

FACTUAL HISTORY

This case was previously before the Board. By decision dated June 25, 2004, the Board affirmed a September 15, 2003 Office decision that denied appellant's claim for a right third finger condition.² The June 25, 2004 Board decision is incorporated herein by reference.

On November 25, 2005 appellant requested reconsideration. He argued that the Office erred in advising Dr. John A. Gragnani and Dr. Edward F. Schafly³ that he first reported his right third finger condition in November 1998, subsequent to his retirement. Appellant argued that the Office should have advised the physicians that a November 12, 1998 x-ray report did not indicate that he had arthritis in his right hand. He contended that the Office medical adviser, in a February 3, 2000 report, wrongly related his third finger condition to construction work performed on his house and failed to note that the 1998 x-ray report did not show arthritis in his right hand. Appellant submitted copies of medical evidence already of record, a November 13, 1998 report from Dr. Susan E. MacKinnon, an attending plastic and reconstructive surgeon, a November 12, 1998 x-ray report and an October 3, 2000 report from Dr. William K. Harris, an orthopedic surgeon.

By decision dated March 27, 2006, the Office denied appellant's November 25, 2005 request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through its regulations, 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 request for reconsideration is filed within one year of the date of that decision.⁷ The Board has found that the imposition of this one-year time

² Docket No. 04-127 (issued June 25, 2004). On November 8, 1993 appellant, then a 50-year-old security engineering technician, filed a claim for a right arm and elbow condition sustained on June 7, 1993. The Office accepted his claim for right medial epicondylitis and subsequently expanded the claim to include bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Appellant underwent surgery on February 8, 1995 and was released to full duty on April 24, 1995. He retired on January 2, 1998.

³ These physicians are, respectively, a Board-certified physiatrist and Office referral physician, and a Board-certified orthopedic surgeon and impartial medical specialist.

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Id.* at 768.

⁷ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated November 25, 2005. As this request was filed more than one year after the Board's June 25, 2004 merit decision, it is not timely.¹⁶ The remaining issue is whether appellant demonstrated clear evidence of error in the September 15, 2003 Office decision which denied his claim for a right third finger condition.

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's September 13, 2003 merit

⁸ *Thankamma Mathews*, *supra* note 5 at 769.

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

¹⁰ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Darletha Coleman*, *supra* note 12.

¹⁵ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁶ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his request for reconsideration, appellant resubmitted a November 13, 1998 report from Dr. MacKinnon, a November 12, 1998 x-ray report and an October 3, 2000 report from Dr. Harris. As this evidence was previously of record and considered by the Office, it is insufficient to establish clear evidence of error in the Office's September 13, 2003 merit decision.¹⁷

Appellant argued in his request for reconsideration that the Office erred in advising Dr. Gragnani and Dr. Schafly that he first reported his right third finger condition in November 1998 and in failing to advise them that a November 12, 1998 x-ray report did not reveal right hand arthritis. He argued that the Office medical adviser wrongly related his third finger condition to construction work performed on his house and failed to note that the 1998 x-ray report did not show right hand arthritis. The issue of whether appellant sustained a work-related right third finger condition is medical in nature and can be resolved only by the submission of medical evidence establishing causal relationship between his employment and his right third finger condition.¹⁸ In his request for reconsideration, he criticized certain factual and medical evidence of record.¹⁹ However, appellant did not submit evidence establishing clear error in the Office's September 15, 2003 determination that the medical evidence failed to establish causal relationship between appellant's right third finger condition and his employment.

As appellant failed to submit clear evidence of error in the Office's September 13, 2003 decision, the Office properly denied his request for further merit review in its March 27, 2006 decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁷ See *George C. Vernon*, 54 ECAB 319 (2003).

¹⁸ *Id.*

¹⁹ The Board notes that lay individuals such as appellant are not competent to render a medical opinion. See *Robert J. Krstyen*, 44 ECAB 227 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 27, 2006 is affirmed.

Issued: October 23, 2006
Washington, DC

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

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

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