



## **FACTUAL HISTORY**

On December 1, 2009 appellant, then a 37-year-old city carrier, filed a Form CA-2, notice of occupational disease, alleging injury to his shoulder and elbow while casing mail. He returned to work on December 3, 2009.<sup>2</sup> In a statement dated December 8, 2009, appellant noted that he began having problems with his right hand, shoulder and elbow six months prior and attributed it to repetitive motions in casing mail daily, lifting mail trays and delivering mail. His condition recently worsened and he sought medical treatment and physical therapy.

Appellant submitted a disability award from the Department of Veterans Affairs dated October 27, 1999, finding a 20 percent service-connected disability. He came under the treatment of Dr. C. Lee Jimmerson, a Board-certified internist, from November 13, 2003 to May 15, 2008, for human immunodeficiency virus and chronic sinusitis. Appellant was treated by Dr. John W. Baddley, a Board-certified internist, on June 1, 2004, for chronic infectious disease who noted that appellant experienced fatigue and recommended a less strenuous job. He was treated by Dr. Mathew Davis, a Board-certified internist, from June 27, 2006 to August 28, 2009, for a right wrist injury and who noted that appellant reached maximum medical improvement on May 29, 2008 and could return to work with restrictions. Also submitted were physical therapy notes from January to March 2009 which diagnosed right shoulder bicep tendinitis, wrist pain and wrist sprain. On June 9, 2009 appellant was treated by a registered nurse for a right wrist sprain. In a January 28, 2010 report, Dr. Kenneth W. Bramlett, a Board-certified orthopedist, noted that appellant was scheduled for shoulder surgery on February 26, 2010 and could not work for two to three weeks.

By decision dated February 18, 2010, OWCP denied appellant's claim finding that he failed to establish fact of injury. The medical evidence failed to contain a medical diagnoses in connection with the claimed work activities.

On May 24, 2011 appellant requested a review of the written record. On June 9, 2011 he withdrew his request for a review of the written record and requested reconsideration before OWCP. In a February 9, 2011 statement, appellant attributed his current shoulder condition to his employment as a carrier for eight years where he repetitively cased mail and noted an onset date of December 1, 2009.

Appellant submitted a duplicate Form CA-2, dated April 5, 2011. In a February 17, 2010 report, Dr. Michael Blum, a Board-certified orthopedic surgeon, diagnosed bilateral shoulder rotator cuff tendinitis. Appellant reported being a mail carrier with an onset of bilateral shoulder pain in January 2009. Dr. Blum noted findings of limited range of motion, good strength and positive impingement in both shoulders. On March 17, 2011 appellant was treated by Dr. Dewey H. Jones, III, a Board-certified orthopedist, who noted that appellant presented with right shoulder pain which began several years prior. Dr. Jones noted findings of pain on range of motion. He advised that there was concern that appellant's injury was work related; however, that had not been discerned. Dr. Jones noted x-rays revealed type III acromion and impingement

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<sup>2</sup> Appellant filed a claim for a right wrist injury which was accepted by OWCP in claim number xxxxxx813. This claim is not before the Board on this appeal.

and underdevelopment of the left shoulder. He recommended a magnetic resonance imaging (MRI) scan of the left shoulder and work up for rheumatoid arthritis. In an April 1, 2011 report, Dr. Jones noted that a March 29, 2011 MRI scan of the right shoulder revealed an intrasubstance tear in the biceps and a tear of the supraspinatus tendon. He opined that appellant's condition may be aggravated by casing mail at work. Dr. Jones recommended physical therapy.

By decision dated June 23, 2011, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>3</sup>

OWCP, 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(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>4</sup> However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP 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 OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>5</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 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>6</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>5</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>6</sup> *Annie L. Billingsley*, *supra* note 4.

<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>9</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures establish a one-year time limitation period for requesting reconsideration that begins on the date of the original OWCP decision.<sup>11</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>12</sup> As appellant's June 9, 2011 request for reconsideration was submitted more than one year after the most recent merit decision of February 18, 2010, it was untimely. Consequently, he must establish clear evidence of error by OWCP in denying his claim for compensation.<sup>13</sup>

Appellant's correspondence on reconsideration attributed his current shoulder condition to his employment as a carrier for eight years. He noted repetitively casing mail and that the onset date was December 1, 2009. While appellant asserted that his shoulder condition was caused by his repetitive work duties as a carrier, his general allegations do not establish clear evidence of error as his arguments do not raise a substantial question as to the correctness of OWCP's decision. He has not established any specific error in OWCP's most recent merit decision that warrants a finding of clear evidence of error. Appellant did not explain how any of his arguments or any of the evidence of record raised a substantial question concerning the correctness of OWCP's decision.

The Board notes that the underlying issue is medical in nature. On reconsideration, appellant submitted a notice of occupational disease which was a duplicate of the CA-2 form submitted on December 1, 2009. OWCP had previously considered this evidence and appellant, in submitting this document, did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. It is not apparent how resubmission of this document is sufficient to raise a substantial question as to the correctness of the OWCP's decision.

Appellant submitted a February 17, 2010, report from Dr. Blum who diagnosed bilateral shoulder rotator cuff tendinitis. He reported being a mail carrier with an onset of bilateral shoulder pain in January 2009. Similarly, in a March 17, 2011 report, Dr. Jones noted treating

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *Robert F. Stone*, 57 ECAB 292 (2005);

<sup>13</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

appellant for right shoulder pain. He noted that it had not been determined whether appellant's condition was work related. In an April 1, 2011 report, Dr. Jones noted that an MRI scan of the right shoulder revealed an intrasubstance tear and opined that appellant's work duties including casing mail may aggravate his condition. However, these reports are insufficient to establish clear evidence of error. To establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. The submission of 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>14</sup> This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that Drs. Blum and Jones' reports submitted on reconsideration are insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its February 18, 2010 decision.

On appeal, appellant asserts that he has submitted sufficient medical evidence to establish that he sustained a work-related right shoulder injury in 2009. As discussed, however, he has not raised any argument or submitted any evidence sufficient to raise a substantial question regarding the correctness of OWCP's last merit decision. On appeal, appellant reiterated his arguments that he submitted sufficient evidence to establish his claim. The issue of whether there is clear evidence of error in OWCP's most recent merit decision is the only matter over which the Board has jurisdiction. As explained, appellant has not established clear evidence of error in OWCP's decision.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration dated June 9, 2011 was untimely filed and did not demonstrate clear evidence of error.

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<sup>14</sup> *D.G.*, 59 ECAB 455 (2008); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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