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

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| **M.G., Appellant** | ) | |
| **and** | ) | **Docket No. 09-414** |
| | ) | **Issued: August 24, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer** | ) | |

*Appearances:*
*Adam Conti, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 20, 2008 appellant filed a timely appeal of November 21, 2007 and September 30, 2008 decisions of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error and finding that he abandoned his hearing. 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 June 12, 2007, the Board does not have jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether the Office properly found that appellant had abandoned his request for a hearing; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of the claim on the grounds that his application for reconsideration was untimely and failed to show clear evidence of error.

## ***FACTUAL HISTORY***

The Office accepted that appellant sustained right knee tendinitis and costochondritis of the left chest wall as a result of his federal employment as a letter carrier. Appellant returned to work in a limited-duty position as a modified clerk. On January 12, 2007 the employing establishment offered him a position as a relief clerk, commencing January 20, 2007. The job offer stated that the position was tailored to meet appellant's physical limitations, noting that his current restrictions included no repetitive movements of wrists and elbows, no pushing, pulling, lifting over 15 pounds, intermittent sitting in 10- to 15-minute intervals and intermittent walking, standing, reaching above shoulder in 15- to 20-minute intervals. The record indicates that appellant worked as a relief clerk and then stopped working on March 10, 2007. He filed a claim for compensation (Form CA-7) for the period commencing March 10, 2007 and a notice of recurrence of disability (Form CA-2a) as of March 10, 2007. On the CA-2a form appellant stated that he was involuntarily reassigned to a new position on January 20, 2007 that was not within his physical limitations.

By decision dated June 12, 2007, the Office denied appellant's claim for compensation commencing March 10, 2007. It found that the medical evidence did not establish an employment-related disability for the period claimed. Appellant requested a telephonic hearing with an Office hearing representative by letter dated July 11, 2007. By letter dated October 4, 2007, the Office advised him that the telephonic hearing would be held at 12:30 p.m. (Eastern time) on November 8, 2007. Appellant was provided with the appropriate telephone number and other relevant information.

In a decision dated November 21, 2007, the Office found that appellant had abandoned his request for a hearing as he failed to appear or contact the Office to explain his failure to appear.

By letter dated August 14, 2008, appellant, through his representative, requested reconsideration. He stated that he attempted to perform the modified duty job but was unable to continue. Appellant indicated that an August 6, 2008 letter from the Atlanta District Reasonable Accommodation Committee (DRAC) had found that the employing establishment was unable to provide him with a position within his restrictions and therefore he was entitled to compensation as of March 10, 2007.

In a decision dated September 30, 2008, the Office found that appellant's application for reconsideration was untimely. It further found that the evidence did not establish clear evidence of error by the Office in denying the claim for compensation.

## ***LEGAL PRECEDENT -- ISSUE 1***

A claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[1] Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the hearing to the claimant and

[1] 20 C.F.R. § 10.616(a).

any representative at least 30 days before the scheduled date.[2] Chapter 2.1601.6(e) of the Office's procedure manual, dated January 1999, provides as follows:

> "e. *Abandonment of Hearing Requests*.
>
> (1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district office]."

## ***ANALYSIS -- ISSUE 1***

In the present case, the Office sent notice of a November 8, 2007 telephonic hearing to appellant's address of record. There is no evidence that appellant requested a postponement or attempted to telephone the Office hearing representative at the designated time on November 8, 2007. In addition, there is no evidence of record that he provided notification of his failure to participate in the scheduled hearing within 10 days of the schedule date.

The Board accordingly finds that, based on the evidence of record, appellant abandoned his request for a hearing in this case.[3] The Office properly issued a formal decision finding abandonment of the hearing request.

## ***LEGAL PRECEDENT -- ISSUE 2***

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 Act[6] 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

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[2] *Id*. at § 10.617(b).

[3] *See C.T.*, 60 ECAB ___ Docket No. 08-2160, issued May 7, 2009).

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.605 (1999).

[6] *See supra* note 4.

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

whether it will review an award for or against compensation.[8] It, 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 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

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[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) submitting 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).

[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).

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 -- ISSUE 2***

The June 12, 2007 Office decision denied appellant's claim for a recurrence of disability commencing March 10, 2007. The application for reconsideration was dated August 14, 2008. Since this is more than one year after the June 12, 2007 merit decision, it is an untimely application for reconsideration. Therefore, the issue is whether appellant has established clear evidence of error by the Office.

On appeal, appellant contends that the evidence establishes that the employing establishment was unable or unwilling to provide him with a position consistent with his medical restrictions and therefore he was entitled to compensation from March 11, 2007. The Board notes that a recurrence of disability may be established if the light-duty job is outside the employee's work restrictions, but there must be sufficient evidence of record to support the finding that the job exceeded physical limitations.[21] In this case, the Board does not have jurisdiction over the merits of the claim. Under the "clear evidence of error" standard, the evidence must be of such probative value that it *prima facie* establishes that appellant was entitled to compensation after March 10, 2007.

The "clear evidence of error" standard is a difficult one to meet and appellant has not met the standard in this case. Appellant relies on an August 6, 2008 letter from the employing establishment's DRAC that the employing establishment could not, at that time, accommodate him. The work restrictions that are discussed are based on an April 29, 2008 functional capacity evaluation. The letter does not discuss the relevant time period in this case, from January 20 to March 10, 2007, or the medical restrictions in effect during this period. The January 12, 2007 job offer indicated that the position was tailored to the current medical restrictions, as outlined by an attending physician, Dr. Ralph Jackson. There is no probative evidence of record that the relief clerk position was outside the existing employment-related work restrictions.[22] Appellant's allegation that the position required work outside his medical restrictions is not sufficient evidence in itself.[23]

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

[20] *Gregory Griffin*, 41 ECAB 458 (1990).

[21] *See Cloteal Thomas*, 43 ECAB 1093 (1992).

[22] Appellant cites *Fallon Bush*, 48 ECAB 594 (1997) in support of his argument. In *Bush*, the Board found that the claimant had established a recurrence of disability because the employing establishment changed the light-duty job to require him to work at night, which exceeded his work restrictions. The evidence in the present case does not establish the job exceeded a specific work restriction.

[23] *Cloteal Thomas, supra* note 21.

The Board finds that appellant did not establish clear evidence of error by the Office. The application for reconsideration was properly denied without merit review of the claim.

## ***CONCLUSION***

The Board finds that the Office properly determined that appellant had abandoned his request for a telephonic hearing. The Board also finds that his application for reconsideration was untimely and failed to show clear evidence of error.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 30, 2008 and November 21, 2007 are affirmed.

Issued: August 24, 2009
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