

FACTUAL HISTORY

On May 11, 1994 appellant, then a 47-year-old equipment operator, filed a claim for an April 27, 1994 right arm injury and numbness sustained when a backhoe bucket struck him. He did not stop work. A coworker corroborated appellant's account of the incident. The disposition of the claim is not of record.

In a January 21, 2004 letter, appellant asserted that the April 27, 1994 injury precipitated multiple sclerosis. He recalled, that following the injury, he experienced systemic, transitory numbness and paresthesias. After consulting several physicians, he was diagnosed with multiple sclerosis. Appellant contacted the Office on December 16, 2003 and was instructed to forward his compensation and medical records.¹ He submitted additional evidence.

In a 1994 report,² Dr. Robert W. Bergstrom, an attending Board-certified internist, noted that appellant was recently struck on the arm by a backhoe. Dr. Bergstrom noted fluctuating symptoms of anxiety, nerve inflammation and paresthesias, most likely due to stress.

In April and May 1994 chart notes, Dr. Lary P. Stieglitz, an attending Board-certified family practitioner, diagnosed a sinus infection and related appellant's symptoms of paresthesias throughout his extremities. He noted that the April 27, 1994 injury could have caused a peripheral neuropathy in the right arm, although this could not explain the paresthesias in appellant's face and feet. Dr. Stieglitz posited that appellant's symptoms were due to anxiety.

Appellant submitted reports from Dr. Narus. In a December 6, 1995 report, Dr. Narus stated that, in April 1994, appellant "developed a sinus infection and fractured his nose while playing basketball." During this time, he was also struck on the right upper arm by the "bucket of a backhoe.... He was knocked to the ground [and] ... had a bad bruise on his arm. [Appellant] state[d] that his whole body felt numb and he had significant pain in his right arm." Appellant experienced pain and paresthesias throughout his extremities, as well as numbness over the left cheek. In a December 27, 1995 report, Dr. Narus diagnosed multiple sclerosis based on characteristic findings on magnetic resonance imaging (MRI) scans. In periodic reports from January 28, 1997 to January 6, 2004, report, Dr. Narus noted appellant's gradually worsening multiple sclerosis symptoms.³ These reports do not mention the April 27, 1994 incident. Appellant continued to work at the employing establishment and on July 10, 2003 was promoted to chief of the road maintenance branch.

¹ In a March 3, 2004 letter, the Office requested that appellant submit additional information, including medical records from 1994. In an April 6, 2004 letter, the Office requested that Dr. Michael S. Narus, an attending Board-certified osteopath specializing in psychiatry and neurology, submit additional information regarding how and why the April 27, 1994 incident could cause multiple sclerosis. The Office afforded Dr. Narus 14 days in which to submit this information. There is no response from Dr. Narus of record prior to the issuance of the April 23, 2004 decision.

² The month and day of the report are not legible.

³ December 26, 1995, October 21, 1999, September 29, 2000, March 13 and December 21, 2001, December 10, 2002 and November 4, 2003 MRI scans of appellant's brain and spinal cord showed myelinoclastic disease and areas of hyperintensity consistent with multiple sclerosis. November 5 and 25, 2003 neuropsychologic testing showed a cognitive dysfunction consistent with multiple sclerosis.

By decision dated April 23, 2004, the Office denied appellant's claim on the grounds that causal relationship was not established. The Office found that appellant submitted insufficient rationalized medical evidence explaining how the April 27, 1994 right arm injury would cause or contribute to multiple sclerosis.

In a July 19, 2004 letter, appellant requested reconsideration. He again asserted that he sustained multiple sclerosis as a consequence of being struck by the back hoe on April 27, 1994. He submitted additional medical evidence from Dr. Narus.

