

FACTUAL HISTORY

This case has previously been before the Board. The facts and the circumstances of this case as set forth in prior decisions and orders are hereby incorporated by reference.¹ On January 7, 1983 appellant, then a 34-year-old clerk, injured his right knee in the performance of duty. The claim was accepted for a right knee contusion with synovitis and permanent aggravation of degenerative disease of the right knee. On March 5, 1984 appellant injured his right shoulder and neck in the performance of duty. This claim was accepted for a cervical strain and right shoulder contusion. Appellant also alleged that he sustained a right ankle condition, temporomandibular joint disease and a mental condition as a result of these injuries. The Office denied appellant's claim for these injuries in a decision dated March 23, 1999. Appellant's request for reconsideration was denied by the Office on April 19, 2000 as he failed to establish clear evidence of error. In a June 3, 2002 decision, the Board found that the Office applied the wrong standard when reviewing his reconsideration request and remanded the case for it to reconsider appellant's evidence based on a timely request for reconsideration.²

By decision dated August 22, 2002, the Office reviewed appellant's claim on the merits and determined that the medical evidence did not support that he sustained injuries to his jaw or ankle or a mental condition as a result of his federal employment. The Office found that the evidence submitted for reconsideration was insufficient to modify its prior decision of March 23, 1999. Appellant requested reconsideration on October 1, 2002 and by decision dated December 18, 2002, the Office declined modification of the August 22, 2002 decision. Appellant filed another request for reconsideration and by decision dated April 3, 2003, the Office denied appellant's request as the evidence submitted was irrelevant and insufficient to require further merit review. In a decision dated October 23, 2003, the Board affirmed the Office decisions of August 22 and December 18, 2002 and April 3, 2003, finding that he failed to establish that he sustained injuries to his jaw and ankle or an emotional condition causally related to the accepted injuries of January 7, 1983 or March 5, 1984. The Board found that the Office properly refused to reopen appellant's case for further merit review pursuant to 5 U.S.C. § 8128(a).³

In the most recent merit decision of May 10, 2004, the Office reviewed appellant's claim and denied modification of its prior decisions.

By letter dated May 13, 2005, received by the Office on May 17, 2005, appellant requested reconsideration. He submitted progress notes from Dr. Raymond G. Shea, a Board-certified orthopedic surgeon, dated from December 15, 2004 through March 14, 2005. On January 12, 2005 Dr. Shea indicated that appellant had severe osteoarthritis of his right knee, which was the result of a workers' compensation injury that occurred while working for the employing establishment in the 1980s. Appellant further submitted reports from

¹ See Docket No. 03-1382 (issued November 28, 2003) (Order Dismissing Appeal); Docket No. 03-1276 (issued October 23, 2003).

² Docket No. 00-2068 (issued June 3, 2002).

³ *Supra* note 1.

Dr. Gary Reasor, a Board-certified anesthesiologist specializing in pain management. In an August 7, 2004 report, Dr. Reasor indicated that appellant could not return to work at the present time. He noted that appellant complained of wide spread musculoskeletal pain from the work-related injury. Appellant also submitted July 27, 2005 notes from the University Medical Services indicating that he had pain in his knee.

By decision dated August 11, 2005, the Office denied appellant's request for reconsideration as it was not timely filed and failed to show clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be set within one year of the date of the Office decision for which review is sought. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁴

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows clear evidence of error on the part of the Office.⁵ 20 C.F.R. § 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 the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

be manifest on its face that the Office committed an error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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 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.¹⁰ 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.¹¹

ANALYSIS

The most recent merit decision by the Office was issued on May 10, 2004 when the Office denied modification of its prior decisions rejecting his claim. Appellant had one year from the date of that decision to request reconsideration, but did not do so until a letter dated May 13, 2005.¹² Accordingly, the Board finds that the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office also properly found that appellant's request for reconsideration did not demonstrate clear evidence of error. Appellant's claims were already accepted for right knee contusion with synovitis, permanent aggravation of degenerative disease of the right knee, cervical strain and right shoulder contusion. The only disputed injuries were to his right ankle, temporomandibular joint disease and a mental condition. None of the material submitted on appeal addresses the relationship of the disputed conditions to appellant's federal employment. Although Dr. Shea indicated appellant's severe osteoarthritis of his right knee was related to his federal employment, this report was not relevant to the nonaccepted condition. Accordingly, as appellant did not show that the Office erred in the issuance of its merit decision, the Board finds that the Office properly denied appellant's request for reconsideration.

⁷ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Id.*

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley*, *supra* note 4.

¹¹ *Gregory Griffin*, *supra* note 5.

¹² As the envelope was not available, the Office properly used the date of the letter to determine whether the reconsideration request was timely. See Federal (FECA) Procedure Manual Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b. (January 2004).

CONCLUSION

The Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 11, 2005 is affirmed.

Issued: March 17, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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