



strain, thoracic strain, left shoulder tendinitis, right shoulder tendinitis and left lateral epicondylitis. On July 29, 1999 it accepted appellant's claim for a grand mal seizure related to anesthesia used for his accepted left shoulder condition. The Office authorized an arthroscopic evaluation on March 4, 1999 and a left shoulder arthroscopy on December 18, 2000. It also accepted appellant's claim for a recurrence on January 10, 2003.

The Office continued to develop appellant's claim.<sup>1</sup> On November 26, 2002 appellant filed a Form CA-7, claim for a schedule award. In a letter dated October 14, 2003, he requested that the Office provide him with a schedule award.

In a July 20, 2005 decision, the Office granted appellant a schedule award for 3 percent right upper extremity impairment and 18 percent left upper extremity impairment. It found no impairment of the left lower extremity impairment.

On August 25, 2005 appellant requested a review of the written record. In a September 8, 2005 decision, the Office denied his request for a hearing, as his request was not made within 30 days. On June 30, 2006 appellant requested reconsideration. In a separate letter also dated June 30, 2006, he alleged that he was requesting for reconsideration of his July 20, 2005 schedule award. Appellant indicated that he had a May 25, 1999 consequential left shoulder injury under claim number xxxxxx237, which was due to an intravascular marcaine-induced seizure. He requested that the Office also consider his right elbow pain, parotid glands and neck pain under claim number xxxxxx737 for consequential injury. Appellant also indicated that on April 1, 2003 his treating physician, Dr. John H. Crothers, a Board-certified orthopedic surgeon, found three percent impairment in his neck.

On August 4, 2006 the Office requested that the Office medical adviser provide an opinion as to whether appellant sustained additional impairment.

In reports dated August 27 and September 25, 2006, the Office medical adviser concluded that appellant was not entitled to additional impairment.

In a September 26, 2006 decision, the Office found that the evidence was insufficient to warrant modification of the July 20, 2005 schedule award decision.<sup>2</sup>

The Office then received reports dated September 21 and December 14, 2006 and January 30, 2007 from Dr. Crothers, who diagnosed degenerative neck disease and degenerative tendinitis of the shoulders and opined that the left shoulder was industrially related. Dr. Crothers also indicated that appellant had a small bump in the soft tissues over the olecranon on the right elbow. He also noted that appellant's shoulder had full range of motion and no real pain. Dr. Crothers indicated that appellant had tenderness over the lateral epicondyle compatible with lateral epicondylitis. In an April 24, 2007 report, he diagnosed tendinitis of the bilateral shoulders, left worse than the right, degenerative neck disease, low back disease and lateral

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<sup>1</sup> On June 20, 2002 the Office determined that appellant's actual earnings as a modified letter carrier represented his wage-earning capacity based on his employment in that position.

<sup>2</sup> The Office also advised appellant that his claim for a consequential injury would be addressed separately.

epicondylitis of the left elbow. In a July 24, 2007 report, Dr. Crothers opined that appellant was at “full work” although he had a fair number of limitations. He continued to treat appellant and submit reports.

On February 14, 2008 appellant requested a schedule award and filled in “consequential injury.”

In a letter also dated February 14, 2008, appellant requested reconsideration. He alleged that he was requesting “reconsideration on the grounds of [his] consequential left shoulder file injury case number xxxxxx237.” Appellant indicated that on May 25, 1999 he had an intravascular marcaine-induced seizure and requested that his right elbow pain, left elbow pain, parotid glands and neck pain be reconsidered under his claim for a consequential injury. He noted that Dr. Crothers did not exclude these conditions as resulting from the grand mal seizure. Appellant also repeated that on April 1, 2003 Dr. Crothers rated his neck at three percent impairment.

In a decision dated March 26, 2008, the Office denied appellant’s request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees’ Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> As one such limitation, the Office has stated that it 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>6</sup> 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 section 8128(a).<sup>7</sup> The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence that does not raise a substantial

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8128(a).

<sup>5</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>6</sup> 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

<sup>7</sup> *Sean C. Dockery*, 56 ECAB 652 (2005); *Mohamed Yunis*, 46 ECAB 827, 829 (1995).

<sup>8</sup> 20 C.F.R. § 10.607(b).

question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.<sup>9</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>10</sup>

### ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on September 26, 2006. Appellant requested reconsideration on February 14, 2008; thus, his reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's February 14, 2008 request for reconsideration failed to show clear evidence of error. The evidence he submitted is not pertinent to the issue on appeal. The only new medical reports appellant submitted in support of his untimely request for reconsideration were Dr. Crothers' reports dating from September 21, 2006 to July 24, 2007. These reports are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant has permanent impairment of a scheduled member of the body to his accepted employment conditions. The reports appellant submitted do not reflect that the Office erred in its September 26, 2006 decision. No other evidence was received by the Office.

Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

### CONCLUSION

The Board finds that the Office properly found appellant's reconsideration request to be untimely and properly found that the request did not show clear evidence of error.

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<sup>9</sup> *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

<sup>10</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 26, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board