In an April 16, 2004 report and April 29, 2004 letter, Dr. Narus noted that appellant related his symptoms to the April 27, 1994 injury and had no prior injuries or conditions of significance to the claim. Dr. Narus stated that as the "etiology of multiple sclerosis [was] clearly unknown," it was "uncertain if [appellant] would have developed multiple sclerosis in relationship to the event of April 27, 1994 ... [I]t is uncertain if there [was] a causal or temporal relationship to his symptom constellation."

In a July 9, 2004 letter, Dr. Narus stated that it had become "apparent that there [was] a significant likelihood that the work injury of 1994 exacerbated, triggered or perhaps unmasked the multiple sclerosis. The trauma may have brought forward the symptoms of multiple sclerosis but did not cause the MS [multiple sclerosis.]" Dr. Narus noted that there was "an abundance of literature, which describe[d] triggering/unmasking/exacerbation of multiple sclerosis in association with trauma. Certainly, [he] believe[d] this to be [appellant's] situation."

By decision dated July 28, 2004, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a review of the claim on the merits. The Office found Dr. Narus' new reports to be speculative regarding how and why the April 27, 1994 incident "caused or triggered the onset of multiple sclerosis."

In a September 29, 2005 letter, appellant requested reconsideration. He asserted that Dr. Narus' reports were sufficient to establish that the April 27, 1994 incident triggered previously dormant multiple sclerosis. He submitted a copy of his case record, including all medical evidence considered by the Office prior to issuance of the July 28, 2004 decision.

By decision dated November 4, 2005, the Office denied reconsideration on the grounds that the September 29, 2005 request was not timely filed within one year of the July 28, 2004 merit decision and did not present clear evidence of error. The Office found that the September 29, 2005 letter and the accompanying evidence did not demonstrate that the Office erred in issuing the July 28, 2004 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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 The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.⁹ Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.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 be 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

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁶ *Thankamma Mathews*, *supra* note 5; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁷ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 5 at 769; *Jesus D. Sanchez*, *supra* note 6.

⁹ *Thankamma Mathews*, *supra* note 5.

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *Thankamma Mathews*, *supra* note 5.

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 6.

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

¹⁵ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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's decision.¹⁶ The Board must make 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

The Office properly determined in this case that appellant failed to file a timely application for review. The last merit decision in this case was issued on July 28, 2004. Appellant's September 29, 2005 letter requesting reconsideration was untimely filed as it was submitted more than one year after the last merit decision.¹⁸ It must now be determined whether appellant's September 29, 2005 request for reconsideration demonstrated clear evidence of error in the Office's July 28, 2004 decision.

Appellant's September 29, 2005 letter asserts that Dr. Narus' reports are sufficient to establish a causal relationship between the April 27, 1994 incident and the onset of multiple sclerosis. The Board finds that this letter does not raise a substantial question as to whether the Office's July 28, 2004 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error.

The medical reports of Dr. Bergstrom, an attending Board-certified internist and Dr. Stieglitz, an attending Board-certified family practitioner, are irrelevant to the claim as they do not diagnose multiple sclerosis. The copies of MRI scans and other test results are irrelevant as they do not provide any medical rationale supporting the asserted causal relationship. Irrelevant evidence is insufficient to demonstrate clear evidence of error.¹⁹ Dr. Narus, an attending Board-certified osteopath specializing in psychiatry and neurology, stated both that the etiology of appellant's condition was uncertain and that it was related to the April 27, 1994 incident. These equivocal opinions are insufficient to raise a substantial question as to the correctness of the Office's July 28, 2004 decision or *prima facie* shift the weight of the evidence in appellant's favor.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his September 29, 2005 request for reconsideration are insufficient to demonstrate clear evidence of error.

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁷ *Gregory Griffin*, *supra* note 7.

¹⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

¹⁹ *Thankamma Mathews*, *supra* note 5.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's July 28, 2004 decision, the last merit decision in the case. Therefore, the November 4, 2005 decision of the Office denying appellant's September 29, 2005 request for reconsideration was proper under the law and the facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 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