



By decision dated November 21, 2006, the Office denied the claim, finding that appellant failed to show sufficient medical evidence in support of his claim that he sustained back, neck and right shoulder injuries in the performance of duty on July 15, 2005.

By letter dated November 27, 2006, appellant's attorney requested an oral hearing, which was held on February 6, 2007. Appellant testified that he had sustained prior injuries to his back, neck and shoulder and submitted a report from Dr. Douglas G. Kimmel, a Board-certified family practitioner.<sup>1</sup>

By decision dated April 20, 2007, an Office hearing representative affirmed the November 21, 2006 decision.

In a January 15, 2008 report, Dr. Shailen Jalali, Board-certified in orthopedic surgery, noted that appellant had complaints of pain, primarily in the neck, with radiation into the occipital area. He stated that appellant was experiencing brachial plexopathy with associated neuropathic pain, in addition to cervical radiculitis, spinal stenosis and facet disease. Dr. Jalali recommended that appellant undergo a course of treatment which included bilateral C3-C4, C4-C5, and C5-C6 intraarticular facet injections.

In an April 18, 2008 report, Dr. Jalali stated:

"On June 29, 2005, while casing mail, [appellant] stated that he felt pain in his neck and shoulder area. He was then asked to handle [a] different type of mail in which he [was] required to reach up over his head. When [appellant] did this, he felt sharp pain in his right arm, back and neck. After this incident, it is my understanding that the patient's workday was reduced to four hours a day. [Appellant] continued to do this until July 15, 2005, when he got off of a stool and felt excruciating pain in his entire thoracic back area extending up into the back of his head. He apparently went home that day but returned to work the next workday and continued working light duty in this fashion until July 27, 2005. Subsequent to that visit, [appellant] was unable to continue working.... Since that time, he states that [he] has been unable to return to work and has had progressively increased complaints of pain both the upper back as well as in the neck. [Appellant] has had a number of different types of injections including trigger point injections, cervical facet injections, as well as continued management with medications. He also has had epidural steroid injections for pain that [is] slightly lower in the thoracic back area.

"I feel it is these incidences, the two occasions; June 29, 2005, when [appellant] was reaching up as well as on July 15, 2005, when he had worsened his pain condition as a result of the activities he was doing specifically at work. The

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<sup>1</sup> Appellant sustained a prior injury while in the performance of duty on September 18, 2001 when he was attacked by a dog while delivering mail. The Office accepted the claim for aggravation of cervical and thoracic sprain and strain under claim number xxxxxx089. On April 10, 2002 the claimant underwent anterior cervical discectomy and fusion at C6-7. On February 17, 2004 two spinal cord stimulators were inserted in the cervical spine. The Office paid appellant compensation for total wage loss until June 2, 2005 when it terminated his compensation on the grounds that the claimant refused an offer of suitable employment without justification.

positions that he was asked to place his body in were causing these exacerbations. I do not feel that this was simply a worsening of [appellant's] pain symptoms on its own; I feel that it is these activities at work that led to his worsening pain symptoms. I feel that he continues to suffer from brachial plexopathy with associated neuropathic and myofascial pain symptoms. I also feel [appellant] suffers from cervical facet disease and disc degeneration as well. He also has had problems with spinal stenosis in the cervical region as well. I feel that the need for [appellant] to go out on disability was directly related to these two incidences that occurred while he was at work in June 2005 and then again in July 2005. At this point, I feel that he is completely disabled and will not be able to return to any type of gainful employment. [Appellant] continues to have ongoing pain complaints. He will require ongoing medical attention including continued medication management as well as potential injection procedures to address facet pathology. [Appellant] also has a spinal cord stimulator that is less than optimal and may require further monitoring and adjustment in the future.”

By letter dated August 18, 2008, appellant's attorney requested reconsideration.

By decision dated September 26, 2008, the Office denied appellant's request for reconsideration without a merit review, finding that he had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that he was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>3</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>4</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>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

In those cases where a request for reconsideration is not timely filed, the Board had held however that 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.<sup>7</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the claimant application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup> 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.<sup>14</sup> The Board makes an

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<sup>4</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 point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

<sup>5</sup> 20 C.F.R. § 10.607(b).

<sup>6</sup> See cases cited *supra* note 2.

<sup>7</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, *supra* note 3.

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 2.

independent determination of whether an appellant 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>15</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 April 20, 2007. Appellant requested reconsideration on August 18, 2008; thus, his reconsideration request is untimely as it was outside the one-year time limit.

Appellant's attorney submitted a brief with his appeal in which he argues that Dr. Jalali's report was sufficiently probative to constitute error. The Board, however, finds that appellant's request for reconsideration failed to show clear evidence of error. The reports from Dr. Jalali dated January 15 and April 15, 2008 are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant sustained an injury on July 15, 2005 in the performance of duty, causally related to factors of his federal employment. Dr. Jalali's reports reviewed the history of appellant's neck, back and shoulder injuries and his account of the incident which, he alleged, had resulted in a work-related injury on July 15, 2005. However, these reports are cumulative and repetitive of reports and arguments previously considered and rejected by the Office. None of the medical evidence submitted by appellant contains a rationalized medical opinion which explains how his work activities on July 15, 2005 physiologically caused his currently diagnosed medical conditions. Neither of the reports he submitted with his request are of sufficient probative value to *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in his favor. Consequently, the evidence submitted by him 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. The Board finds that the Office did not abuse its discretion in denying further merit review.

### CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated August 18, 2008. Inasmuch as his reconsideration requests were untimely filed and failed to establish clear evidence of error, the Office properly denied further review on September 26, 2008.

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<sup>15</sup> Gregory Griffin, *supra* note 3.

**ORDER**

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

Issued: October 9, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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