

**United States Department of Labor
Employees' Compensation Appeals Board**

J.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 08-271
Issued: June 20, 2008**

Appearances:
Joyce Fuller, Esq., for the appellant
No appearance, for the Director

Oral Argument May 7, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

Appellant filed a timely appeal of an October 12, 2007 decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued April 22, 2002, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied merit review on the grounds that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The case was previously before the Board. By decision dated December 21, 2005, the Board affirmed an August 27, 2004 Office decision finding that appellant's request for

reconsideration was untimely filed and failed to show clear evidence of error.¹ In a decision dated August 17, 2007, the Board dismissed appellant's appeal as there was no final decision issued within one year of the filing of the appeal.² The history of the case contained in the Board's prior decision and order and is incorporated herein by reference.

To summarize the procedural history of the case, appellant filed a claim in January 1992 for a left arm injury.³ He also had a claim for a left wrist injury on March 2, 1992 and an occupational claim for a left wrist injury in June 1992. These claims were combined under OWCP File No. 16201559. On May 16, 2000 appellant filed a traumatic injury claim for a right shoulder injury. This claim was also developed under OWCP File No. 16201559. A statement of accepted facts dated July 8, 2004 reported the following as accepted conditions: left tenosynovitis of the hand and wrist, left lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions and sprain/strain of the right shoulder, upper arm and acromioclavicular joint. Appellant received a schedule award for a 10 percent left arm permanent impairment on July 23, 1996 and a 21 percent right arm impairment on August 16, 2005.

On August 10, 2000 appellant filed a traumatic injury claim alleging that he sustained a right shoulder injury on August 9, 2000 when a coworker tapped on his shoulder. This claim was developed under the OWCP File No. 162003381. In May 2003, the Office combined the case files, with File No. 16201559 as the master file and 162003381 as the subsidiary file.

As noted in the December 21, 2005 Board decision, the claim for an August 9, 2000 right shoulder injury was denied by merit decisions dated November 22, 2000, May 21, 2001 and April 22, 2002. By decision dated October 1, 2002, the Office denied merit review of the claim. In a decision dated August 27, 2004, the Office denied merit review on the grounds that appellant's request for reconsideration was untimely and failed to show clear evidence of error and the Board affirmed this decision.

In a letter dated September 21, 2006, appellant requested reconsideration. He reported the date of injury as August 9, 2000, but did not identify an Office decision. On December 6, 2006 the Office received a request for reconsideration stating that the November 22, 2000 and April 22, 2002 decision developed the claim without all the factual and medical evidence. The Office advised appellant by letter dated December 29, 2006, he needed to identify an Office decision. On January 25, 2007 appellant requested reconsideration of the August 27, 2004 decision. He resubmitted a September 18, 2000 report from Dr. Gary Gartsman, an orthopedic surgeon. Appellant also submitted a May 10, 2006 report from Dr. Andrew Kant, an orthopedic surgeon, who reported that appellant was injured on September 10, 1991 and May 3, 2000. Dr. Kant provided results on examination and diagnosed cervical strain, post carpal and cubital tunnel release and shoulder bursitis.

¹ Docket No. 04-2283 (issued December 21, 2005).

² Docket No. 07-978 (issued August 17, 2007). Appellant had requested an appeal of a decision dated December 29, 2006, but the Board found this was an informational letter and not a final decision with appeal rights.

³ Appellant indicated that he was aware of the injury on September 11, 1991.

By decision dated October 12, 2007, the Office determined that appellant's applications for reconsideration were untimely. The Office denied merit review on the grounds that appellant had not shown clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁴ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

Section 8128(a) of the Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁸ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁹ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.¹⁰ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹¹

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹² In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.605 (1999).

⁶ 5 U.S.C. § 8128(a).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁹ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *See Leon D. Faidley, Jr.*, *supra* note 7.

¹² *Leonard E. Redway*, 28 ECAB 242 (1977).

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

ANALYSIS

Appellant submitted a number of letters requesting reconsideration, beginning on a September 21, 2006. He indicated that the date of the injury was August 9, 2000 and he noted that the Office decisions dated November 22, 2000, April 22, 2002 and August 27, 2004. These decisions relate to the claim of a right shoulder injury on August 9, 2000. Since the last decision on the merits of this claim was the April 22, 2002 decision, the application for reconsideration was untimely filed.

To require the Office to reopen the case for merit review, appellant must establish "clear evidence of error" by the Office. Appellant contends that the claim was not properly developed and the evidence not properly considered, without providing support for her contention. He argued, for example, that the traumatic injury claim for August 9, 2000 was a duplicate of the claim for a May 3, 2000. As the Board explained in its prior decision, appellant was alleging a

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁷ See *Leona N. Travis*, *supra* note 15.

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 7.

²⁰ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

new employment incident on August 9, 2000 and therefore it was a new claim for compensation, not a duplicate of a prior claim. Appellant submitted the September 18, 2000 report from Dr. Gartsman and stated that it was not considered by the Office. The May 21, 2001 decision from the Office hearing representative specifically discussed the report and found that it was not sufficient to establish the claim. She submitted a May 10, 2006 report from Dr. Kant, who did not discuss an August 9, 2000 injury.

The Board finds that appellant has not established clear evidence of error by the Office. While the May 3, 2000 right shoulder injury and the August 9, 2000 claim have separate OWCP file numbers, the cases have been combined under a master file and associated subsidiary file. If appellant has a claim based on any accepted right or left arm condition, then he may pursue such a claim and receive a final decision. With respect to the denial of the claim for a right shoulder injury on August 9, 2000, appellant has not established clear evidence of error and the Office properly denied merit review.

CONCLUSION

The application for reconsideration was untimely and failed to show clear evidence of error by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2007 is affirmed.

Issued: June 20, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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