

FACTUAL HISTORY

This is appellant's second appeal before the Board. On May 23, 2000 the Board affirmed the Office's October 7, 1998 denial of his request for reconsideration of its July 21, 1997 merit decision denying his claim for recurrence of disability.¹ Appellant alleged that he suffered from headaches, dizziness and depression as a result of his work injuries. The facts and circumstances of the case are detailed in the Board's first decision and are hereby incorporated by reference.

Subsequent to the Board's May 23, 2000 decision, appellant submitted numerous requests for reconsideration of the Office's July 21, 1997 decision. In support of his May 14, 2001 request, appellant submitted a May 4, 2001 letter from his treating physician, Dr. James D. Mallory, Jr., a Board-certified psychiatrist, in which he expressed his opinion that appellant's condition was "caused from his employment injury." Appellant also submitted a letter dated November 18, 1998 wherein Dr. Mallory stated that he began having headaches and blackouts after he was struck in the head by a mail sack on December 29, 1986 and again by a large mail container on July 26, 1989. He indicated that there was "no logical conclusion to explain the exacerbation of symptoms other than the head injury."

By decision dated July 12, 2001, the Office denied appellant's request for reconsideration as untimely and failing to show clear evidence of error.

In his December 20, 2002 request for reconsideration, appellant contended that there had been a conflict of medical opinion at the time the decision was entered. By decision dated February 10, 2003, the Office again denied his request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

In support of his April 14, 2003 request for reconsideration, appellant submitted several medical reports, including a June 16, 1993 letter from Dr. J.E. McDaniel, a Board-certified neurologist, indicating that appellant had been referred to him for anxiety and chronic pain; a July 1, 1997 letter from Dr. Mallory, reflecting his opinion that appellant's psychiatric condition resulted from his headaches and blackouts; an August 29, 1997 letter from Dr. Mallory relating the history of appellant's condition; and another copy of Dr. Mallory's November 18, 1998 report. By decision dated May 16, 2003, the Office again denied appellant's request as untimely and failing to show clear evidence of error.

To support his May 6, 2004 request for reconsideration, appellant submitted five letters from Dr. Mallory. His November 20, 1995 report indicated that appellant suffered from postconcussion syndrome associated with emotional instability and anxiety. Dr. Mallory's December 20, 1995 report reflected that he experienced cognitive slowing and mild dementia secondary to head trauma. His May 8, 1996 report revealed that appellant had experienced headaches after a 1968 automobile accident and that those symptoms came under the heading of "psychiatric" as well as "neurological." An October 27, 1998 report reiterated that his headaches and blackouts were caused by his work-related injuries; and a report dated September 4, 2003

¹ Docket No. 99-381 (issued May 23, 2000). The Board denied appellant's petition for reconsideration by order dated December 29, 2000.

reflected Dr. Mallory's opinion that appellant's inability to work was caused by work-related injuries of 1986 and 1989. By decision dated June 25, 2004, the Office denied his request for reconsideration as untimely and failing to show clear evidence of error.

On November 30, 2004 appellant filed his most recent request for reconsideration of the Office's July 21, 1997 decision. In support of his request, appellant submitted a November 11, 2004 letter to his senator, in which he contended that the Office erred in its June 25, 2004 decision by failing to clarify that the mail sack with which he had been struck was full. He also alleged that the Office erred by failing to specifically refer to Dr. Mallory as a psychiatrist. Appellant also submitted a November 2, 2004 letter from Dr. Mallory responding to the June 25, 2004 decision. Dr. Mallory argued that medical reports dated December 30, 1986 describing headaches and trauma to the head and a letter dated February 3, 1998 from Dr. Mark Kozinn, a Board-certified neurologist, who provided a diagnosis of post-traumatic headache being caused by stress and hyperventilation, established that appellant had been treated for psychiatric symptoms prior to April 10, 1992. Dr. Mallory further stated that his August 29, 1997 letter contained his opinion that his on-the-job injuries had been the cause of his "symptoms and disability." Appellant also submitted another copy of Dr. Mallory's August 29, 1997 letter.

By decision dated January 20, 2005, the Office denied appellant's request for reconsideration as untimely and failing to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² 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 that decision.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ The Office procedures states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

² 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607; *see also* Alan G. Williams, 52 ECAB 180 (2000).

