

October 1, 1997 request for an oral hearing as untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act. The Board also affirmed, in part, the Office's February 18, 1998 decision denying appellant's February 2, 1998 request for reconsideration of its January 10, 1997 decision denying appellant's claim for compensation for the period beginning on or after March 26, 1994 as untimely filed pursuant to section 8128 of the Act. The Board, however, found that the case was not in posture for decision as to whether the Office properly determined that appellant's request for reconsideration failed to present clear evidence of error. The Board found that the case record was incomplete as it did not contain a complete copy of the Office's February 18, 1998 decision or a memorandum explaining why appellant's request for reconsideration failed to present clear evidence of error. Accordingly, the Board remanded the case to the Office for reconstruction of the record. The facts of the case are set forth in the Board's November 12, 1999 decision.¹

On remand, the Office issued a March 28, 2002 decision denying appellant's February 2, 1998 request for reconsideration of its January 10, 1997 decision on the grounds that it was not timely filed and failed to present clear evidence of error. On June 7, 2002 appellant, through his congressional representative, appealed the Office's decision to the Board.

In an order dated May 15, 2003, the Board remanded the case to the Office as the record did not contain a copy of the Office's March 28, 2002 decision. On remand, the Board instructed the Office to reconstruct the case record to be followed by an appropriate decision on whether appellant's request for reconsideration failed to present clear evidence of error.²

On remand, the Office issued a September 11, 2003 decision denying appellant's February 2, 1998 request for reconsideration as it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the 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.⁵

Section 10.607(a) of the Office's implementing regulation states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of

¹ Docket No. 98-1239 (issued November 12, 1999).

² Docket No. 02-1588 (issued May 15, 2003).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

error by the Office in its most recent merit decision. The reconsideration request must establish that the Office decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

ANALYSIS

The Office properly determined that appellant failed to present clear evidence of error. The issue for purposes of establishing clear evidence of error in this case is whether there was an error in the Office decision to deny appellant's claim for compensation for the period beginning on or after March 26, 1994 on the grounds that the evidence of record failed to establish that appellant was disabled or continued to have residuals of the January 10, 1994 employment injury. The only evidence that appellant submitted in support of his request for reconsideration were medical reports from Dr. Ray W. Covington, a Board-certified orthopedic surgeon. In his July 9, 1997 report, Dr. Covington indicated that he initially saw appellant for evaluation of his right wrist. He noted that appellant underwent carpal tunnel surgery in 1995, which was performed by Dr. Gary L. Becker, a Board-certified orthopedic surgeon. Dr. Covington further noted that appellant experienced pain since the surgery with certain movement. He provided his

⁶ 20 C.F.R. § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

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

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

findings on physical examination and appellant's medical treatment, which included medication and physical therapy. Dr. Covington's report is irrelevant inasmuch as it did not address whether appellant's right wrist problems were causally related to his January 10, 1994 employment injury, and thus, it cannot establish clear evidence of error.

Similarly, Dr. Covington's April 13, 1998 report finding that appellant had bilateral radial nerve palsy, more on the left than the right and that he needed to undergo a neurological evaluation which probably included a nerve conduction study is irrelevant. His report did not address whether appellant's wrist problems were caused by his accepted employment injury, and thus, it cannot establish clear evidence of error.

CONCLUSION

The Board finds that as appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error, the Office properly denied merit review of appellant's claim pursuant to section 8128(a) of the Act.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member