

right reflex sympathetic dystrophy (RSD) as a result of a trip and fall incident at work. On May 20, 1993 appellant underwent a stabilization/reconstruction of the distal joint. On June 24, 1996 the Office accepted the additional conditions of somatization disorder with psychotic depression. Appellant was released to return to work based on her physical condition, but remained off work due to her psychiatric condition.

By decision dated October 4, 1999, the Office terminated appellant's compensation benefits on the basis that she did not have a continuing work-related condition of either an orthopedic or psychiatric nature. The Office accorded determinative weight to the second opinion medical examiners, Dr. Richard Sidell, a Board-certified orthopedist and Dr. Jonathan Gamze, a Board-certified psychiatrist.

On September 27, 2000 appellant requested reconsideration of the Office's October 4, 1999 decision. By decision dated December 6, 2000, the Office modified its prior decision of October 4, 1999 to the extent that the medical evidence demonstrated that appellant had a 32 percent permanent impairment of the right upper extremity for her accepted condition of right distal-ulnar joint subluxation. Appellant accordingly was entitled to continuing medical treatment for that condition. By decision dated December 14, 2000, the Office issued a schedule award for a 32 percent permanent impairment of the right upper extremity. The period of the award ran from June 28, 2000 to May 27, 2002.

On July 5, 2001 appellant requested reconsideration of the Office's December 6, 2000 schedule award and submitted a report dated May 30, 2001 from Dr. Mark Gonzalez. By decision dated July 31, 2001, the Office denied modification of its December 6, 2000 schedule award decision.

In a letter dated July 29, 2003, appellant again requested reconsideration. She disputed the fact that there was no medical evidence to overcome the October 4, 1999 decision, which established that she had no continuing work-related restrictions, by noting the 32 percent permanent impairment of her right upper extremity based on the accepted condition of right distal radio-ulnar joint subluxation. She further noted that Dr. Gonzalez' report of June 29, 2000 had established that there was a 67 percent impairment to her right upper extremity and asserted that she did not believe that Dr. Gonzalez' reports of 1997, 1999 or 2000 had been considered in determining her medical and other compensation benefits. She additionally expressed her disagreement with Dr. Sidell's July 20, 1999 report and alleged that no hands-on examination was given or any tests taken, Dr. Sidell had advised that he could not determine whether she could return to work and the physician referenced reports of evaluations which appellant stated had never taken place. Copies of Dr. Gonzalez' previously submitted reports of June 29, 2000 and May 30, 2001, were submitted for review along with previous correspondence from the Office.

By decision dated October 29, 2003, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ 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.² 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.³ The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁴ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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 be 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 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. 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.⁶

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.607 (1999); *see also Alan G. Williams*, 52 ECAB 180 (2000).

³ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b) (1999).

⁵ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review.⁷ In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁸ The last merit decision in this case was the Office's December 6, 2000 decision which modified the termination decision of October 4, 1999, to establish entitlement to a 32 percent impairment of the right upper extremity and continuing medical treatment for the accepted condition of right distal radio-ulnar joint subluxation.⁹ As appellant's July 29, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record, the Office's December 6, 2000 decision it was untimely.

As appellant's request was filed more than one year after the Office's December 6, 2000 decision, appellant must demonstrate "clear evidence of error" on the issue which was decided by the Office. In support of her request for reconsideration, appellant essentially argued that she was entitled to medical and compensation benefits and that the schedule award was erroneous. She resubmitted copies of Dr. Gonzalez' June 29, 2000 and May 30, 2001 reports where the physician recommended a 67 percent impairment to her right upper extremity and provided a diagnosis of reflex sympathetic dystrophy. The Board finds that appellant did not submit any medical evidence which explicitly establishes that she is entitled to a greater schedule award than the 32 percent previously awarded for her right upper extremity or which explicitly establishes that she is entitled to medical and compensation benefits for a reflex sympathetic dystrophy condition, which the Office had determined was resolved. Dr. Gonzalez' June 29, 2000 and May 30, 2001 reports were previously considered by the Office in its October 4, 1999 and July 31, 2001 decisions. As the physician's reports offer no new evidence on the issues in question, they are not sufficient to raise a substantial question as to the correctness of the Office's decision and, thus, do not substantiate clear evidence of error.¹⁰

Additionally, appellant's complaints and arguments pertaining to Dr. Sidell's report are not sufficient to *prima facie* shift the weight and raise fundamental question as to the correctness of the December 6, 2000 decision which had modified the October 4, 1999 termination decision. There is no evidence in the record to support that Dr. Sidell's evaluation was improper. Appellant also submitted no medical evidence to overcome the weight accorded to Dr. Sidell's report which was of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the Office's decision.¹¹

⁷ This case may be distinguished from a case requesting an additional schedule award because appellant did not submit new evidence. See *Linda T. Brown*, 51 ECAB 115 (1999).

⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

⁹ The Office's October 4, 1999 decision which had terminated appellant's compensation benefits is incorporated into the Office's December 6, 2000 decision to the extent it was not modified.

¹⁰ See *Thankamma Mathews*, 44 ECAB 765 (1993).

¹¹ See *John Crawford*, *supra* note 6.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her application for review do not raise a substantial question as to the correctness of the Office's December 6, 2000 decision and, thus, are insufficient to demonstrate clear evidence of error.

To the extent that appellant contends that she is entitled to continued medical benefits, the Office's December 6, 2000 decision noted that she is entitled to continuing medical treatment for her right distal radio-ulnar joint subluxation.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on the merits on the ground that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member