

FACTUAL HISTORY

This case has been before the Board on two previous occasions. The facts and the circumstances of this case as set forth in prior decisions and orders are hereby incorporated by reference.¹ On September 17, 1997 appellant, then a 41-year-old lock and dam equipment operator, filed an occupational disease claim alleging that, as a result of conditions of his federal employment, he suffered a heart attack due to stress and overexertion. By decision dated December 24, 1997, the Office denied appellant's claim as it found that appellant had failed to establish fact of injury. By decision dated December 6, 2000, the Board found that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error. On March 20, 2001 the Office again denied appellant's request for reconsideration without conducting a merit review. By order dated September 24, 2002, the Board set aside the March 20, 2001 Office decision and remanded the case with instructions that the Office double this case with appellant's claim for a traumatic injury filed on the same date. The Board instructed the Office to review all evidence in both cases and then issue a new decision on whether there was sufficient evidence in support of appellant's claim.

By decision dated April 23, 2003, the Office reviewed the new evidence and denied appellant's claim as the medical evidence failed to establish that there was a relationship between his employment and the claimed conditions.

By letter dated May 30, 2005, appellant requested reconsideration. He submitted a July 28, 2003 report from Dr. Harry Hawthorne, a Board-certified internist with a subspecialty in clinical cardio electrophysiology, who indicated that appellant was discharged with a diagnosis of inducible ventricular tachycardia with severe ischemic cardiomyopathy. On August 8, 2005 the Office denied appellant's request for reconsideration as it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the 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

¹ *Richard Joseph Murray, Jr.*, Docket No. 00-257 (issued December 6, 2000), *petition for recon denied*, June 5, 2001; *Richard Joseph Murray, Jr.*, Docket No. 01-1958 (issued September 24, 2002).

[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).²

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.³ 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.⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ 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.⁷ 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.⁸ 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.⁹

ANALYSIS

The most recent merit decision by the Office was issued on April 23, 2003. Appellant had one year from the date of that decision to request reconsideration but did not do so until May 30, 2005. Accordingly, the Board finds that appellant's application for review was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.607(a).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *Id.*

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon D. Faidley*, *supra* note 2.

⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office also properly found that appellant's request for reconsideration did not demonstrate clear evidence of error. The only evidence submitted on reconsideration was a report by Dr. Hawthorne. This report did not discuss the cause of appellant's heart problems and was therefore not sufficient to establish clear evidence of error on the part of the Office in the issuance of its merit decision. Accordingly, the Office properly denied appellant's request for reconsideration.

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 8, 2005 is affirmed.

Issued: March 16, 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