



## **FACTUAL HISTORY**

On August 10, 2000 appellant, then a 36-year-old mail processor, filed a traumatic injury claim alleging that he sustained shoulder, clavicle strain and right rotator cuff injury on August 9, 2000 when a coworker tapped him on the shoulder, causing him to “go to his knees.” By merit decisions dated November 22, 2000 and April 22, 2002, OWCP denied the claim on the grounds that the medical evidence did not establish that the diagnosed conditions were causally related to the alleged incident. The case has previously been before the Board. By decision dated December 21, 2005, the Board affirmed an August 27, 2004 OWCP decision finding that appellant’s request for reconsideration was untimely filed and failed to show clear evidence of error.<sup>3</sup> In a decision dated August 17, 2007, the Board dismissed his appeal as there was no final decision issued within one year of the filing of the appeal.<sup>4</sup> By decision dated June 20, 2008, the Board affirmed an October 12, 2007 OWCP decision, finding appellant’s application for reconsideration was untimely and showed no clear evidence of error.<sup>5</sup> In a decision dated December 17, 2009, the Board affirmed a February 13, 2009 OWCP decision, finding his application for reconsideration as untimely and failed to show clear evidence of error. The history of the case as contained in the Board’s prior decisions and orders is incorporated herein by reference.

By letter dated June 14, 2010, appellant requested reconsideration of his claim. He submitted treatment notes from Dr. Gary Gartsman, an orthopedic surgeon, dated August 22 and 23, 2000. Appellant also resubmitted a September 18, 2000 report from Dr. Gartsman, as well as duty status reports (Form CA-17) dated May 17 to September 5, 2000 from Dr. J.P. Trowbridge, a general practitioner.

On reconsideration appellant argued that OWCP had “failed to adequately develop the case file.” He asserted the November 22, 2000 decision did not consider the medical evidence submitted, including a preexisting injury. According to appellant, “new evidence shows the intervening incident did not cause a new injury,” noting Dr. Gartsman’s September 18, 2000 report. He also argued that the September 21, 2001 and April 22, 2002 OWCP’s decisions failed to develop and consider the evidence. With respect to the April 22, 2002 decision, appellant stated that it did not mention the September 18, 2000 report.

By decision dated August 3, 2010, OWCP determined appellant’s application for reconsideration was untimely. It denied the application on the grounds that it did not show clear evidence of error by OWCP.

---

<sup>3</sup> Docket No. 04-2283 (issued December 21, 2005).

<sup>4</sup> Docket No. 07-978 (issued August 17, 2007).

<sup>5</sup> Docket No. 08-271 (issued June 20, 2008).

## LEGAL PRECEDENT

The Act provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>6</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>7</sup>

Section 8128(a) of the Act<sup>8</sup> does not entitle a claimant to a review of OWCP’s decision as a matter of right.<sup>9</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>10</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>11</sup> As one such limitation, it 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>12</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>13</sup>

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of OWCP’s decision upon presentation of new evidence that the decision was erroneous.<sup>14</sup> In accordance with this holding OWCP 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 OWCP.<sup>15</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>16</sup> The evidence must be positive, precise and explicit and must be

---

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.605 (1999).

<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</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>11</sup> Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent evidence not previously considered by OWCP; *see* 20 C.F.R. § 10.606(b).

<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> *See Leon D. Faidley, Jr.*, *supra* note 9.

<sup>14</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>16</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

manifest on its face that OWCP committed an error.<sup>17</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>18</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>19</sup> This entails a limited review by OWCP 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 OWCP.<sup>20</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 OWCP's decision.<sup>21</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>22</sup>

### ANALYSIS

As the Board noted in its December 17, 2009 decision, the last OWCP's decision on the merits of the underlying claim for injury on August 9, 2000 was an April 22, 2002 decision. The application for reconsideration was dated June 14, 2010. Since this is more than one year after the last merit decision, it is untimely filed.

The issue therefore is whether the application for reconsideration establishes clear evidence of error by OWCP in the denial of the claim for injury on August 9, 2000. With his application, appellant submitted form reports from Dr. Trowbridge, a September 18, 2000 report from Dr. Gartsman and treatment notes from Dr. Gartsman dated August 22 and 23, 2000. He argued that OWCP did not consider all the evidence and specifically stated that the April 22, 2002 decision did not mention the September 18, 2000 report from Dr. Gartsman. The report was specifically addressed in the November 21, 2001 decision by the OWCP's hearing representative. There is no evidence that OWCP failed to consider the probative evidence of record. The evidence from Dr. Gartsman does not establish clear evidence of error. The treatment notes refer to appellant being hit on the shoulder and falling to his knees, which was not factually established. There is no rationalized medical opinion on causal relationship between a diagnosed shoulder condition and an August 9, 2000 employment incident.

Appellant appears to argue that the evidence shows this was not a "new injury." He filed a claim based on an employment incident on August 9, 2000. Even if the injury is an aggravation of a prior injury or involves the same part of the body as a prior injury, it is still

---

<sup>17</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>18</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>19</sup> See *Leona N. Travis*, *supra* note 17.

<sup>20</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>21</sup> *Leon D. Faidley, Jr.*, *supra* note 9.

<sup>22</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

considered a new injury if the claim is based on new employment incidents or exposures.<sup>23</sup> It was appellant's burden of proof to submit evidence sufficient to establish the claim. The evidence submitted on reconsideration is not sufficient to establish clear evidence of error. Dr. Trowbridge provided form reports that do not provide a complete and accurate background or a probative medical opinion on causal relationship between a diagnosed condition and the employment incident. As noted above, the clear evidence of error standard is difficult to meet; it is not enough to show that the evidence could be construed so as to produce a contrary conclusion. It must *prima facie* shift the weight of the evidence in appellant's favor. The June 14, 2010 application for reconsideration does not show clear evidence of error by OWCP.

On appeal, appellant argues the application for reconsideration was timely, noting the Board decision dated December 17, 2009. This decision was not decision on the merits of the claim and only a merit decision by the Board would provide an additional one year to timely request reconsideration.<sup>24</sup> Appellant also reiterates the arguments raised to OWCP. For the reasons noted, the clear evidence of error standard has not been met in this case.

### **CONCLUSION**

The Board finds that the application for reconsideration was untimely and failed to show clear evidence of error.

---

<sup>23</sup> See *J.P.*, Docket No. 10-2043 (issued June 6, 2011); Federal (FECA) Procedure Manual, *supra* note 15 at *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

<sup>24</sup> A right to reconsideration within one year accompanies any merit decision on the issues. Federal (FECA) Procedure Manual, *supra* note 15, Chapter 2.1602.3(b) (June 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 3, 2010 is affirmed.

Issued: August 16, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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