



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> In an October 22, 2002 decision, the Board affirmed Office decisions dated January 4 and April 13, 2001, finding that it properly terminated appellant's monetary benefits effective January 4, 2001 for refusal of suitable work. The facts of the case are set forth in the Board's prior decision and incorporated herein by reference.<sup>3</sup>

On May 6, 2007 appellant filed a claim for a schedule award. On June 25, 2007 the Office requested that he submit a report from a treating physician addressing the extent and degree of any impairment as a result of his work-related injuries.

In a July 13, 2007 report, Dr. Kirk L. Jensen, a Board-certified orthopedic surgeon, diagnosed right shoulder impingement and supraspinatus sprain/strain and recommended continued modified duty. On April 27, 2008 he treated appellant for bilateral shoulder pain and diagnosed status post right shoulder rotator cuff repair, bilateral shoulder impingement and bilateral shoulder adhesive capsulitis. Dr. Jensen opined that appellant was permanent and stationary and totally disabled from his bilateral shoulder condition. On July 21, 2008 he opined that appellant's right shoulder function had deteriorated with marked crepitus indicative of a recurrent supraspinatus tendon tear and the left shoulder symptoms were indicative of tendinitis. Dr. Jensen diagnosed left shoulder supraspinatus tendinitis and right shoulder status post rotator cuff repair and postoperative adhesive capsulitis and continued appellant's restrictions. In an April 27, 2009 report, he noted that appellant was permanent and stationary and totally disabled as a result of his bilateral shoulder condition. In an August 25, 2009 attending physician's report, Dr. Jensen reiterated his findings and diagnosis.

On July 27, 2009 appellant filed a Form CA-7, claim for compensation for total disability for the period beginning May 17, 2009.

On September 29, 2009 appellant's congressman requested the status of appellant's claim. In an October 13, 2009 response, the Office provided a summary of his case and noted that, because he refused an offer of suitable work, he was not entitled to further monetary compensation benefits. Appellant was instructed to pursue his appeal rights.

In a letter dated October 13, 2009, the Office acknowledged receipt of appellant's claim for a schedule award and his claim for compensation beginning May 17, 2009. It informed him that by decision dated January 4, 2001 he was no longer entitled to monetary compensation because he refused an offer of suitable employment. The Office instructed appellant to pursue his appeal rights.

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<sup>2</sup> The Office accepted appellant's claim for right carpal tunnel syndrome, right shoulder tendinitis and right rotator cuff impingement. On September 13, 1999 appellant underwent right rotator cuff repair and had repeat surgery on May 2, 2000.

<sup>3</sup> Docket No. 01-1831 (issued October 22, 2002).

On November 12, 2009 appellant requested reconsideration of the January 4, 2001 decision noting that there was a mix up with the medical unit and human resources and that he did not refuse suitable work. The Office received a copy of the employing establishment's November 2, 2000 job offer, a November 2, 2000 notice from the Office advising him that the offered job was suitable, the December 13, 2000 notice providing him an additional 15 days to accept the job offer without penalty and the January 4, 2001 decision terminating monetary benefits for refusal of suitable work.

By a decision dated March 18, 2010, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and did not present clear evidence of error by the Office.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>6</sup> As one such limitation, it 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>7</sup> The right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any merit decision by the Board.<sup>8</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 section 8128(a).<sup>9</sup>

The Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8128(a).

<sup>6</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>7</sup> 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

<sup>8</sup> *D.G.*, 59 ECAB 455 (2008); *Leon D. Faidley*, 41 ECAB 104, 111 (1989). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004).

<sup>9</sup> *Sean C. Dockery*, 56 ECAB 652 (2005); *Mohamed Yunis*, 46 ECAB 827,829 (1995).

<sup>10</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

must be of sufficient probative value to 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>11</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>14</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.<sup>15</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The most recent merit decision is the Board's October 22, 2002 decision affirming the Office's termination of monetary benefits. Appellant's request for reconsideration was dated November 12, 2009, more than one year after October 22, 2002. Therefore, her reconsideration request was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant's November 12, 2009 request contended that he did not refuse suitable work, rather there was a miscommunication or mix up with the medical unit and human resources. The Office also received a letter from his congressman regarding the status of the claim and copies of evidence previously of record pertaining to the termination of his benefits. While appellant addressed his disagreement with the Office's decision to terminate his benefits for a refusal of suitable work, his general allegations do not establish clear evidence of error or raise a substantial question as to the correctness of the Office's decision. The Board previously considered this argument about a miscommunication and he did not submit any further evidence supporting his assertions or explaining how there was clear error in the prior decision on this matter. Appellant did not support his assertions with positive, precise and explicit evidence manifesting on its face that the Office committed an error in terminating his benefits for refusal of suitable work. The Office properly found that his reconsideration request and his factual submissions did not establish clear evidence of error.

Appellant also provided reports from Dr. Jensen who noted appellant's treatment and opined that he was totally disabled. Dr. Jensen's 2008 report does not specifically support that appellant was unable to perform the offered position at the time benefits were terminated in 2001. To the extent that he may have changed his opinion on appellant's ability to engage in duties consistent with the offered position, his 2008 report does not raise a substantial question as

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<sup>11</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>12</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

to the correctness of the Office's decision. The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>16</sup> These reports do not establish clear evidence of error by the Office.

Appellant has not otherwise provided any argument or evidence sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration dated November 12, 2009 was untimely filed and did not demonstrate clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2011  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

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

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<sup>16</sup> See *B.W.*, 61 ECAB \_\_\_\_ (Docket No. 10-323, issued September 2, 2010).