

This case has previously been before the Board. In a February 15, 2000 decision, the Board affirmed the Office hearing representative's December 29, 1997 decision affirming a December 13, 1996 Office decision terminating appellant's compensation benefits effective

December 13, 1996 on the grounds that he no longer had any disability causally related to his April 10, 1996 employment-related injuries.¹ The Board accorded determinative weight to an October 31, 1996 medical report of Dr. Lawrence E. Miller, a Board-certified orthopedic surgeon and Office referral physician, which found that appellant was capable of returning to his regular work duties on a full-time basis. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.² The facts and the history relevant to the present issue are hereafter set forth.

After the issuance of the Board's decision on February 15, 2000, the Office received a March 13, 2000 medical report of Dr. Malik M.P. Akhtar, an attending orthopedic surgeon, who stated that appellant had not been seen in his office since January 6, 1997 following a work-related automobile accident which resulted in fractured multiple ribs, left shoulder sprain and neck, back, right knee and right ankle and heel injuries. He found that appellant sustained impingement and rotator cuff arthropathy of the left shoulder, post-traumatic depression and myofasciitis traumatica with recurrence flare-ups. Dr. Akhtar further found that appellant was status post fracture of the ribs with recurrent pleurisy. He also diagnosed post-traumatic arthritis of the shoulder joints and cervical spine which he stated was likely to worsen with time. Dr. Akhtar opined that appellant remained totally disabled for work. In a March 26, 2002 report, he reiterated his prior diagnoses. Dr. Akhtar opined that appellant continued to have residuals of his accepted April 10, 1996 employment-related injuries.

On November 19, 2006 appellant, through counsel, requested reconsideration. Counsel contended that appellant's claim should be expanded to include additional work-related medical conditions. He further contended that the Office erred in terminating appellant's compensation as the medical evidence of record established that appellant had continuing residuals and disability causally related to his accepted April 10, 1996 employment-related injuries.

By decision dated February 2, 2007, the Office found that appellant's letter requesting reconsideration was dated November 9, 2006, more than one year after the Board's February 15, 2000 decision and was untimely.³ The Office found that appellant did not submit evidence to establish clear evidence of error in the prior decision terminating his compensation benefits.

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 The Office, through its regulations, has

¹ Docket No. 98-1144 (issued February 15, 2000).

² On April 12, 1996 appellant, then a 53-year-old part-time flexible letter carrier, filed a traumatic injury claim alleging that on April 10, 1996 he fractured the left side of his body as a result of an automobile accident that occurred while he was working at the employing establishment. The Office accepted his claim for a concussion, cervical sprain, left shoulder sprain, lumbosacral derangement and rib fracture.

³ The Board notes that it appears that the Office inadvertently stated that appellant's request for reconsideration was dated November 9, 2006 rather than November 19, 2006.

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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.¹³ 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.¹⁴

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁵

The last merit decision in this case was issued by the Board on February 15, 2000. The Board found that the Office properly terminated appellant's compensation effective December 13, 1996 on the grounds that he no longer had any disability causally related to his April 10, 1996 employment-related injuries.¹⁶ As appellant's November 9, 2006 letter requesting reconsideration was made more than one year after the Board's February 15, 2000 merit decision, the Board finds that it was not timely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that the Office erred in terminating his compensation effective December 13, 1996 on the grounds that he no longer had any disability causally related to the accepted employment injuries. The Board notes that this issue is medical in nature.

Appellant has not presented clear evidence of error by the Office in terminating his compensation benefits. In support of his November 9, 2006 request for reconsideration, appellant submitted Dr. Akhtar's March 13, 2000 and March 26, 2002 reports which found that he sustained impingement and rotator cuff arthropathy of the left shoulder, post-traumatic depression, myofascitis traumatica with recurrence flare-ups and post-traumatic arthritis of the shoulder joints and cervical spine. Dr. Akhtar also found that appellant was status post fracture of the ribs with recurrent pleurisy. He opined that appellant's continuing residuals and total disability were causally related to the April 10, 1996 employment injuries. This evidence is insufficient to *prima facie* shift the weight of the evidence in appellant's favor of because Dr. Akhtar's reports were previously of record and considered by the Office.¹⁷ Moreover, Dr. Akhtar failed to provide medical rationale explaining how or why appellant's continuing residuals and disability were causally related to the accepted employment injuries. For these reasons, the Board finds that Dr. Akhtar's March 13, 2000 and March 26, 2002 reports are of diminished probative value and therefore do not establish clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹⁵ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁶ *See supra* note 1.

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

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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