

FACTUAL HISTORY

On October 2, 2006 appellant, then a laundry worker, filed an occupational disease claim alleging that he injured his left shoulder pulling heavy laundry chutes in the performance of duty. In a letter dated October 11, 2006, the Office requested additional information from him. The Office allowed 30 days for a response.

In support of his claim, appellant submitted a series of medical notes from Dr. Dale S. Snead, a Board-certified orthopedic surgeon, dated December 13, 2005 through August 18, 2006. On January 25, 2006 Dr. Snead noted appellant's work duty of pulling linen over his head and his complaints of left shoulder pain. He diagnosed left rotator cuff tendinitis and left acromial joint arthralgia. Dr. Snead recommended surgery. Appellant underwent left shoulder arthroscopy with acromioplasty and distal clavical excision on March 2, 2006. Dr. Snead examined appellant on March 7, 2006 following his surgery. On March 21, 2006 he stated that appellant reported tripping on a sweeper cord and falling on his left shoulder. Dr. Snead noted that appellant's recovery was progressing ahead of schedule. In a note dated April 4, 2006, he reported appellant's symptoms of muscle tightness and soreness as well as numbness and tingling in his fingers. Dr. Snead diagnosed mild brachial plexopathy or cervical abnormality related to his fall. On May 2, 2006 appellant indicated to Dr. Snead that he was happy with his progress. Likewise on June 2, 2006, he had no complaints or problems according to Dr. Snead. In a note dated July 14, 2006, appellant reported increasing shoulder pain after returning to work. Dr. Snead stated, "His job requires a lot of heavy lifting, particularly overhead." He recommended that appellant change jobs to reduce his symptoms. On August 18, 2006 Dr. Snead stated that appellant might experience intermittent pain with his shoulder, but indicated that formal work restrictions were not necessary.

By decision dated December 27, 2006, the Office denied appellant's claim finding that he failed to submit the necessary medical opinion evidence on the causal relationship between his diagnosed condition of left rotator cuff tendinitis and his employment duties to establish an occupational disease. Appellant requested an oral hearing on March 27, 2007. By decision dated May 17, 2007, the Branch of Hearings and Review denied his request for an oral hearing on the grounds that his request was not made within 30 days of the Office's December 27, 2006 decision. The Branch of Hearings and Review determined that appellant's claim could be equally well addressed through the reconsideration process.

Appellant requested reconsideration on February 1, 2008 and submitted several copies of each of Dr. Snead's January 25, March 7 and 21, April 4, May 2, June 2, July 14 and August 18, 2006 treatment notes. He also submitted a note dated November 6, 2006 from Dr. Snead's office noting his request for documentation of injury. Appellant submitted a note dated August 27, 2007 from Dr. Snead which stated that, as appellant's injury was caused by pulling dirty linens, he should consider different work.

By decision dated March 4, 2008, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely and did not establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”¹

The claimant can choose between two formats: an oral hearing or a review of the written record.² The requirements are the same for either choice.³ The Board has held that section 8124(b)(1) is “unequivocal” in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking⁴ and before the claimant has requested reconsideration.⁵ However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.⁶

ANALYSIS -- ISSUE 1

The Office issued a merit decision in appellant’s claim on December 27, 2006. Appellant requested an oral hearing on March 27, 2007. This request was more than 30 days after the December 27, 2007 Office decision. Therefore appellant was not entitled to an oral hearing as a matter of right. The Branch of Hearings and Review then proceeded to exercise its discretion in granting or denying an oral hearing by determining that his claim could be addressed through the reconsideration process. The Board finds that the Branch of Hearings and Review properly denied appellant’s request for an oral hearing on the grounds that it was not timely filed and that he could pursue his claim through the reconsideration process.

¹ 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

² 20 C.F.R. § 10.615.

³ *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

⁴ 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁵ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

⁶ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁹ The Office, through 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 application for review is filed within one year of the date of that decision.¹⁰ If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.¹¹ In the absence of this evidence, the Office procedures state that the date of the reconsideration request letter should be used to determine timeliness.¹² 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).¹³

The Office's regulations require that an application for reconsideration must be submitted in writing¹⁴ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."¹⁵ The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."¹⁶

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.¹⁷

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁹ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹⁰ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ 20 C.F.R. §§ 10.607; 10.608(b).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹³ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 8 at 769; *Jesus D. Sanchez*, *supra* note 9 at 967.

¹⁴ 20 C.F.R. § 10.606.

¹⁵ 20 C.F.R. § 10.605.

¹⁶ 20 C.F.R. § 10.607(b).

¹⁷ *Thankamma Mathews*, *supra* note 8 at 770.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.²⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²¹ 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.²² 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.²³ The Board must make 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.²⁴

ANALYSIS -- ISSUE 2

The Office issued a merit decision in appellant's claim on December 27, 2006. Appellant requested reconsideration on February 1, 2008, more than one year after the December 27, 2006 decision. Therefore this request was untimely in accordance with the Office's regulations. The appropriate standard of review is whether appellant's February 1, 2008 request for reconsideration established clear evidence of error in the Office's December 27, 2006 decision.

The Office denied appellant's occupational disease claim on the grounds that he failed to submit medical opinion evidence establishing a causal relationship between his diagnosed left shoulder tendinitis with resulting surgery and the duties of his federal position as a laundry worker. Appellant submitted a series of notes from Dr. Snead, a Board-certified orthopedic surgeon, in support of his claim. Dr. Snead discussed the relationship of appellant's employment to his shoulder condition only in the August 18, 2006 note which appellant submitted in support of his reconsideration request. This note merely stated that as appellant's injury was caused by pulling dirty linens, he should consider different work. This note is not sufficient to establish clear evidence of error on the part of the Office. While Dr. Snead's August 18, 2006 note is relevant to the central issue as it briefly mentions a causal connection between appellant's employment duties and his shoulder condition, the note does not provide a detailed discussion of

¹⁸ *Id.*

¹⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

²⁰ *Jesus D. Sanchez*, *supra* note 9 at 968.

²¹ *Leona N. Travis*, *supra* note 19.

²² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

²³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²⁴ *Gregory Griffin*, *supra* note 10.

appellant's employment duties and does not provide medical reasoning in support of Dr. Snead's opinion. Therefore the August 18, 2006 note is not 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.

CONCLUSION

The Board finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely. The Board further finds that appellant's untimely request for reconsideration did not establish clear evidence of error on the part of the Office.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2008 and May 17, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 9, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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