

benefits effective December 31, 2000 and rescinded acceptance of her right knee condition and authorization for surgery.² The law and the facts of the previous Board decision are incorporated herein by reference.

On January 26, 2004 appellant requested reconsideration and submitted additional medical reports dating from July 3, 2001 to September 7, 2002 from Dr. Roger T. Pelli, an attending Board-certified osteopath specializing in family practice. He noted treating appellant with osteopathic manipulation and reiterated previous findings and conclusions. By decision dated April 28, 2004, the Office denied modification of the prior decision.

On November 4, 2005 appellant requested reconsideration and submitted additional reports from Dr. Pelli dated March 3 and 31, 2004. In reports dated April 13, 2004, Dr. Rodney A. Rozario, a Board-certified neurosurgeon, noted appellant's complaints of neck pain with a magnetic resonance imaging (MRI) scan finding a sizeable herniation at C6-7. Dr. Rozario recommended surgery that was performed on April 27, 2004 by Dr. Lee L. Thibodeau, Board-certified in neurosurgery, who provided follow-up reports. In reports dating from July 29 to December 27, 2004, Dr. Sacha D. Matthews, a Board-certified orthopedic surgeon, noted that appellant was post-op a left carpal tunnel release and tracked her recovery.

In a November 11, 2004 report, Dr. John Pier, Board-certified in physical medicine and rehabilitation, noted appellant's past medical history and that he was evaluating her for pain. Dr. Pier diagnosed cervical cord compression, status post microdiscectomies with residual paresthesias, degenerative lumbar spondylosis, fibromyalgia/chronic pain syndrome and right knee pain with quadriceps weakness. He stated: "she has asked me today as to whether I felt her fall on the ice in 1993 was responsible for her back problems. I think two slips on the ice in this setting certainly began a pain response. As to whether it is responsible for her current multifaceted pain syndrome, I am not able to say."

On February 22, 2005 Dr. Matthews performed additional left upper extremity surgery and provided follow-up reports. On May 11, 2005 Dr. Thibodeau performed laminoforaminotomies at L3-4 and L4-5 and on June 9, 2005 noted her progress. By report dated October 5, 2005, Dr. Christina Reilly, a Board-certified osteopath specializing in family practice, noted appellant's history of neck and lower back pain and her treatment by Dr. Thibodeau. Dr. Reilly stated that she had taken over appellant's care and treatment from Dr. Pelli. Appellant also submitted copies of invoices for medical care, postoperative and discharge instructions and reports from nurse practitioners and physician's assistants.

By decision dated March 16, 2006, the Office denied appellant's reconsideration request on the grounds that her request was untimely filed and she failed to establish clear evidence of error.

² The instant case was adjudicated by the Office under file number 010314395. The record contains a second February 14, 2002 decision, adjudicated under file number 010238999, which denied a recurrence of disability of a May 20, 1985 employment injury to appellant's neck and right elbow. On June 5, 2002 appellant solely requested reconsideration of the 010314395 decision.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act. It 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 Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of the Office regulations,⁵ if the claimant's application for review shows "clear evidence of error" on the part of the Office. 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. 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 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁷

ANALYSIS

The Board initially finds that, as more than one year had elapsed from the date of issuance of the April 28, 2004 decision, appellant's request for reconsideration on November 4, 2005 was untimely filed.⁸ The Board also finds that appellant failed to establish clear evidence of error with her request.

In order to establish clear evidence of error, a claimant must submit evidence that is 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

³ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁵ 20 C.F.R. § 10.607.

⁶ *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁷ *Nancy Marcano*, 50 ECAB 110 (1998).

⁸ *Supra* note 3.

decision is insufficient to establish clear evidence of error.⁹ The Board previously found that the Office properly rescinded acceptance of appellant's right knee condition and terminated her compensation benefits effective December 31, 2000. The only accepted condition in this case is sacroiliac sprain and the relevant issue is whether appellant has any continuing disability causally related to this condition. The invoices and medical instructions appellant submitted with her November 4, 2005 reconsideration request are irrelevant and insufficient to establish clear evidence of error and the reports by nurse practitioners and physician's assistants are not considered medical evidence as these persons are not considered physicians under the Act.¹⁰ Drs. Rozario, Thibodeau and Matthews merely provided opinions regarding the need for neck, lower back and hand surgery, described surgical procedures and appellant's recovery and did not provide any opinion on the cause of these conditions. Their reports are, therefore, not pertinent to the issue in this case. Dr. Pelli merely reiterated diagnoses and conclusions previously reviewed by both the Office and the Board and Dr. Reilly simply described her treatment. Dr. Pier was the only physician who provided any opinion on causal relationship and he stated that while a fall could cause a pain response, he could not say that appellant's present multifaceted pain syndrome was caused by her work-related falls. Appellant's diagnosed fibromyalgia has not been accepted as employment related.

Consequently, as none of the medical reports are sufficient to raise a substantial question as to the correctness of the prior decisions,¹¹ appellant has not met his burden to establish clear evidence of error on the part of the Office such that the Office erred in denying merit review. The Board, therefore, finds that, in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

CONCLUSION

The Board finds that, as appellant's reconsideration requests were not timely filed and he failed to establish clear evidence of error, the Office properly denied a merit review of his claim in its March 16, 2006 decision.

⁹ *Nancy Marcano*, *supra* note 7.

¹⁰ 5 U.S.C. § 8101(2); *see Sean O'Connell*, 56 ECAB ____ (Docket No. 04-1746, issued December 20, 2004).

¹¹ *See George C. Vernon*, 54 ECAB 319 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 16, 2006 be affirmed.

Issued: December 28, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board