

FACTUAL HISTORY

On February 7, 1978 appellant, then a 30-year-old air traffic controller, filed a claim for a traumatic injury; Office File No. 140-125959.¹ He alleged that on February 5, 1978 he sustained a mental condition as a result of losing an aircraft and possibly the lives of six persons aboard an aircraft under his control jurisdiction.² Appellant stopped work on February 6, 1978.³ On April 4, 1978 the Office accepted appellant's claim for acute depression.

On August 14, 2002 appellant filed a claim alleging that he sustained a recurrence of disability. By letters dated October 23 and November 13, 2002, the Office addressed the medical evidence that he needed to submit to establish his recurrence of disability claim.

By decision dated January 23, 2003, the Office found that appellant did not sustain a recurrence of disability causally related to his February 7, 1978 employment-related injury. It noted that he was treated for his employment-related emotional condition until December 4, 1978. The Office further found that appellant did not submit any bridging evidence establishing that he sought treatment for his accepted emotional condition from December 4, 1978 until his recurrence of disability on August 14, 2002. By letter dated February 20, 2003, appellant requested an oral hearing before an Office hearing representative.

In a November 12, 2003 decision, the hearing representative affirmed the Office's January 23, 2003 decision. The hearing representative found the factual and medical evidence of record insufficient to establish that appellant sustained a recurrence of disability on August 14, 2002 causally related to his February 5, 1978 employment injury. Appellant did not submit any bridging evidence that he sought treatment for his accepted emotional condition from 1980, the year he stopped working at the employing establishment, through his recurrence of disability on August 14, 2002.

By letters dated June 21, 2004, from Joan Everett, an employing establishment workers' compensation specialist, and June 24, 2004 from Richard W. Musser, appellant's father, appellant requested reconsideration.⁴ In an affidavit signed by appellant on March 26, 2004, he described his April 28, 1977 and February 5 and August 11, 1978 employment injuries and resultant disability. He submitted medical reports dated April 6, May 2, August 11 and September 5, 1978 from Dr. Patricia C. Patrick, a psychiatrist, who found that appellant

¹ Prior to the instant claim, appellant filed a traumatic injury claim on May 6, 1977. He alleged that on April 28, 1977 he watched helplessly as two jet aircraft merged on the radar scope at the same altitude. Appellant stopped work on April 28, 1977 and returned to work on May 2, 1977. On September 23, 1977 the Office accepted appellant's claim for hyperventilation. The Office originally assigned File No. A14-117417. It has been combined into Master File No. 140-125959.

² The record reveals that only one person aboard the aircraft survived the February 5, 1978 incident.

³ Appellant retired on disability from the employing establishment effective May 9, 1980. He successfully completed training in a second career program and obtained employment as a stock broker.

⁴ In a letter dated July 8, 2004, the Office advised appellant that Ms. Everett's June 21, 2004 and Mr. Musser's June 24, 2004 letters were not acceptable. It requested that he submit a letter of representation designating his father as his legal representative.

sustained an emotional condition causally related to the February 5, 1978 employment injury and that he was totally disabled for work. A March 20, 1978 report of Jon F. Burke, PhD., a clinical psychologist, found that appellant suffered from an emotional condition. In progress notes covering dated March 11 to April 13, 2004, Dr. Dennis B. Elrod, a psychiatrist, diagnosed depression and probable post-traumatic stress disorder. He found that appellant was totally disabled for work. In a November 26, 2003 report, Dr. Ramzi M. Nassar, a Board-certified psychiatrist, opined that appellant sustained post-traumatic stress disorder and leg pain and he had a global assessment functioning score of 50 to 60. In a November 26, 2003 prescription, he ordered medication for appellant's emotional condition.

On August 6, 2004 the Office issued a decision, denying modification of the November 12, 2003 decision. Appellant failed to submit rationalized medical evidence establishing that he sustained a recurrence of disability on August 14, 2002 causally related to his February 5, 1978 employment injury. The Office noted that appellant did not submit any bridging evidence that he was treated for his accepted emotional condition during the period 1980 through 2002.