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁵ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ 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 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. 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.⁸ 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.⁹

ANALYSIS

The Office found that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁰ The last merit decision in this case, was the Office's July 21, 1997 decision denying appellant's claim for recurrence of disability. As his May 6 and November 30, 2004 letters requesting reconsideration were submitted more than one year after the last merit decision of record, they were untimely. Consequently, appellant must demonstrate "clear evidence of error" on the part of the Office in denying his claims for compensation.¹¹

To support his May 6, 2004 request for reconsideration, appellant submitted five letters from Dr. Mallory: a November 20, 1995 report indicating that he suffered from postconcussion syndrome associated with emotional instability and anxiety; a December 20, 1995 report reflecting that he experienced cognitive slowing and mild dementia secondary to head trauma; a May 8, 1996 report documenting that appellant had experienced headaches after a 1968 automobile accident and that those symptoms came under the heading of "psychiatric" as well as "neurological;" an October 27, 1998 report reiterating that his headaches and blackouts were

⁷ *Dorletha Coleman*, 55 ECAB _____ (Docket No. 03-868, issued November 10, 2003); *Leon J. Modrowski*, 55 ECAB _____ (Docket No. 03-1702, issued January 2, 2004).

⁸ *Id.* See also *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-20, issued January 11, 2005).

⁹ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁰ *Veletta C. Coleman*, *supra* note 3; *Larry L. Lilton*, 44 ECAB 243 (1992).

¹¹ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB _____ (Docket No. 03-2223, issued January 9, 2004).

caused by his work-related injuries; and a letter dated September 4, 2003 opining that appellant's inability to work was caused by work-related injuries of 1986 and 1989. Dr. Mallory's reports dated November 20 and December 20, 1995, May 8, 1996 and October 27, 1998, as well as opinions and facts contained therein, had been received and considered by the Office in prior decisions.¹² His September 4, 2003 letter merely repeats his opinion that appellant's symptoms are the result of his "on[-]the[-]job injuries" and provides no new medical facts or explanation as to causal relationship. The Board finds that because Dr. Mallory's reports are cumulative and repetitive, they do not constitute a basis for reopening the record. The Board finds further that the Office properly denied appellant's request for merit review on June 25, 2004 in that he failed to produce new evidence establishing error on the part of the Office.

In conjunction with his November 30, 2004 request for reconsideration, appellant submitted a November 11, 2004 letter to his senator, in which he contended that the Office erred in its June 25, 2004 decision by failing to clarify that the mail sack with which he had been struck was full. He further alleged that the Office erred by failing to specifically refer to Dr. Mallory as a psychiatrist. Appellant also submitted a November 2, 2004 letter from him responding to the June 25, 2004 decision. Dr. Mallory argued that medical reports dated December 30, 1986 describing headaches and trauma to the head and a letter dated February 3, 1998 from Dr. Kozinn, a Board-certified neurologist, who provided a diagnosis of post-traumatic headache being caused by stress and hyperventilation, established that appellant had been treated for psychiatric symptoms prior to April 10, 1992. He further stated that his August 29, 1997 letter contained his opinion that appellant's on-the-job injuries had been the cause of his "symptoms and disability." Appellant also submitted another copy of Dr. Mallory's August 29, 1997 letter. The issue before the Office in its July 27, 1997 decision was whether he had established by the weight of the medical evidence, by virtue of a rationalized medical opinion, that he had sustained a recurrence of disability. In his November 2, 2004 letter, Dr. Mallory did not provide new evidence relevant to the issue at hand, but rather rehashed evidence already in the record and already considered by the Office. Moreover, the issues addressed by appellant in his November 11, 2004 letter do not raise a substantial question concerning the correctness of the Office's decision. The facts surrounding his injury were not in dispute and not relevant to the issue before the Office. Nor were Dr. Mallory's credentials an issue in the case. To establish clear evidence of error, the evidence must be precise, explicit and manifest on its face that the Office committed an error.¹³ The Board finds that the evidence submitted on reconsideration fails to meet this standard and that, therefore, the Office properly denied appellant's request for merit review on January 20, 2005.

¹² The Office cited Dr. Mallory's December 20, 1995 report in its February 5, 1996 decision. The Board cited and considered his October 27, 1998 letter and May 8, 1996 report in its May 23, 2000 decision.

¹³ See *Veletta C. Coleman*, *supra* note 3.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review on June 25, 2004 and January 20, 2005. The Board further finds that his reconsideration requests were untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 25, 2004 and January 20, 2005 are affirmed.

Issued: August 18, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board