

FACTUAL HISTORY

On December 19, 2005 appellant, a 63-year-old rural mail carrier, filed a traumatic injury claim (Form CA-1) for stretched right arm and shoulder muscles as well as bruised and fractured ribs on his right side. He asserted the conditions resulted from a December 5, 2005 incident when, while delivering a package to the front door of a residence, he slipped on ice-covered porch steps and fell.

Appellant sought treatment from Dr. Matthew A. Greene, a chiropractor, who submitted a report dated January 13, 2006 diagnosing shoulder strain, rib strain, as well as cervical and thoracic sprain/strain.

In a dated February 1, 2006 decision, the Office denied the claim. It accepted that the December 5, 2005 incident occurred as alleged, but found that the evidence of record did not establish that the employment incident caused an injury.

On February 28, 2006 appellant requested reconsideration. In support of this request for reconsideration, he submitted a January 25, 2006 report from Dr. Daniel M. Moshos, an osteopathic physician, who concurred with Dr. Greene's diagnoses and recommended chiropractic treatment for cervical and thoracic subluxations.

By decision dated May 25, 2006, the Office denied modification of its February 1, 2006 decision finding that the medical evidence was insufficient to establish an injury.

On May 21, 2007 appellant requested reconsideration. He submitted a January 2, 2007 magnetic resonance imaging scan and a January 31, 2007 report from Dr. Thomas P. Matrka, who addressed his complaints regarding his right shoulder and right upper extremity. Appellant also submitted physical therapy reports from Jeter Physical Therapy and employing establishment health unit notes.

By decision dated July 5, 2007, the Office denied modification of its May 25, 2006 decision finding that the medical evidence of record did not establish that the December 5, 2005 incident caused an injury.

On June 25, 2008 the Office received a May 8, 2008 report from Dr. Sureah Nayak, a Board-certified orthopedic surgeon, who reviewed appellant's history of injury and medical treatment and diagnosed tear of the right shoulder biceps tendon.

On January 9, 2009 appellant, through his attorney, requested reconsideration. In a September 24, 2008 report, Dr. Martin Fritzhand, a Board-certified urologist, reviewed appellant's history of injury. He diagnosed right shoulder impingement syndrome and rupture of the right bicep brachia and tendon. Dr. Fritzhand stated that the December 5, 2005 incident could "certainly have caused both the impingement syndrome and biceps [*sic*] rupture."

By decision dated September 9, 2009, the Office denied the request, without merit review, because appellant's reconsideration request was untimely filed and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ 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.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. 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. The application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard. To establish clear evidence of error, an appellant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

⁴ 20 C.F.R. § 10.607.

⁵ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *See Jesus D. Sanchez*, *supra* note 3.

⁸ *See supra* note 6.

⁹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁰ The Board makes an 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.¹¹

ANALYSIS

The most recent merit decision of record is dated July 5, 2007. Appellant's reconsideration request was dated January 9, 2009, more than a year after the July 5, 2007 decision. Accordingly, his request was untimely.

In accordance with internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review established clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly establish that the Office's prior decision was clearly in error.

To establish clear evidence of error, the evidence must do more than simply suggest a contrary conclusion. It must manifest on its face that the Office's decision is wrong.¹² The Office denied appellant's claim on the grounds that he had not submitted adequate medical evidence, established causal relationship between the diagnosed conditions and the accepted incident. Following the last decision denying reconsideration it received a January 25, 2008 report from Dr. Nayak. This report did not provide a medical opinion on causal relationship; as such this report does not establish clear error in the Office's denial of the claim. Appellant also submitted a September 24, 2008 report from Dr. Fritzhand, who speculated that the December 5, 2005 incident could "certainly have caused both the impingement syndrome and biceps [*sic*] rupture," Dr. Fritzhand report merely suggests an alternate conclusion concerning the existence of a causal relationship between appellant's claimed conditions and the accepted employment incident. It does not demonstrate that the Office's July 5, 2007 decision was clearly wrong.

Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that it abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

¹⁰ *Leon D. Faidley, Jr., supra* note 3.

¹¹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

¹² *Supra* note 2.

CONCLUSION

The Board finds that the Office properly denied appellant's reconsideration request as it was untimely-filed and lacking clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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