

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and lacked clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In its July 21, 2000 decision, the Board noted that appellant, a chief of fire department operations, had sustained an employment-related motor vehicle accident which resulted in lower back strain and facial lacerations on August 2, 1996. He returned to work on August 19, 1996. Appellant filed a claim on December 16, 1996 alleging that on September 9, 1996 while sitting at his desk he leaned over to retrieve a pen and his back locked up. He alleged that he sustained a recurrence of disability due to his August 2, 1996 employment injuries.² The Board denied appellant's claim for recurrence of disability finding that the medical evidence of record was not sufficiently well rationalized to establish that appellant's work stoppage on September 9, 1996 was due to his August 2, 1996 employment injuries and affirmed the Office's November 19, 1998 merit decision. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Appellant requested reconsideration on February 25, 2003 and alleged that he had no prior back or neck problems, that he sustained a traumatic injury and that he continued to receive medical treatment for his back pain. He stated that he submitted a report from Dr. Mark Wren, a Board-certified physiatrist.

Accompanying appellant's request for reconsideration was a report dated September 30, 1997 from Dr. Wren and treatment notes from September 30, 1997 through February 24, 1998 and July 21, through October 16, 1998. These documents were not previously included in the record.³ These documents provide a history of injury and list of symptoms, a diagnosis of possible sacroiliac joint-related pain status post a motor vehicle accident and mild degenerative disc disease, but do not contain an opinion on causal relationship nor a statement of disability. Dr. Wren also submitted a note dated June 13, 2001 addressing appellant's upper back pain. On May 23, 2002 he stated that appellant had chronic back pain and radiculopathy improved with intermittent epidural steroid injections.

Dr. Wren completed a narrative report on May 17, 2000 which stated that appellant had chronic back pain and chronic persisting tenderness in the sacroiliac area on the left after a motor vehicle accident in August 1996. He provided work restrictions.

Appellant resubmitted a report dated April 15, 1998 from Dr. Freddie L. Contreras, a Board-certified neurosurgeon, reviewed by the Board in its prior decision. Dr. Contreras stated that appellant could work with no repetitive bending, stooping, straining and a lifting limit of 20

² Docket No. 99-1143 (issued July 21, 2000).

³ The Board has previously reviewed Dr. Wren's reports dated September 24, 1998 and March 11, 1998.

pounds. He submitted his claim form and other factual evidence regarding his motor vehicle accident.

On March 10, 2003 Dr. Roshan Sharma, a physician Board-certified in physical medicine and rehabilitation, diagnosed lumbar radicular syndrome. He did not provide a history of injury or an opinion on disability.

By decision dated November 7, 2003, the Office denied appellant's request for reconsideration finding that it was not timely filed and did not contain clear evidence of error.⁴ The Office found that the reports from Dr. Contreras and Dr. Wren were not sufficient to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

The Office's regulation require that an application for reconsideration must be submitted in writing¹⁰ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."¹¹ The regulations provide:

“[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

⁴ Following the Office's November 7, 2003 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁷ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁸ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 6 at 769; *Jesus D. Sanchez*, *supra* note 7 at 967.

¹⁰ 20 C.F.R. § 10.606.

¹¹ 20 C.F.R. § 10.605.

most recent decision. The application must establish, on its face that such decision was erroneous.”¹²

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.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 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’s decision.¹⁹ The Board must make 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

Appellant requested reconsideration by written application on February 25, 2003. Since he filed his reconsideration request more than one year after the July 21, 2000 merit decision, the Office properly determined that the request was untimely.

The underlying issue in this case is whether appellant has submitted the necessary rationalized medical opinion evidence to establish that he sustained a recurrence of disability on

¹² 20 C.F.R. § 10.607(b).

¹³ *Thankamma Mathews*, *supra* note 6 at 770.

¹⁴ *Id.*

¹⁵ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁶ *Jesus D. Sanchez*, *supra* note 7 at 968.

¹⁷ *Leona N. Travis*, *supra* note 15.

¹⁸ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²⁰ *Gregory Griffin*, *supra* note 8.

September 9, 1996 causally related to his August 2, 1996 employment injuries of facial lacerations and low back strain. In support of his request for reconsideration, appellant submitted treatment notes and reports from Dr. Wren, a Board-certified physiatrist, which are new to the record. He also submitted a report dated March 10, 2003 from Dr. Sharma, a physician Board-certified in physical medicine and rehabilitation. However, these reports are not sufficient to establish clear evidence of error on the part of the Office as the reports do not contain an opinion on the causal relationship between appellant's condition and his accepted employment injury with supportive medical rationale and do not provide a complete history of injury including his incident of reaching at work on September 9, 1996. Due to these deficiencies, these reports are not 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's November 19, 1998 merit decision.

Appellant's additional factual submissions and statements do not address the underlying medical issue in this case. Therefore, this evidence is not relevant to the issue decided by the Office and cannot establish clear evidence of error.

CONCLUSION

The Board finds that appellant filed an untimely application for reconsideration and that his application did not establish clear evidence of error on the part of the Office.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member