

Appellant has two claims before the Office. He filed a claim for an October 16, 1979 back injury while lifting a bag. This claim was accepted for lumbar strain and aggravation of

scoliosis under OWCP File No. xxxxxx632. Pursuant to this claim, appellant filed a claim for a recurrence of disability commencing May 16, 1994. The Office denied the claim by decision dated September 16, 1996. By decision dated April 4, 1997, it denied further merit review of the claim. The Board affirmed the Office's denial of the recurrence claim in a decision dated August 11, 1999.¹ The Board found appellant did not submit sufficient medical evidence to establish a recurrence of disability commencing May 16, 1994.

On May 1, 1990 appellant filed a claim for a left knee injury. This claim was accepted for left knee strain and synovitis under OWCP File No. xxxxxx216. On June 23, 2005 the Office advised appellant that his claim had also been accepted for post-traumatic stress disorder (PTSD) and major depressive disorder, single episode.

By letter dated May 10, 2006, appellant requested reconsideration of his claim. He included both OWCP File No's and stated that the claims warranted review for "possible total permanent disability considering the severity of the affective disorders and anxiety-related disorders, secondary to the accepted physical injuries." Appellant submitted additional medical evidence, including an April 24, 2006 report from Dr. Dorian Lagrotta, a psychiatrist, who provided a history and results on examination, diagnosing PTSD and depressive disorder. Dr. Lagrotta stated that appellant developed symptoms of depression, aggravated by his chronic physical conditions due to the 1979 back trauma and 1990 knee trauma. In a report dated May 5, 2006, Dr. Rolando Chin, an orthopedic surgeon, provided a history and results on examination. Dr. Chin concluded that appellant had been suffering for years of multiple orthopedic conditions that had worsened over the years and limited his physical activities, functional capacity and ability to work.

The Office requested that an Office medical adviser provide an opinion as to whether appellant's problems on or after 1994 were due to the 1979 injury. In a report dated August 2, 2006, an Office medical adviser stated that there was no evidence of causal relationship between the 1979 injuries and the development of an L5-S1 disc herniation with a 2003 discectomy.

By decision dated August 17, 2006, the Office determined the request for reconsideration was untimely and failed to show clear evidence of error. It noted the last merit decision was the August 11, 1999 Board decision.

Appellant requested an appeal to the Board. By order dated March 18, 2008, the Board remanded the case to the Office for proper assemblage of the case record.² The Board indicated that while the Office had transmitted the left knee claim, File No. xxxxxx216, the August 17, 2006 Office decision was issued under File No. xxxxxx632.

By decision dated September 5, 2008, the Office again found that appellant's reconsideration request was untimely and failed to show clear evidence of error.

¹ Docket No. 97-2880 (issued August 11, 1999).

² Docket No. 07-741 (issued March 18, 2008).

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.³ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁴

Section 8128(a) of the 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 regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁹ 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 5 U.S.C. § 8128(a).¹⁰

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹¹ In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹²

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.605 (1999).

⁵ *Supra* note 3.

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 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."

⁸ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *See Leon D. Faidley, Jr.*, *supra* note 6.

¹¹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ 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 decision.¹⁸ The Board makes 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.¹⁹

ANALYSIS

In the present case, appellant filed an application for reconsideration dated May 10, 2006. Appellant identified File No. xxxxxx632, the October 16, 1979 injury, as well as File No. xxxxxx216, the April 30, 1990 injury. With respect to the October 16, 1979 injury, the last merit decision of record was the Board's August 11, 1999 decision, affirming the denial of a recurrence of disability commencing May 16, 1994. Appellant referred to a February 16, 2006 decision, but there is no decision of that date. The Office issued a letter dated February 16, 2006, which explained to appellant that if he wanted to exercise appeal rights he should clearly identify the appeal right being pursued. This letter is not a final decision of the Office with appeal rights.²⁰ Since the last merit decision was dated August 11, 1999, the May 10, 2006 application for reconsideration was filed more than one year after the decision and is untimely.

The issue therefore is whether the application showed clear evidence of error by the Office. Appellant submitted additional medical evidence, but neither Dr. Lagrotta or Dr. Chin provided probative medical evidence on the underlying merit issue. The claim was for a recurrence of disability commencing May 16, 1994 causally related to the accepted October 16,

¹³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁶ See *Leona N. Travis*, *supra* note 14.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

²⁰ 20 C.F.R. § 10.126.

1979 injuries. The physicians did not provide any medical opinion on this issue. Dr. Lagrotta did not discuss a recurrence of disability on or after May 16, 1994. Dr. Chin noted multiple orthopedic conditions, without addressing the relevant issue. The clear evidence of error standard requires that the evidence 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. Appellant did not meet the standard in this case.

On appeal, appellant states that the Office has recognized two claims, but considered only the back injury. He indicated that he had several knee surgeries, that his back strain had worsened, and the evidence from Dr. Lagrotta indicated severe depression was due to both injuries. The Board notes that the psychiatric conditions were accepted pursuant to File No. xxxxxx216. If appellant has a claim for a specific period of disability due to these conditions, he may pursue such a claim under that file number. The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.²¹ In this case the only decision issued within one year of the filing of the appeal was the September 5, 2008 decision issued under File No. xxxxxx632. This decision properly found that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

CONCLUSION

The Board finds appellant's application for reconsideration was untimely and failed to show clear evidence of error.

²¹ See 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The Board notes that for Office decisions dated November 19, 2008 or later, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e) (2009); 73 Fed. Reg. 62190 (October 20, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2008 is affirmed.

Issued: October 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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