The Office received a May 14, 2004 progress note of Dr. Michael R. McCoy⁵ which found that appellant sustained spondylosis and disc disease of the lumbar spine and depression and that he used tobacco. An article entitled "Reliving Trauma" from the National Institute of Mental Health provided facts, treatment and research findings related to post-traumatic stress disorder.

By letter dated September 29, 2006, appellant, through his attorney, requested reconsideration of the Office's August 6, 2004 decision. A November 7, 2005 report of Dr. Royal P. Kiehl, a psychiatrist, found that appellant sustained post-traumatic stress disorder, pathological guilt and recurrent major depression. He stated that appellant was profoundly affected by his military and air traffic control experiences. Dr. Kiehl stated that appellant suffered from considerable back and ankle pain secondary to injuries he sustained in the military. In a June 14, 2006 report, he found that appellant suffered from severe depression and anxiety with a return of his post-traumatic stress disorder. Dr. Kiehl indicated that this diagnosis was originally made by Dr. Patrick in 1978 and reestablished in 2003 by Dr. Nassar. He opined that the sole cause of the recurrence of appellant's emotional condition was due to the February 1978 employment-related injury. Dr. Kiehl further opined that appellant was totally disabled from gainful employment due to the recurrence of his post-traumatic stress disorder and the severity of his depression.

By decision dated January 3, 2007, the Office found that appellant's letter requesting reconsideration was dated September 29, 2006, more than one year after the Office's August 6, 2004 decision and was untimely. The Office further found that appellant did not submit evidence to establish clear evidence of error in the prior decision finding that he did not sustain a recurrence of disability on August 14, 2002 causally related to his February 5, 1978 employment-related injury.

⁵ The Board notes that Dr. McCoy's professional qualifications are not contained in the case record.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁹

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

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.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Id.* at § 10.607(b).

¹⁰ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹⁶

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁷

The last merit decision in this case was issued by the Office on August 6, 2004, finding that appellant did not sustain a recurrence of disability on August 14, 2002 causally related to his February 5, 1978 employment injury. As his September 29, 2006 letter requesting reconsideration was made more than one year after the Office's August 6, 2004 merit decision, the Board finds that it was not timely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was clear error in the Office's finding that he failed to establish that he sustained a recurrence of disability on August 14, 2002 causally related to his February 5, 1978 employment-related acute depression.

In support of his September 29, 2006 request for reconsideration, appellant submitted Dr. McCoy's May 14, 2004 progress note which found that he had spondylosis, disc disease of the lumbar spine and depression. Dr. Kiehl's November 7, 2005 report stated that appellant sustained post-traumatic stress disorder, pathological guilt and recurrent major depression. He stated that appellant was profoundly affected by his military and air traffic control experiences. Dr. Kiehl also noted considerable back and ankle pain secondary to injuries appellant sustained in the military. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. Neither Dr. McCoy nor Dr. Kiehl provided any opinion as to, the underlying issue of whether he sustained a recurrence of disability on August 14, 2002 caused by his February 5, 1978 employment injury. The Board finds that Dr. McCoy's progress note and Dr. Kiehl's report do not establish clear evidence of error.

Dr. Kiehl's June 14, 2006 report listed severe depression and anxiety with a return of his post-traumatic stress disorder. He opined that the sole cause of the recurrence of appellant's emotional condition was due to his February 1978 employment-related injury. Dr. Kiehl advised that appellant was totally disabled from gainful employment due to the recurrence of his post-traumatic stress disorder and the severity of his depression. Although this evidence addressed the recurrence of appellant's employment-related emotional condition and disability, Dr. Kiehl did not explain how or why the recurrence was caused by the accepted employment injury. The June 14, 2006 report fails to establish clear evidence of error.

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *Larry L. Litton*, 44 ECAB 243 (1992).

The article entitled "Reliving Trauma" addressed facts, treatment and research findings related to post-traumatic stress disorder. The submission of this factual evidence does not show clear evidence of error because it is not relevant to the main issue in the present case, which is medical in nature and should be resolved by the submission of medical evidence. The Board, therefore, finds that the article does not shift the weight in favor of appellant's claim.

For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2007
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