

FACTUAL HISTORY

This case has previously been before the Board.² By decision dated June 19, 2003, the Board affirmed an Office decision dated August 28, 2002, in which the Office denied appellant's claim for reconsideration of a November 30, 1994 Office decision on the grounds that the request was untimely and failed to demonstrate clear evidence of error. By decision dated December 4, 1996, the Board affirmed the Office's decisions dated November 30 and July 21, 1994 in which the Office denied his claim for a recurrence on November 3, 1993 causally related to his April 20, 1993 employment injury and the Office's May 7, 1995 decision denying his request for a hearing. The Board's June 19, 2003 and December 4, 1996 decisions are herein incorporated by reference.

On August 5, 2003 following the issuance of the Board's June 19, 2003 decision, appellant requested reconsideration of the Office's last merit decision dated November 30, 1994. He did not submit any new medical or factual evidence. Appellant submitted a written statement from his wife stating her opinion that appellant was totally disabled due to his April 20, 1993 employment injury. His wife stated her opinion that the medical evidence of record was sufficient to establish appellant's claim for a recurrence.

By decision dated October 28, 2003, the Office denied appellant's August 5, 2003 request for reconsideration on the grounds that the request was not timely filed within one year and failed to demonstrate clear evidence of error in the last merit decision.³

LEGAL PRECEDENT

The Board's jurisdiction to consider and decide appeals from final Office decisions extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed his appeal with the Board on April 5, 2004, the only decision properly before the Board is the Office's October 28, 2003 decision denying his request for reconsideration.⁵

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with

² Docket No. 02-2349 (issued June 19, 2003). On April 20, 1993 appellant, then a 33-year-old equipment cleaner, sustained a low back strain in the performance of duty. He was released by his attending physician to return to regular work on May 4, 1993. On June 1, 1994 and August 12, 2002 appellant filed claims for a recurrence.

³ The Board notes that in its October 28, 2003 decision, the Office indicated that the last merit decision in this case was dated July 21, 1994 and that all Office decisions dated after the July 21, 1994 decision had not reviewed the merits of the case. However, the Office's November 30, 1994 decision was a merit decision.

⁴ 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

⁵ See *Algimantas Bumelis*, 48 ECAB 679 (1997).

⁶ 5 U.S.C. § 8128(a).

⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against compensation.⁸

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁹ The Office will not review a decision denying or terminating compensation benefits unless the application for review is filed within one year of the date of that decision.¹⁰ The Board has held that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the office under 5 U.S.C. § 8128(a).¹¹

The Office may not deny an application for review solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a) of the Act, 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.”¹² Office procedures provide that the Office will reopen a claimant’s case for a 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.¹³ 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 clearly demonstrates error on the part of the Office.¹⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁵ This evidence must establish, on its face, that such decision was erroneous.¹⁶ Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ 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

⁸ *Leon D. Faidley, Jr.*, *supra* note 7.

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *See Gregory Griffin*, *supra* note 7.

¹² *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹³ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

¹⁴ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ 20 C.F.R. § 10.607(b).

¹⁷ *Jimmy L. Day*, 48 ECAB 654 (1997).

¹⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

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.¹⁹ 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.²⁰

ANALYSIS

In its October 28, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office's last merit decision in his case was issued November 30, 1994. Appellant requested reconsideration by letter dated August 5, 2003, which is more than one year after November 30, 1994.

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision dated November 30, 1994 and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his request for reconsideration, appellant submitted a statement from his wife stating her opinion that he was totally disabled and his disability was job related. However, lay individuals are not competent to render a medical opinion.²¹ Therefore, this statement is not relevant to the issue of whether appellant sustained a recurrence of disability causally related to his April 20, 1993 employment injury and does not show clear evidence of error in the Office's November 30, 1994 merit decision.

CONCLUSION

The Board finds that the Office, in its October 28, 2003 decision, properly determined that appellant's untimely request for reconsideration failed to show clear evidence of error in the Office's November 30, 1994 decision.

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 7.

²⁰ *Thankamma Mathews*, 44 ECAB 765 (1993); *Gregory Griffin*, *supra* note 7.

²¹ *Arnold A. Alley*, 44 ECAB 912 (1993); *Sheila Arbour*, 43 ECAB 779 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 28, 2003 is affirmed.

Issued: November 1, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member