

burden of proof to establish that he sustained intermittent periods of disability from July 12 to November 26, 1990 and/or a recurrence of disability causally related to a July 2, 1990 employment injury.

Subsequent to the Board's October 8, 1996 decision, in a letter received by the Office on October 1, 2003, appellant requested that his case be reopened. In a letter dated September 1, 2003, received by the Office on October 2, 2003, appellant filed an "appeal."² In both letters appellant noted that he was disabled.

By decision dated January 8, 2004, the Office denied appellant's request on the grounds that it had not been filed within one year of the July 13, 1994 merit decision and did not show clear evidence of error. On March 8, 2004 appellant requested reconsideration. In a letter dated March 12, 2004, the Office informed appellant that he could not request reconsideration but could file an appeal with the Board.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ 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.⁴ 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.⁵

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. 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 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁶

² By letter dated November 11, 1999, appellant's congressional representative had inquired about appellant's case. In a response dated January 18, 2000, the Office noted that appellant had not exercised further appeal rights and that his case was closed.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ *Nancy Marcano*, 50 ECAB 110 (1998).

ANALYSIS

The only decision before the Board is the January 8, 2004 decision in which the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that as more than one year had elapsed from the date of issuance of the July 13, 1994 merit decision and appellant's request for reconsideration dated September 1, 2003, his request for reconsideration was untimely. The Board further finds that appellant failed to establish clear evidence of error.

With his September 1, 2003 request for reconsideration, appellant submitted no additional evidence and merely stated that he was disabled. Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.⁷ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁸ In the case at hand, appellant submitted no medical evidence whatsoever.

The Board therefore finds that in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, properly denied further review of the merits of the case.

CONCLUSION

The Board finds that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error such that the Office properly denied a merit review of his claim.

⁷ Cheryl L. Decavitch, 50 ECAB 397 (1999).

⁸ Fereidoon Kharabi, 52 ECAB 291 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 8, 2004 be affirmed.

Issued: August 2, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member