Appellant submitted a copy of the mail receipt but no copy of an earlier reconsideration request.¹⁷ The only reconsideration request of record is dated October 6, 2006, more than one year after the October 5, 2004 decision. Appellant has not established that he submitted a timely reconsideration request.

CONCLUSION

The Board finds that appellant failed to demonstrate clear evidence of error in the Office's October 5, 2004 merit decision. Accordingly, the Office properly denied his request for further merit review in its October 25, 2006 decision.

¹⁷ 20 C.F.R. § 10.606 states that a reconsideration request must be submitted in writing and must set forth arguments and contain evidence that shows that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 25, 2006 is affirmed.

Issued: June 12, 2007
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