

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 16, 1995 appellant, then a 37-year-old instrument mechanic, sustained a traumatic injury to his left knee while in the performance of duty. The Office initially accepted the claim for left knee strain and authorized arthroscopic surgery, which appellant underwent on September 14, 1995. The claim was later expanded to include left medial meniscus tear. Appellant received appropriate wage-loss compensation and the Office placed him on the periodic compensation rolls effective December 10, 1995.²

The Office referred appellant for vocational rehabilitation and in May 1996, the Office approved a rehabilitation plan that would prepare appellant for employment as a computer programmer. The plan authorized appellant's enrollment at the University of Tennessee-Knoxville to pursue a Bachelor of Science degree in computer engineering. Appellant made sufficient progress through fall of 1998 and he was on schedule to graduate in December 1999. However, beginning in early 1999, appellant's rehabilitation counselor experienced difficulty in maintaining regular contact with appellant, which severely hampered the rehabilitation counselor's ability to monitor appellant's progress.³ This continued through fall of 1999, at which point the Office advised appellant on October 27, 1999 that if he did not fully cooperate with the rehabilitation counselor the training program would be terminated and efforts would be initiated to reduce his compensation to reflect his probable wage-earning capacity had he successfully completed the training program. Appellant did not respond to the Office's October 27, 1999 correspondence.

In a decision dated January 20, 2000, the Office reduced appellant's wage-loss compensation because of his failure to fully cooperate with vocational rehabilitation efforts. The Office adjusted appellant's compensation to reflect his capacity to earn \$33,000.00 annually as a computer programmer.

In an undated letter received by the Office on November 7, 2001, appellant inquired about the status of a request for reconsideration he had submitted "[a]lmost a year ago." Appellant made a similar request on January 11, 2002. On January 16, 2002 the Office informed appellant that it had no record of receipt of a request for reconsideration. The Office advised appellant to resubmit a copy of his original request along with any proof he may have that it was previously submitted. In a letter dated February 26, 2002, appellant advised the Office of the address to which he had previously mailed his request for reconsideration. Appellant, however, did not provide a copy of the original request nor did he submit any proof that he mailed the

² The employing establishment terminated appellant's employment for cause effective July 21, 1995.

³ During this same time frame the Office authorized a second arthroscopic procedure, which appellant underwent on May 13, 1999.

request to the address identified in his February 26, 2002 correspondence. On April 3, 2002 the Office informed appellant that the address he identified in his February 26, 2002 correspondence was the appropriate mailing address to submit a request for reconsideration. The Office further advised appellant to resubmit his earlier request and any proof that he submitted his original request in a timely manner.

In a letter dated June 27, 2002, appellant advised the Office that he had obtained more copies from the school of all the papers he submitted with his earlier request for reconsideration. He expressed confusion over the type of evidence he should provide to prove he had submitted a request for reconsideration more than a year and a half earlier. Appellant again wrote the Office on February 17, 2003 explaining that more than two years ago he had sent his application for reconsideration to the mailing address the Office provided. Two copies of the request were reportedly delivered around 10:00 a.m. on January 16, 2001 and another two copies were delivered by the postal service. Appellant, however, did not provide a copy of the original request or any proof of delivery.

In a decision dated January 7, 2004, the Office denied appellant's request as untimely. The Office further found that appellant failed to demonstrate clear evidence of error on the part of the Office in issuing the January 20, 2000 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷ In those instances when a request for reconsideration is not timely filed, the Office

⁴ 5 U.S.C. § 8128(a); see *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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 his own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607 (1999).

⁷ 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁸

ANALYSIS

The one-year time limitation begins to toll the day the Office issued its January 20, 2000 decision, as this was the most recent merit decision in the case.⁹ In correspondence received by the Office on November 7, 2001 appellant stated he had requested reconsideration “[a]lmost a year ago.” He later stated that the Office received his application on January 16, 2001. The record does not include evidence of receipt of a request for reconsideration on or about January 16, 2001. And despite repeated requests by the Office to provide a copy of the original request and any proof of mailing, appellant did not submit any such evidence prior to the issuance of the January 7, 2004 decision.¹⁰ The Office considered appellant’s June 27, 2002 letter as a request for reconsideration. The earliest evidence of appellant’s intent to request reconsideration is the November 7, 2001 correspondence. Even if given the benefit of this earlier date, the November 7, 2001 correspondence was received more than one year after the Office’s January 20, 2000 decision and therefore appellant is not entitled to review of his claim as a matter of right. Because appellant filed his request for reconsideration more than one year after the Office’s January 20, 2000 merit decision, he must demonstrate “clear evidence of error” on the part of the Office in reducing his wage-loss compensation due to his failure to fully cooperate with vocational rehabilitation efforts.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ In the instant case, appellant failed to demonstrate clear evidence of error because he has not submitted any evidence or argument relevant to the January 20, 2000 decision. All the relevant correspondence the Office received dating back to November 7, 2001 pertained to the alleged prior submission of a request for reconsideration. Appellant did not specifically comment on the Office’s January 20, 2000 decision or submit any evidence that would call into question the propriety of that decision. As appellant’s request for

⁸ 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁹ *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

¹⁰ As previously indicated, the record includes evidence received by the Office after the issuance of the January 7, 2004 decision and due to the timing of receipt the Board is precluded from considering this evidence on appeal. 20 C.F.R. § 501.2.

¹¹ *See Dean D. Beets*, *supra* note 8.

reconsideration failed to demonstrate clear evidence of error, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member