

August 29, 1991. By letter dated October 16, 1991, the Office accepted appellant's claim for lumbosacral strain and right shoulder strain.

On April 6, 2001 appellant filed a claim alleging a recurrence of the August 29, 1991 employment injury. Under date and hour of recurrence, he wrote: "continuous." He further, noted: "Since the injury I have required [intermittent] medical attention for my lower back, neck, shoulder and arm." By letter dated May 30, 2001, the Office requested that he submit further information in support of his claim, including a personal statement and medical records. On June 20, 2001 appellant submitted a statement describing the initial injury, his physical condition and his medical treatment. However, he did not submit any new medical evidence. The Office denied appellant's claim for a recurrence by decision dated December 16, 2002.

By letter dated November 3, 2005 and received by the Office on November 23, 2005, appellant requested reconsideration. He submitted a June 28, 2004 medical report by Dr. William C. McCarthy, a Board-certified family practitioner, who stated that he had been appellant's primary care physician since July 2002, noting:

"As your agency has documented, [appellant] was injured in August 1991 as a result of a gas line rupture. He was hit on the back of the neck by a heavy object, and sustained a number of injuries, especially to the neck, shoulder and low back. [Appellant] underwent neck surgery in 1998, shoulder surgery in 2000, courses of physical therapy for his low back, and has had other problems resulting from his injuries.

"[Appellant] continues to have recurrent problems stemming from the original injury. I have treated him on several occasions for problems related to his work injury. In January 2003, he was seen for worsening neck pain and was referred to a neurosurgeon. [Appellant] was referred for physical therapy in March 2003 for continued neck pain. In April 2003, he was evaluated by a spine surgeon for his neck and low back problems.

"[Appellant's] injuries have left him with major physical impairments. He has marked reduction in neck and shoulder mobility. Because of his back pain and [sic] he can only stand for about 20 to 30 minutes at a time. [Appellant] can sit for no longer than an hour at a time, and cann[o]t lift more than 10 or so pounds. His right shoulder pain limits reaching and pulling. These are just a few of the limitations [appellant] currently living with. [Appellant] was recently placed on an analgesic medication and sent for physical therapy for his back, because of recent pain."

By decision dated December 2, 2005, the Office denied appellant's request for reconsideration as it was not timely filed and did not establish 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 sent 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 under 5 U.S.C. § 8128(a).¹

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.² 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.³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁵ 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.⁶ To show clear evidence of error, the evidence submitted must not only be a clear procedural error but must be of sufficient probative value to *prima facie* shift the weight of the

¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² *Charles J. Prudencio*, 41 ECAB 499 (1990).

³ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁴ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁵ *Id.*

⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.⁷ 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.⁸

ANALYSIS

The most recent merit decision by the Office was issued on December 16, 2002. Appellant had one year from the date of that decision to request reconsideration but did not do so until November 3, 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).

The Office also properly found that appellant's request for reconsideration did not demonstrate clear evidence of error. On April 6, 2001 appellant filed a claim for recurrence of his accepted injury. Appellant did not submit any medical evidence to support that he sustained a recurrence of disability due to his 1991 injury. As there was no medical evidence supporting his claimed recurrence, the Office denied the claim. With his untimely request for reconsideration, appellant submitted a medical report by Dr. McCarthy dated June 28, 2004. Dr. McCarthy addressed appellant's medical history and current medical condition, noting that he continued to have pain in his back, neck and shoulder which he related to appellant's work injury. However, the Board notes that Dr. McCarthy has been treating appellant since July 2002 and would not have any direct knowledge of appellant's condition at the time he filed the claim for recurrence on April 6, 2001, nor does Dr. McCarthy indicate that he had reviewed appellant's medical records. He did not provide a detailed explanation as to why he attributed appellant's current conditions in his back, neck and shoulder to his 1991 work injury.

Accordingly, the report of Dr. McCarthy is not sufficient to show clear evidence of error on the part of the Office at the time it issued its December 16, 2002 decision. Office procedures provide that 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 of a miscalculation of a schedule award). Even evidence such as a detailed, well rationalized report, which if submitted prior to the Office's denial, would have supported further development of the evidence, is not clear evidence of error and would not require a review of a case.⁹

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

⁷ *Leon D. Faidley, Jr.*, *supra* note 1.

⁸ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 2, 2005 is affirmed.

Issued: September 19, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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