



June 23, 1982 employment injuries to his left leg.<sup>1</sup> On the second appeal, the Board found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.<sup>2</sup> The Board found that a March 19, 1999 report from appellant's attending physician, Dr. James O. Gemmer, did not directly address whether his condition on that date was causally related to his employment injuries, that it lacked rationale, and that, even without these deficiencies, it would at best create a conflict of medical opinion, which was not sufficient to establish clear evidence of error.

Subsequent to that Board decision, appellant requested reconsideration in an undated letter received by the Office on January 10, 2002. By letter dated January 17, 2002, the Office advised appellant that his request must clearly identify the decision and issues upon which reconsideration was requested, and must be accompanied by relevant new evidence or a legal argument not previously considered. In a May 11, 2002 letter, appellant stated that he was requesting reconsideration of a decision "made some time around August 17, 2001 regarding my work-related injury of June 8, 1982 and January 5, 1983." Appellant stated that he was about to have a hip replacement, that Dr. Gemmer stated in his most recent report that appellant's injury was job related, and that he filed in an untimely manner due to financial problems, namely inability to pay for or receive follow-up medical care.

By decision dated June 30, 2002, the Office found that appellant's request for reconsideration was insufficient to warrant review of its prior decisions. Appellant appealed this decision to the Board. By decision dated October 30, 2003, the Board found that appellant's request for reconsideration was untimely, but that the Office reviewed his request under the regulatory standards applicable to a timely request for reconsideration. The Board remanded the case to the Office for review of appellant's reconsideration request under the appropriate regulatory standard.<sup>3</sup>

By decision dated November 25, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

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<sup>1</sup> Docket No. 94-1250 (issued February 16, 1996).

<sup>2</sup> Docket No. 00-143 (issued June 26, 2001).

<sup>3</sup> Docket No. 03-1715 (issued October 30, 2003).

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that “An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought.” The Board has found 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).<sup>4</sup>

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.<sup>5</sup> Title 20 of section 10.607(b) of the Code of Federal Regulations provides: “[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> This entails a limited review by the Office of how the evidence

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<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>9</sup> *See Leona N. Travis*, *supra* note 7.

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

In the present case, the most recent merit decision was the Board's decision and order issued on February 16, 1996. As appellant's January 10, 2002 request for reconsideration was not filed within one year of this decision, the Board finds that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Board further finds that appellant's request for reconsideration did not demonstrate clear evidence of error. Appellant did not submit any new evidence with his January 10 or May 11, 2002 letters requesting reconsideration. As his statement that he was going to undergo hip replacement surgery is not medical evidence, it does not demonstrate error in the Office's determination that the residuals of his employment injuries resolved.<sup>13</sup> His contention that Dr. Gemmer supported causal relation in his most recent report does not demonstrate clear evidence of error, given that the Board addressed this report, which was dated March 19, 1999, in its most recent prior decision and found that it did not demonstrate clear evidence of error.

### CONCLUSION

The Board finds that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

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<sup>10</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley*, *supra* note 4.

<sup>12</sup> *Gregory Griffin*, *supra* note 5.

<sup>13</sup> Causal relation is a medical question that generally can only be resolved by competent medical evidence. *Ausberto Guzman*, 25 ECAB 362 (1974).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 25, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member