

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued December 10, 2004,² the Board found that the Office properly denied appellant's request for a merit review of its August 3, 1995 decision on the grounds that it was untimely filed and did not present clear evidence of error. The August 3, 1995 decision terminated appellant's compensation benefits effective August 10, 1995 as his work-related disability and need for medical treatment had ceased.³

On December 23, 2004 appellant filed a petition for reconsideration, asserting that the Board committed legal and factual errors in its December 10, 2004 decision and order. The Office did not comply with the Board's March 7, 2005 request to transmit the case record for review. The Board granted the Office an extension of time to July 9, 2005 to transmit the case record. As the Office did not comply, the Board issued an order on April 3, 2006⁴ setting aside its December 10, 2004 decision. The Board remanded the case to the Office for reconstruction of the record and issuance of an appropriate decision. The law and facts of the case as set forth in the Board's prior decision and order are hereby incorporated by reference.

By decision dated May 15, 2006, the Office denied appellant's January 19, 2004 request for reconsideration of the Office's June 26, 1996 decision on the grounds that it was not timely filed and failed to present clear evidence of error. The Office noted that it was issuing the decision pursuant to the Board's April 3, 2006 order to protect appellant's appeal rights.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of

² Docket No. 04-1767 (issued December 10, 2004).

³ The Office accepted that on February 20, 1979 appellant, then a 31-year-old letter carrier, sustained neck and upper back pain, a cervical strain with radiculopathy, lumbosacral strain and trauma to the third and fourth fingers of the left hand when he slipped and fell on stairs while delivering mail.

⁴ Docket No. 04-1767 (issued April 3, 2006).

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁷ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

that decision.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.¹⁰ Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by the Office 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 the Office.¹⁶ 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 the Office's decision.¹⁷ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁸

⁸ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 6 at 769; *Jesus D. Sanchez*, *supra* note 7 at 967.

¹⁰ *Thankamma Mathews*, *supra* note 6 at 770.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Thankamma Mathews*, *supra* note 6 at 770.

¹³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁴ *Jesus D. Sanchez*, *supra* note 7 at 968.

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁸ *Gregory Griffin*, *supra* note 8.

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on June 26, 1996. Appellant's January 19, 2004 letter requesting reconsideration was untimely filed as it was submitted more than one year after the last merit decision.¹⁹ It must now be determined whether appellant's January 19, 2004 request for reconsideration demonstrated clear evidence of error in the Office's June 26, 1996 decision.

Appellant's January 19, 2004 letter reiterated his assertion that he had a continuing work-related disability on and after the Office terminated his compensation benefits effective August 10, 1995. The Board finds that this letter does not raise a substantial question as to whether the Office's June 26, 1996 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error.

Appellant also submitted copies of medical reports previously of record and considered by the Office prior to issuing the June 26, 1996 merit decision. These reports are irrelevant as they do not contain medical rationale supporting the asserted causal relationship. Irrelevant evidence is insufficient to demonstrate clear evidence of error.²⁰

Appellant has not established that the Office improperly denied his request for further review of the merits of his claim. His reconsideration request did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his January 19, 2004 request for reconsideration do not *prima facie* shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's June 26, 1996 decision and are thus insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's June 26, 1996 decision, the last merit decision in the case. Therefore, the May 15, 2006 decision of the Office denying appellant's January 19, 2004 request for reconsideration was proper under the law and facts of this case.

¹⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

²⁰ *Thankamma Mathews*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 15, 2006 is affirmed.

Issued: March 2, 2007
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