# United States Department of Labor
# Employees' Compensation Appeals Board

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| **PATRICK G. MANAGAN, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1802** |
| | ) | **Issued: April 14, 2006** |
| **DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Denver, CO, Employer** | ) | |

*Appearances:*
*Patrick G. Managan, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On August 30, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated October 14, 2004 which denied his recurrence of disability claim, and an August 9, 2005 decision which denied his request for reconsideration as untimely filed and failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits and nonmerits of this case.

### ***ISSUES***

The issues are: (1) whether appellant established a recurrence of disability on August 22, 2003 causally related to his accepted work injury of November 26, 1996; and (2) whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

### ***FACTUAL HISTORY***

This case has previously been before the Board. On December 1, 1996 appellant, then a 45-year-old biologist, filed a claim for traumatic injury alleging that on November 26, 1996 he

sustained neck injuries as a result of a car accident, which occurred in the performance of duty. The Office accepted his claim for cervical strain and authorized physical therapy and a health club membership. In a November 10, 2003 decision, the Board affirmed the Office decisions dated October 24, 2002 and February 28, 2003 which terminated appellant's entitlement to medical benefits effective July 14, 1999 and found that he failed to establish entitlement to continuing medical benefits. The facts and history contained in the prior decision are incorporated by reference.[1] The facts and history relevant to the present issue are hereafter set forth.

On November 21, 2003 appellant filed a notice of recurrence of disability alleging a recurrence of the November 26, 1996 employment injury on August 22, 2003. He noted that on that date he sustained "neck and shoulder injuries in [an] auto[mobile] accident" and that the "diagnosis [was] consistent with aggravation of original injuries." By letter dated January 7, 2004, the Office requested further information. Appellant did not respond within the time allotted. By decision dated February 10, 2004, the Office denied appellant's claim. The Office noted that on November 10, 2003 the Board affirmed the Office's denial of continuing causal relationship of any medical condition related to the accepted injury, and that therefore appellant had no further appeal rights on this claim. The Office also noted that appellant's claim for recurrence noted that he had been in an accident on August 22, 2003, and that if this accident occurred on the job, he should file a new claim.

On February 27, 2004 appellant requested a hearing which was held on July 21, 2004. Appellant testified that the August 22, 2003 accident was not related to work. He indicated that he sustained injuries at that time in "the shoulder, neck, head, whiplash, trauma, … in areas similar to those prior injuries," and that he may have missed a day or two from work.

On September 9, 2004 appellant submitted a note dated August 27, 2003 by Dr. David J. Doig, which indicated that 50 percent of appellant's injuries were related to the accident of August 15, 2003 and 50 percent was related to preexisting conditions.

By decision dated October 14, 2004, the hearing representative affirmed the Office's February 10, 2004 decision, finding that the medical evidence failed to establish that appellant sustained a recurrence of disability effective August 22, 2003.

On June 10, 2005 appellant requested reconsideration of the decision dated February 10, 2004. On August 9, 2005 the Office denied appellant's request for reconsideration because it was not timely filed within one year of the February 10, 2004 decision and failed to establish clear evidence of error.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 10.5(x) of the Office's regulations provides, in pertinent part:

> "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which

[1] Docket No. 03-1326 (issued November 10, 2003).

had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[2]

The Board has held that, in order to establish a claim for a recurrence of disability, a claimant must establish that he experienced a spontaneous material change in the employment-related condition without an intervening injury.[3]

## ***ANALYSIS -- ISSUE 1***

Appellant has submitted no medical evidence establishing that he sustained a recurrence of his November 26, 1996 work-related condition on August 22, 2003. Rather, he testified that he was in a nonemployment-related automobile accident on that date. The September 9, 2004 note by Dr. Doig opined that half of appellant's injuries were a consequence of the August 22, 2003 nonemployment-related injury and the other half a consequence of preexisting conditions, specifically multiple strains. Dr. Doig did not, however, identify the origin or etiology of the strains or otherwise relate the diagnosis to the accepted November 26, 1996 employment injury.[4] Accordingly, the automobile accident was a new intervening injury and establishes that appellant did not sustain a "spontaneous material change in the employment-related condition without an intervening injury"[5] as required under the Federal Employees' Compensation Act. Thus, appellant has not established that he sustained a recurrence of disability causally related to the November 26, 1996 employment injury.

## ***LEGAL PRECEDENT -- ISSUE 2***

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[6] 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.[7] 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.[8] 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

[2] 20 C.F.R. § 10.5(x).

[3] *Carlos A. Marrero*, 50 ECAB 117 (1998).

[4] The Board notes that if the employment attributes to a disability or condition there is no apportionment and the disability or condition is compensable. *See generally, Henry Klaus,* 9 ECAB 333 (1957).

[5] *Id.*

[6] 5 U.S.C. §§ 8101-8193. 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).

[7] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[8] *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).

C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

## ***ANALYSIS -- ISSUE 2***

In the instant case, the Office issued a decision on February 10, 2004 denying appellant's claim for recurrence on August 22, 2003. Appellant's claim for an alleged recurrence was reviewed by the Office hearing representative on the merits by decision dated October 14, 2004. Appellant's request for reconsideration, dated June 10, 2005, was filed within one year of the merit decision of the hearing representative, dated October 14, 2004. Since the last merit

[9] *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).

[10] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[11] *See Darletha Coleman*, *supra* note 8; *Dean D. Beets*, 43 ECAB 1153 (1992).

[12] *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[13] *See Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez*, *supra* note 8.

[14] *Leona N. Travis*, *supra* note 12.

[15] *See Nelson T. Thompson*, *supra* note 10.

[16] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[17] *See George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

decision was issued within one year of the date of appellant's request for reconsideration, it is timely and the Office must assess the reconsideration request under the appropriate standards.[18] The "clear evidence of error" standard utilized in this case is appropriate only for reconsideration requests made more than one year after the Office's merit decision. Accordingly, this case will be remanded to the Office for further consideration of appellant's timely request for reconsideration. After such further development as it deems necessary, the Office should issue an appropriate decision.

## ***CONCLUSION***

The Office properly determined that appellant failed to establish that he sustained a recurrence of his November 26, 1996 accepted work injury on August 22, 2003. The Office improperly found that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 14, 2004 is affirmed. However, the decision dated August 4, 2005 is vacated, and this case is remanded for further consideration consistent with this opinion.

Issued: April 14, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

[18] *Vicente P. Taimanglo*, 45 ECAB 504 (1994).