

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

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**J.F., Appellant**

**and**

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

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**Docket No. 09-1027  
Issued: December 17, 2009**

*Appearances:*  
*Joyce Fuller, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On March 9, 2009 appellant filed an appeal of a February 13, 2009 nonmerit decision of the Office of Workers' Compensation Programs finding 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 determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error. Appellant submitted a lengthy, carefully detailed brief explaining the history of the case and pointing out several areas in which he argues that the Office did not follow its own procedures.

## **FACTUAL HISTORY**

The case has previously been 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.<sup>1</sup> 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.<sup>2</sup> By decision dated June 20, 2008, the Board affirmed an October 12, 2007 Office decision finding appellant's application for reconsideration was untimely and showed no clear evidence of error.<sup>3</sup> The history of the case as contained in the Board's prior decisions and orders are incorporated herein by reference.

Appellant filed a claim in January 1992 for a left arm injury. He also had a claim for a left wrist injury on March 2, 1992 and an occupational disease claim for a left wrist injury in June 1992. These claims were combined under OWCP File No. xxxxxx559. On May 16, 2000 appellant filed a traumatic injury claim for a right shoulder injury. This claim was also developed under OWCP File No. xxxxxx559. 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 OWCP File No. xxxxxx381. In May 2003, the Office combined the case files, with OWCP File No. xxxxxx559 as the master file and xxxxxx381 as the subsidiary file. The claim for an injury on August 9, 2000 was denied by merit decisions dated November 22, 2000, May 21, 2001 and April 22, 2002.

On November 28, 2008 appellant submitted a November 19, 2008 application for reconsideration. Appellant stated that he was requesting reconsideration of the October 12, 2007 decision. He contended that the most recent merit decision showed clear evidence of error because the "medical evidence shows the diagnosis for the first-aid injury of August 9, 2000 and the accepted claim of May 3, 2000 are the same." According to appellant, the Office also erred when it failed to return the Form CA-1 to the employing establishment. He also argued that his requests for reconsideration were timely.

On reconsideration appellant resubmitted a September 18, 2000 report from Dr. Gary Gartsman, an orthopedic surgeon, who noted appellant reported being struck in the shoulder at work on August 9, 2000. He also resubmitted a January 22, 2001 report from Dr. Gartsman, stating the rotator cuff and acromioclavicular problems were interrelated.

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<sup>1</sup> Docket No. 04-2283 (issued December 21, 2005).

<sup>2</sup> Docket No. 07-978 (issued August 17, 2007).

<sup>3</sup> Docket No. 08-271 (issued June 20, 2008).

By decision dated February 13, 2009, the Office found appellant's reconsideration request was untimely and failed to show 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.<sup>4</sup> 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."<sup>5</sup>

Section 8128(a) of the Act<sup>6</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>7</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>9</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 reconsideration is filed within one year of the date of that decision.<sup>10</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 5 U.S.C. § 8128(a).<sup>11</sup>

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.<sup>12</sup> 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

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.605 (1999).

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> 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."

<sup>9</sup> 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; or (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).

<sup>10</sup> *Id.* at § 10.607(a).

<sup>11</sup> *See Leon D. Faidley, Jr.*, *supra* note 7.

<sup>12</sup> *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.<sup>13</sup>

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

### ANALYSIS

Appellant filed an application for reconsideration dated November 19, 2008 of the Office's October 12, 2007 decision. However, the only decision over which the Board has jurisdiction is the Office's February 13, 2009 decision. The Board found appellant's request untimely and that it did not raise clear evidence of error by the Office. In fact, the October 12, 2007 decision of the Office found that appellant's prior application for reconsideration was untimely and failed to show clear evidence of error. The only appeal right to the October 12, 2007 decision was a request for review by the Board.<sup>20</sup> Appellant exercised that right in Docket No. 08-271 and the Board reviewed that Office decision in its June 20, 2008 decision. That decision became final 30 days from the date of issuance.<sup>21</sup>

The last decision on the merits of appellant's case was dated April 22, 2002 in which the Office provided appellant his appeal rights. This application for reconsideration was not filed until November 19, 2008, more than one year after the merit decision, and is therefore untimely.

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

<sup>14</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>15</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>16</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>17</sup> See *Leona N. Travis*, *supra* note 15.

<sup>18</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>19</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d)(1) (June 2002) (only appeal right to a decision finding a claimant's application for reconsideration was untimely and failed to show clear evidence of error is an appeal to the Board).

<sup>21</sup> See *Joseph A. Brown, Jr.*, 55 ECAB 572 (2004).

Since the application for reconsideration is untimely, appellant is not entitled to merit review unless the application shows clear evidence of error by the Office. Appellant points out in his brief alleged errors in several stages of the proceeding where proper procedures may not have been followed by the Office, *e.g.*, not rendering a decision within 90 days which could jeopardize appellant's rights and that the same claims examiner should not render a decision on a request for reconsideration of the same issue. Even if those errors had been committed by the Office, they are not within the jurisdiction of the Board at this time. Appellant further notes that the medical evidence shows the same diagnosis as a prior accepted injury, but that fact alone does not establish clear evidence of error by the Office.

The underlying issue before the Board is whether the medical evidence established that a diagnosed condition was causally related to the August 9, 2000 employment incident when appellant was allegedly hit on the shoulder by a coworker. The issue before the Board in this case, however, as the request for reconsideration before the Office was untimely, is whether appellant has established that the April 22, 2002 Office decision (the last merit decision) was in error. This requires evidence that clearly establishes that the Office was wrong in its previous merit decision. Submitted with appellant's request for reconsideration was a new medical report from Dr. Gartsman and a resubmission of a previous report from him. Neither these reports nor any other evidence submitted with appellant's reconsideration established that the Office's last merit decision was in error. Although the evidence does relate to the underlying medical condition, that is not sufficient to meet the exacting standard necessary to establish clear evidence of error by the Office.<sup>22</sup> The Board finds the Office properly denied merit review in this case.

### CONCLUSION

The Board finds that the Office properly denied appellant's application for reconsideration as it was untimely and failed to show clear evidence of error.

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<sup>22</sup> Supra Note 16. The term "clear evidence of error" is intended to represent a difficult standard. Even evidence such as a detailed, well-rationalized medical report which, if submitted in a timely reconsideration, would have created a conflict in medical opinion requiring further development, is not enough to establish clear evidence of error. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 13, 2009 is affirmed.

Issued: December 17, 2009  
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