

FACTUAL HISTORY

On December 17, 2002 appellant, a 46-year-old housekeeping aid leader, filed an occupational disease claim alleging that on January 1, 2002 he first realized his hepatitis C condition was employment related.

In a letter dated January 15, 2003, the Office informed appellant that the evidence of record was insufficient to establish his claim and advised him to submit additional medical and factual evidence. He was informed that he had 30 days to provide the required information. No evidence was received by the Office.

By decision dated February 24, 2003, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury due to factors of his federal employment.

Subsequent to the decision, the Office received factual and medical evidence from appellant, including employee health records for the period April 15, 1985 to February 13, 2002, showing treatment for various injuries, including needle sticks and conditions; an October 8, 1998 liver biopsy which found hepatitis C; a December 16, 2002 statement by Dr. Robert S. Litwack, a Board-certified anesthesiologist and a February 3, 2003 attending physician's report (Form CA-20) by Dr. Alfred Lee, a Board-certified internist. Dr. Litwack noted that appellant had been "subjected to accidental dirty needle sticks" since the 1990's and "there were patients being prepared for operations who were at high risk for infectious diseases such as hepatitis B, hepatitis C and HIV." Dr. Lee diagnosed chronic hepatitis C of unknown origin and noted that appellant refused treatment when seen in 1998.

Appellant requested reconsideration in a letter dated March 3, 2003, which was received by the Office on May 16, 2003 and submitted medical and factual evidence in support of his request.

By decision dated June 30, 2003, the Office modified the February 24, 2003 decision to accept "that fact of injury and performance of duty, along with the needle stick injuries be accepted as factors of federal employment." However, the Office found the medical evidence of record insufficient to establish that appellant's chronic hepatitis C condition was causally related to his employment.¹

In a February 17, 2005 letter received by the Office February 22, 2005, appellant's representative requested reconsideration of the "February 24, 2005" decision and submitted July 28 and September 29, 2004 progress notes diagnosing hepatitis C. Additionally, he resubmitted Dr. Litwack's December 16, 2002 statement.

By decision dated March 11, 2005, the Office determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

¹ On July 1, 2003 the Office received employee health records for the period April 15, 1985 to February 13, 2002 and a February 3, 2003 attending physician's report by Dr. Lee. The record reveals that appellant had submitted this evidence subsequent to the February 24, 2003 decision, which was previously considered by the Office in its June 30, 2003 decision.

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.² 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.³ 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.⁴ 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 error" on the part of the Office.⁵ 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so

² 5 U.S.C. §§ 8101-8193. To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision. *See* 20 C.F.R. § 10.607(a). When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act. *See Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004). The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

³ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁴ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *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 merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ *See Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See Pasquale C. D'Arco*, 54 ECAB ____ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez*, *supra* note 4.

as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² 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.¹³

ANALYSIS

The one-year time limitation began to run the day following the June 30, 2003 Office decision, which was the last merit decision in the case.¹⁴ Appellant's request for reconsideration was dated February 17, 2005, therefore, his request was untimely. Because he filed his request more than one year after the Office's June 30, 2003 merit decision, he must demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.

The Board finds that the evidence submitted by appellant, in support of his request, does not raise a substantial question as to the correctness of the Office's June 30, 2003 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In this case, appellant submitted a December 16, 2002 report by Dr. Litwack, the employee health records for the period April 15, 1985 to February 13, 2002 and a February 3, 2003 attending physician's report by Dr. Lee, which had all been previously considered by the Office in the June 30, 2003 merit decision and found not to have established that appellant's chronic hepatitis C was employment related and, therefore, it was insufficient to establish error on the part of the Office.

Appellant also submitted July 28 and September 29, 2004 progress notes which diagnosed hepatitis C. However, these progress notes do not demonstrate that the Office committed clear evidence of error when it denied his claim based on the failure to establish that his hepatitis C was causally related to his accepted employment factors. Appellant has failed to submit any evidence which establishes clear evidence of error as the medical evidence does not *prima facie* shift the weight of evidence in favor of his claim. The Board finds that he has not

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, *supra* note 6.

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ See *George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁴ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

established clear evidence of error in the Office's refusal to reopen his case for further review on its merits. The Board, therefore, finds that these records are insufficient to raise a substantial question as to the correctness of the Office's June 30, 2003 merit decision and the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that appellant filed an untimely request for reconsideration and on the face of his application for reconsideration he failed to establish clear evidence of error on the part of the Office in the issuance of the June 30, 2003 merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office dated March 11, 2005 is affirmed.

Issued: September 6, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board