

appellant developed degenerative osteoarthritis due to factors of his federal employment.² In the second appeal, the Board found that the Office had properly determined the amount of compensation to which appellant was entitled and that he received the maximum amount permissible under the Federal Employees' Compensation Act and the applicable regulations.³ The Board also found that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on September 20, 1994. In the third appeal, the Board found that appellant failed to establish that he sustained a consequential injury as a result of his accepted employment injury.⁴ On August 8, 2003 the Board issued an order denying appellant's petition for reconsideration.⁵ The facts and the circumstances of the case are set out in the Board's prior decisions and are incorporated herein by reference.⁶

In a letter dated December 14, 2004, appellant requested reconsideration of the denial of his claim that his peptic ulcer, hearing loss, vertigo and heart conditions are consequential injuries of his accepted left knee and lumbar vertebrae osteoarthritis. In support of his request, appellant submitted a November 4, 2004 report by Dr. Lamberto Salud Olaes, an attending physician, who diagnosed peptic ulcer disease, hearing loss, low back syndrome, chronic obstructive pulmonary disease, prostatism, severe degenerative joint disease, hyperlipidemia, HCVD and arteriosclerotic heart disease. He noted that appellant has taken aspirin since 1946 and nonsteroidal antiinflammatory drugs (NSAID) since 1963. In concluding, Dr. Olaes stated that appellant "started to have progressive hearing loss, which I think was related on to prolonged use of Aspirin/NSAIDS."

Appellant filed status requests in letters dated May 19 and August 8, 2005.

In a nonmerit decision dated August 26, 2005, the Office determined that appellant's request for reconsideration was untimely and failed to show 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 Act.⁷ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the

January 1963 he first realized his limp was due to his employment. The Office accepted appellant's claim for osteoarthritis of the left knee and lumbar vertebrae on April 30, 1992.

² Docket No. 91-1374 (issued January 27, 2002).

³ 46 ECAB 970 (1995).

⁴ Docket No. 02-2091 (issued February 11, 2003).

⁵ Docket No. 02-2091 (issued August 8, 2003).

⁶ Appellant alleged that he sustained a peptic ulcer, hearing loss, vertigo and heart conditions as consequential injuries.

⁷ 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

date of that decision.⁸ 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.⁹ 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.¹⁰ 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.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 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 decision.¹⁷ 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.¹⁸

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

⁹ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *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 [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *See Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Leon J. Modrowski*, *supra* note 10; *Jesus D. Sanchez*, *supra* note 9.

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

¹⁶ *See Nelson T. Thompson*, *supra* note 11.

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

¹⁸ *See George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

In its August 26, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on December 14, 2004, more than one year after the last merit decision of record, *i.e.*, the Board's February 11, 2003 decision.¹⁹ Therefore, he must demonstrate clear evidence of error on the part of the Office in its prior decisions.

The Office proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening the case for further merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The evidence appellant submitted in support of his request for reconsideration does not demonstrate clear evidence of error. The November 5, 2004 report by Dr. Olaes, provided no opinion as to whether appellant's peptic ulcer, hearing loss, vertigo, tinnitus and heart condition were the result of the accepted osteoarthritis of the left knee and lumbar vertebrae, the relevant issue in the prior merit decisions. Dr. Olaes stated that appellant's hearing loss is related "to prolonged use of Aspirin/NAIDS." This evidence is insufficient to show clear evidence of error in the Office's August 26, 2005 decision and it properly denied his reconsideration request.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁹ According to Office procedure, the one year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2005 is affirmed.

Issued: February 9, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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