

full time in 1998. In a January 28, 1999 decision, the Office terminated appellant's benefits relying on the November 16, 1998 medical report of Dr. Jay Stein, an orthopedist and an independent medical examiner. Appellant appealed that decision and requested an oral hearing. At the July 21, 1999 hearing, appellant, who has an extensive history of work and nonwork-related medical conditions, argued that the Office failed to consider the cumulative effect of his employment on his back condition. In an October 13, 1999 decision, the hearing representative affirmed the January 28, 1999 termination finding the weight of the medical evidence rested with Dr. Stein, as the impartial medical examiner, and that the medical evidence failed to establish any permanent impairment or residual disability related to the accepted injury.

Appellant's subsequent requests for reconsideration were denied on November 27, 2000 and August 2 and November 18, 2001 and July 24¹ and November 13, 2002 and January 27 and June 3, 2003.

In a September 10, 2002 request for reconsideration, appellant submitted two medical reports already in the record and argued that the impartial medical examiner's report should not carry the weight of the evidence as he has a bad reputation in the medical community, and that the Office should have sought further clarifications from his physicians, as they had from the impartial medical examiner. In a November 13, 2002 decision, the Office denied reconsideration finding that appellant had not established clear evidence of error.

In his November 13, 2003 request for reconsideration, appellant argued that the Office denied him an opportunity to submit new medical evidence and clarify medical reports previously submitted. Appellant also argued that the impartial medical examiner's report was not sufficiently rationalized and that the fact that he received a schedule award on July 1, 1993 for a 14 percent impairment of his lower extremity establishes that his accepted aggravation could not have ended. In a January 27, 2003 decision, the Office denied reconsideration finding that appellant had failed to establish clear evidence of error.

In his April 26, 2003 request for reconsideration, appellant submitted a 15-page personal statement arguing that his back condition has not resolved, the impartial medical examiner's report was not well rationalized and that the Office was biased because it had not fully responded to his requests for information. In addition appellant submitted medical evidence from Dr. Nathan Lebwhol, an orthopedist, and a February 5, 1993 report from Dr. Jason Hanft, a podiatrist, who wrote that he highly suspected that the burning appellant experiences in his feet is related to his spinal deformity. In his May 18, 2001 report, Dr. Lebwhol wrote that he was puzzled as to the cause of appellant's symptoms. In his personal statement, appellant reargued that the accepted aggravation of his herniated disc had not resolved. In a June 3, 2003 decision, the Office found that appellant's claim was not timely and that he failed to submit clear evidence of error.

¹ As appellant filed his appeal with the Board on August 28, 2003 these decisions are not currently before the Board because they were issued more than one year prior to taking jurisdiction of the case. See 20 C.F.R. § 501.3(d)(2).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ 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.⁵

ANALYSIS

In its November 13, 2002 and January 27 and June 3, 2003 decisions, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 13, 1999 and appellant's requests for reconsideration were dated September 10 and November 13, 2002 and January 27, 2003, all more than one year after the October 13, 1999 merit review.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁶ Office procedures provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.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

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

⁸ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that the Office committed an error.⁹ Evidence which 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

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. In each decision 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 critical issue in the case is whether appellant has shown by clear evidence of error that he has residuals of his accepted October 10, 1993 back condition on or after October 13, 1999. With his September 10, 2002 request appellant submitted two medical reports already in the record and argued that the impartial medical examiner's report should not carry the weight of the evidence as he has a bad reputation in the medical community, and that the Office should have sought further clarifications from his doctors, as they had from the impartial medical examiner. Without judging the merits of these arguments they do not, on their face, shift the weight of the evidence in favor of appellant and thereby establish clear evidence of error in the October 13, 1999 decision by the hearing representative.

In his November 13, 2002 request for reconsideration, appellant argued that the Office denied him an opportunity to submit new medical evidence and clarify medical reports previously submitted. Appellant also argued that the impartial medical examiner's report was not sufficiently rationalized and that the fact that he received a schedule award on July 1, 1993 for a 14 percent impairment of his lower extremity establishes that his accepted aggravation could not have ended. It is not clear from his statement why appellant feels he could not submit new medical evidence. He has previously raised his concerns with the impartial medical examiner's report and it is not clear what the significance of receiving a schedule award in 1993 has on the termination of an accepted aggravation in 1999. None of these arguments meet the

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 5.

standard of clear evidence of error by on their face shifting the weight of the evidence in favor of appellant.

In his April 26, 2003 request for reconsideration, appellant argued that his back has not resolved, the impartial medical examiner's report was not well rationalized and that the Office was biased because it had not fully responded to his requests for information. Appellant also submitted medical evidence from Dr. Lebwhol, who wrote on February 5, 1993 that he was puzzled as to the cause of appellant's symptoms. This report does meet the standard to establish clear evidence of error as it is six years prior to the termination.

In his February 5, 1993 report, Dr. Hanft is insufficient because it too is six years old and it attributed the burning appellant experienced in his feet to his spinal deformity, not his accepted aggravation. Regarding appellant's personal statement, the critical issue is whether appellant had residuals of his back aggravation and as such appellant's personal statement is of limited probative value. On their face appellant's arguments, which have been raised several times before do not shift the weight in his favor and thereby establish clear evidence of error.

CONCLUSION

The Board finds that the evidence submitted by appellant in support of his application for reconsideration does not raise a substantial question as to the correctness of the Office's decisions and is insufficient to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions by the Office of Workers' Compensation Programs dated June 3 and January 27, 2003 and November 13, 2002 are affirmed.

Issued: February 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member