

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

J.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hillsboro, OH, Employer**

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**Docket No. 11-2081
Issued: May 3, 2012**

Appearance:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

**RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge**

JURISDICTION

On September 23, 2011 appellant, through his attorney, filed a timely appeal of an August 15, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration without conducting a merit review. Because more than one year elapsed between the most recent merit decision dated July 5, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. See 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP 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

This case has previously been on appeal before the Board.³ In a July 9, 2010 decision, the Board found that the evidence submitted by appellant on reconsideration was insufficient to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review. The Board found that OWCP did not abuse its discretion in denying further merit review. The facts and history contained in the prior appeal are incorporated by reference.

On July 8, 2011 appellant's representative requested reconsideration and submitted additional medical evidence. He alleged that the new medical evidence established that the work injury of December 5, 2005 caused both appellant's impingement syndrome and biceps rupture. Counsel argued that the prior decision was contrary to law and the claim should be approved.

In an August 20, 2010 report, Dr. Martin Fritzhand, an occupational physician and Board-certified urologist, noted that in his September 24, 2008 report, he attempted to explain the causal relationship between the well-documented injury appellant sustained to the right upper extremity and the subsequent findings of a ruptured right biceps and right shoulder impingement. Dr. Fritzhand, indicated that the use of the word "could" was "unfortunate" as it was "more accurate to state that within reasonable medical probability" appellant's "December 5, 2005 [employment] injury certainly caused both the impingement syndrome and the biceps rupture."

In a decision dated August 15, 2011, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present 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 anytime 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."⁴

³ Docket No. 10-33 (issued July 9, 2010).

⁴ 5 U.S.C. § 8128(a).

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁵ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

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 manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient 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. 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.⁸ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.⁹

ANALYSIS

In its August 15, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on July 5, 2007. Counsel requested reconsideration on July 8, 2011, more than one year after the July 5, 2007 merit decision and was, therefore, untimely.

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁹ *Id.*

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by him in support of his application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in OWCP's July 5, 2007 decision which found that the medical evidence did not establish that the employment incident caused an injury.

With his July 8, 2011 request for reconsideration, counsel submitted an August 20, 2010 report from Dr. Fritzhand, who attempted to explain the causal relationship between employment incident and the subsequent findings of a ruptured right biceps and right shoulder impingement. Dr. Fritzhand opined that "within reasonable medical probability" appellant's "December 5, 2005 [employment] injury certainly caused both the impingement syndrome and the biceps rupture." However, this report is insufficient to establish clear evidence of error. While Dr. Fritzhand sought to explain his opinion on causal relationship and provided some reasoning, the Board notes that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹⁰

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in its July 5, 2007 decision. Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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