

FACTUAL HISTORY

On July 30, 2002 appellant, then a 43-year-old employee,² filed an occupational disease claim alleging that he sustained disequilibrium, labyrinthitis and sinus, throat and ear problems due to exposure to contaminated dust particles while working at the World Trade Center site in New York City between September 11 and 25, 2001. He stopped work on October 13, 2001.

The Office accepted that appellant sustained acute sinus and inner ear infections, labyrinthitis, vertigo associated with otitis media and an ankle sprain caused by vertigo. He received Office compensation for total disability starting August 13, 2003.

During the period October 13, 2001 to August 12, 2003, appellant continued to receive wages through receipt of continuation of pay and use of his own vacation and sick leave, which he earned with the Town of Narragansett, as well as sick leave that was donated to a leave bank by coworkers of the Town of Narragansett.

The record contains a January 2002 document which indicates that appellant asked an Office official whether he could buy back the leave he used with the Town of Narragansett during the period October 13, 2001 to August 12, 2003. He was advised that the Office did not process leave buy back with a private employer and that his compensation request could only be processed if he refunded the Town of Narragansett for the pay he received during the period October 13, 2001 to August 12, 2003.

In Forms CA-7 dated July 29, 2002 and August 8, 2003, appellant claimed that he was entitled to Office compensation during the period October 13, 2001 to August 12, 2003. On the August 8, 2003 form, a supervisor from the Town of Narragansett stated that he used sick leave for the period October 14, 2001 to October 14, 2002 and vacation leave for the period October 15, 2002 to October 15, 2003 and received continuation of pay for the period January 15, 2003 to the present.

By decision dated September 2, 2003, the Office denied appellant's claim on the grounds that the record failed to support that he had lost wages during the period October 13, 2001 to August 12, 2003. It indicated that he received pay during the period October 13, 2001 to August 12, 2003, through leave usage and continuation of pay and that he could not also receive compensation for this period. The Office stated, "To receive compensation for the time lost from work due to an accepted work-related condition you must be in a leave-without-pay status."

Appellant requested a hearing before an Office hearing representative in connection with his claim. At the hearing held on May 26, 2004, appellant argued that he should be able to receive both pay from leave usage and from Office compensation during the same period.

² Appellant worked part time for the Office of Emergency Preparedness at the employing establishment as an administrative officer and full time for the Town of Narragansett as a lieutenant firefighter and emergency medical technician. He was providing emergency relief while on travel duty for the employing establishment at the time of his injury.

Appellant submitted documents which detailed the salary paid to him between September 2001 and August 2003 and which listed the amount that the Town of Narragansett was charged to replace him during the period he was off work. He also submitted a copy of an agreement between his union and the Town of Narragansett.

By decision dated and finalized November 26, 2004, the Office hearing representative affirmed the Office's September 2, 2003 decision. He indicated that section 8118(c) of the Federal Employees' Compensation Act precludes payment of compensation to a claimant until he is in a leave-without-pay status.

On January 4, 2006 appellant requested reconsideration of his claim. His request was effectuated by the Office's receipt of a December 29, 2005 letter which was forwarded by his congressional representative.³

In support of his reconsideration request, appellant submitted a January 13, 2003 memorandum of agreement between his union and the Town of Narragansett, which indicated that a sick leave bank could be used to pay him and the record of a hearing held in connection with his application for disability retirement. Appellant also submitted copies of records showing how much he was paid between January and December 2003 and the costs that the Town of Narragansett incurred to replace appellant during his absence.⁴

By decision dated March 13, 2006, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁷ Office regulation and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

³ In this letter, appellant's congressional representative detailed the history of appellant's claim and asked if any assistance could be provided.

⁴ The records indicated that appellant could pay back the leave he used during the period October 13, 2001 to August 12, 2003 and, therefore, be considered in a leave-without-pay status for that period.

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴

ANALYSIS

In its March 13, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. His reconsideration request was filed on January 4, 2006, more than one year after the last merit decision of record, the Office's November 26, 2004 decision and, therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its November 26, 2004 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. Appellant argued that the Office improperly determined that he could not receive both wages and the Act compensation

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

during the period October 13, 2001 to August 12, 2003. However, he did not submit evidence clearly showing that the Office's determination was improper.¹⁵

Appellant submitted a January 13, 2003 memorandum of agreement between his union and the Town of Narragansett, the record of a hearing held in connection with his application for disability retirement and copies of records showing how much he was paid between January and December 2003 and the costs that the Town of Narragansett incurred to replace appellant during his absence. These records do not show that the Office erred in its November 26, 2004 decision.

The documents submitted by appellant tend to show that he was not in a leave without pay status during the period October 13, 2001 to August 12, 2003 and, therefore, could not receive compensation during this period. For example, the memorandum of agreement between appellant's union and the Town of Narragansett indicated that a sick leave bank could be used to pay him and the records concerning the costs of replacing appellant during his absence and detailed the amounts of wages he received during the period October 13, 2001 to August 12, 2003.¹⁶

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's November 26, 2004 decision and it properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁵ During the period October 13, 2001 to August 12, 2003, appellant continued to receive wages through receipt of continuation of pay and use of his own vacation and sick leave which he earned with the Town of Narragansett, as well as sick leave that was donated to a leave bank by coworkers of the Town of Narragansett. Section 8118(c) of the Act precludes payment of compensation to a claimant until he is in a leave-without-pay status, *i.e.*, until use of annual or sick leave ends or pay otherwise terminates. 5 U.S.C. § 8118(c).

¹⁶ The records indicated that appellant could pay back the leave he used during the period October 13, 2001 to August 12, 2003 and, therefore, be considered in a leave-without-pay status for that period. However, there is no indication in the record that appellant paid back the leave.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 13, 2006 decision is affirmed.

Issued: November 30, 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