



explained that he was required to crawl in low mines for long periods and had to tilt and twist his neck to inspect the mines. Appellant notes that his neck and back were often in an awkward position without relief as he traveled in the mines distances of approximately 1,000 feet to 2 miles.

Appellant submitted multiple reports including records from Dr. Larry Mitchell from 1997 to 2002 noting multiple diagnoses including fibromyalgia and osteoarthritis, a surgical summary of a 1991 C4-5 fusion, a position description and records of administration actions.

Appellant also submitted reports from Dr. Lyle Gage, Jr., appellant's surgeon, from July 1991 to January 1992, including a report concerning appellant's July 8, 1991 cervical fusion, and from Dr. Jose M. Piriz from November 29, 1999, and May 11 and October 31, 2000 who diagnosed hypertension, hyperlipidemia, hypothyroidism, chronic low back pain, and a questionable history of myocardial infarction.

The record also includes a June 12, 2002 report from Dr. Syed M. Ahmad, appellant's rheumatologist, who diagnosed positive antinuclear antibody, fibromyalgia syndrome, generalized osteoarthritis, hypertension, arteriosclerotic heart disease, C4-5 fusion, carpal tunnel release, obesity, hyperlipidemia and hypothyroidism. He recommended that appellant return to work. On September 16, 2002 Dr. Ahmad essentially repeated his June 12, 2002 report, adding that appellant had applied for disability compensation.

By letter dated December 13, 2002, the Office informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

On January 30, 2003 the Office denied appellant's claim on the grounds that the medical evidence failed to establish that his condition was caused by factors of his federal employment.

In a narrative received by the Office on April 4, 2003, appellant stated that the totality of his working experience, covering a period of about 19 to 20 years, that required him to crawl and stand in low coal mines, caused pain and injuries to his neck, shoulders, knuckles, back and knees. He added that he often rode in a personnel carrier which required him to bend or lie flat which caused strain. Appellant also noted that normal work requirements such as climbing ladders and stairs contributed to his condition. He stated that because of his work experience he could no longer stand for any length of time before his left knee and leg would become numb. He related that his back hurts and that he was unable to carry anything over 10 to 15 pounds.

In a decision dated June 24, 2003, the Office denied modification of appellant's request for consideration on the grounds that the medical evidence failed to establish that his viable reality was causally related to his duties as a coal mine inspector.

On May 5, 2004 appellant submitted treatment notes from Dr. Mitchell covering January 8 to July 8, 2002 that identified multiple medical conditions including fibromyalgia, osteoarthritis, coronary heart disease, hypothyroidism, low back pain, hypertension, bulging disc at L5-S1, a February 2002 head injury, severe pain syndrome, high blood pressure, cardiovascular disease, and anxiety and depression.

In a report dated March 20, 2003, Dr. Mitchell stated that appellant has chronic back pain with herniated disc at L5-S1, fibromyalgia, osteoarthritis, hypertension, colitis and coronary artery disease. He opined that it was his reasoned medical opinion that appellant's osteoarthritis and disc disease relate directly to his federal employment. Dr. Mitchell related that working in the mines for many years which involves lifting, crawling, and bending "has taken a toll on all of his joints resulting in his osteoarthritis." Dr. Mitchell added that the cause of appellant's fibromyalgia was less clear, but that trauma, either acute or over time, "does predispose one to fibromyalgia." On September 9, 2002 Dr. Mitchell stated that appellant was disabled from work since April 18, 2002 due to chronic low back pain with herniated disc at L5-S1, and osteoarthritis.

On May 5, 2004 appellant submitted a narrative report noting his C4-5 neck fusion which contributed to his fibromyalgia. He noted that he had continuous pain in his neck, shoulders, down his back to his hips and legs. Appellant stated that his surgery, carpal tunnel release and back problems have brought on fibromyalgia and fatigue. He noted that the coal mines were cold and damp that added to the pain and muscle weakness.

On August 16, 2004 the Office acknowledged receiving numerous documents on May 5, 2004. The Office advised appellant that, if he wanted to pursue one of his appeal rights, he should follow a course of action outlined in the appeal rights that accompanied his June 24, 2003 decision.

On September 20, 2004 appellant requested reconsideration.

In a decision dated October 18, 2004, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and did not present 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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

---

<sup>1</sup> 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

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

<sup>3</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

error” on the part of the Office.<sup>4</sup> 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.<sup>5</sup>

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 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’s 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.<sup>6</sup>

### ANALYSIS

The one-year time limitation for requesting reconsideration began to run when the Office issued its June 24, 2003 decision, as this was the most recent merit decision in the case. Appellant’s most recent request for reconsideration was dated September 20, 2004, more than one year after June 24, 2003; therefore, he is not entitled to review of his claim as a matter of right. Because appellant filed his request more than one year after the Office’s June 24, 2003 merit decision, he must demonstrate “clear evidence of error” on the part of the Office in denying his claim for compensation.

Appellant then submitted treatment notes from Dr. Mitchell covering January 8 to July 8, 2002 that identified multiple medical conditions including fibromyalgia, osteoarthritis, coronary heart disease, hypothyroidism, low back pain, hypertension, bulging disc at L5-S1, a February 2002 head injury, severe pain syndrome, high blood pressure, cardiovascular disease, and anxiety and depression.

In the report dated March 20, 2003, Dr. Mitchell stated that appellant has chronic back pain with herniated disc at L5-S1, fibromyalgia, osteoarthritis, hypertension, colitis and coronary artery disease. He opined that it was his reasoned medical opinion that appellant’s osteoarthritis

---

<sup>4</sup> 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 decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

<sup>5</sup> See *Alberta Dukes*, 56 ECAB \_\_\_\_ (Docket No. 04-2028, issued January 11, 2005).

<sup>6</sup> See *id.*; *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

and disc disease relate directly to his federal employment. Dr. Mitchell related that his working in the mines for many years involving lifting, crawling, and bending “has taken a toll on all of his joints resulting in his osteoarthritis.” Dr. Mitchell added that the cause of appellant’s fibromyalgia was less clear, but that trauma, either acute or over time, “does predispose one to fibromyalgia.” On September 9, 2002 Dr. Mitchell stated that appellant was disabled from work since April 18, 2002 due to chronic low back pain with herniated disc at L5-S1, and osteoarthritis.

On May 5, 2002 appellant submitted a narrative report noting his C4-5 neck fusion which contributed to his fibromyalgia. He noted that he had continuous pain in his neck, shoulders, down his back to his hips and legs. Appellant stated that his surgery, carpal tunnel release and back problems have brought on fibromyalgia and fatigue. He noted that the coal mines were cold and damp that added to the pain and muscle weakness.

The Board finds that Dr. Mitchell’s reports are insufficient to establish that the Office’s decision denying benefits was clearly erroneous as they do not provide a rationalized medical opinion on the relevant issue of whether appellant’s conditions were caused by his employment. They are insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Likewise, appellant has not explained why other medical reports that he submitted on reconsideration, and which were previously of record, were sufficient to *prima facie* shift the weight of the evidence in favor of his claim. Appellant’s September 20, 2004 request for reconsideration and the accompanying evidence failed to demonstrate clear evidence of error on the part of the Office. Accordingly, 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 his request was untimely and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 18, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member