

**United States Department of Labor
Employees' Compensation Appeals Board**

JOHN D. GUINN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 06-232
Issued: April 4, 2006**

Appearances:
John D. Guinn, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2005 appellant filed a timely appeal of the August 8, 2005 decision of the Office of Workers' Compensation Programs which found that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated July 16, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the November 8, 2005 decision denying his request for reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 3, 2003 appellant, then a 51-year-old mail handler, filed a claim alleging that on February 24, 2003 he sustained an injury while in the performance of his federal duties. The Office accepted that he sustained a left shoulder contusion. Appellant returned to light-duty work on February 24, 2003 and was released by his physician for full-duty work on May 21, 2003.

On August 13, 2003 appellant filed a claim alleging a recurrence of disability on August 4, 2003. He advised that, after he returned to full duty in June 2003, his original injury was aggravated, but appellant did seek medical treatment until August 6, 2003. In an August 10, 2003 medical note, Dr. Bret R. Sokoloff, a Board-certified orthopedic surgeon, noted that he reported recurrent discomfort in his left shoulder with repetitive use and lifting and provided an assessment of left shoulder impingement, rotator cuff tendinitis and chronic pectoralis tendon rupture. Appellant was restricted from lifting for one week before resuming full-duty work status.

In an August 28, 2003 letter, the Office advised appellant of the deficiencies in his claim and requested additional factual and medical evidence. He did not respond to the Office's factual inquiries but submitted several progress reports from Dr. Sokoloff, which recommended arthroscopic surgery.

By decision dated September 30, 2003, the Office denied appellant's recurrence claim on the basis that it was not established that his current medical condition was causally related to the February 24, 2003 work injury.

On June 14, 2004 appellant requested reconsideration of the September 30, 2003 decision and submitted additional progress reports from Dr. Sokoloff.

By decision dated July 16, 2004, the Office denied modification of its September 30, 2003 decision. The Office noted that appellant's claim for a recurrence of disability was actually a claim for a new occupational injury caused by new employment duties since his return to full-time work.

Additional evidence was received by the Office between July 19, 2004 and June 24, 2005. In a May 4, 2005 progress report, Dr. Sokoloff stated that appellant had mild impingement and minimal isometric discomfort and noted that surgical treatment was currently on hold. He also opined that all of his symptoms and conditions were related to his initial injury and advised that, because appellant had temporary relief while on light duty, did not mean that he had a new injury once he resumed full activities.

In a letter dated July 8, 2004, which the Office received July 21, 2005, appellant requested reconsideration of the Office's July 16, 2004 decision. He stated that the medical care and physical therapy he received helped him to avoid surgery, but appellant experienced pain in his left shoulder and pectoral muscles. Appellant contended that he should not be penalized if the wrong claim form was filled out. Copies of a March 20, 2003 magnetic resonance imaging

(MRI) scan of the left shoulder and a June 24, 2004 duty status report, both previously of record, were submitted. The envelope containing the reconsideration request is not of record.

By decision dated August 8, 2005, the Office denied appellant's request for reconsideration, finding that it was untimely filed and did not establish clear evidence of error. The Office noted that the medical reports of appellant's condition were inconsistent and the evidence did not support that there was an objective material worsening of his condition without intervening factors.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.¹ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.² The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.⁵

ANALYSIS

The one-year time limitation begins to run on the date following the date of the original Office decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ Therefore, appellant had one year from July 16, 2004 to submit a timely request for reconsideration. The Office received appellant's July 8, 2005 request for reconsideration on July 21, 2005. Because the request was received more than one year after the July 16, 2004 merit decision, the Office found the request to be untimely.

¹ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² 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. 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607 (1999).

⁴ 20 C.F.R. § 10.607(a) (1999).

⁵ 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁶ *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

The Board notes that Office regulations and Chapter 2.1602.3(b)(1) of the Office's procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.⁷ The Board notes that the envelope containing the request was not retained in the record and appellant did not submit any evidence to establish that he had mailed the request on July 8, 2005. The procedural manual states that, when there is no evidence to establish the mailing date, the date of the letter itself should be used.⁸ For this reason, the Board finds that as appellant's reconsideration request was dated July 8, 2005 and there is no other evidence to establish the mailing date, his request for reconsideration was timely filed. As he timely filed his request for reconsideration within one year of the July 16, 2004 merit decision, the Office improperly denied appellant's reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.

CONCLUSION

The Board finds that appellant's July 8, 2005 request for reconsideration was timely filed.

⁷ See 20 C.F.R. § 10.607(a). The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b)(1) (January 2004).

⁸ *Id.*, see also *Donna M. Campbell*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2005 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: April 4, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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