

orthopedic surgeon, diagnosed cervical strain. The Office accepted a left shoulder strain and later accepted cervical and lumbar strains. On September 8, 2000 appellant filed a second traumatic injury claim alleging that she felt pain in her right shoulder and lower right arm while working on September 6, 2000. She stopped work on September 9, 2000. Appellant returned to light duty on July 11, 2001. The Office accepted right shoulder and cervical sprains. On October 18, 2001 the Office combined the two claims under one file.

Appellant claimed a schedule award on September 20, 2001. On January 12, 2002 Dr. Mitchell provided an impairment rating and stated that appellant reached maximum medical improvement on December 1, 2001. On March 21, 2002 an Office medical adviser recommended that the Office further develop the claim regarding diagnoses, causal relationship and impairment. On May 14, 2002 the Office referred appellant to Dr. John Sklar, a Board-certified physiatrist, for a second opinion evaluation in connection with her schedule award claim. In a June 13, 2002 report, Dr. Sklar concluded that appellant had one percent impairment of both the right and left upper extremities due to pain and found that appellant reached maximum medical improvement on December 1, 2001. On August 7, 2002 the Office awarded appellant a schedule award for one percent impairment of the right arm and one percent impairment of the left arm. On August 7, 2002 appellant filed a recurrence of disability claim asserting that she experienced neck pain after a training class on July 15, 2002. She stopped work on July 17, 2002 and returned on July 31, 2002. The Office paid appropriate compensation.

On January 6, 2003 appellant filed a recurrence of disability claim alleging disability commencing November 20, 2002 after straining her neck for three weeks. She provided treatment notes and factual evidence. On November 4, 2002 Dr. Mitchell diagnosed cervical spine and left shoulder spasm but recommended that appellant continue working in her modified assignment. In a December 23, 2002 report, he stated that appellant still experienced persistent neck and back pain and diagnosed cervical strain and cervical disc disease. After the Office requested additional information, appellant supplied treatment notes and progress reports. On March 16, 2003 Dr. Mitchell reported that appellant had a recurrence of disability since “around July 31, 2002,” which ultimately rendered her unable to work after November 20, 2002. In a July 31, 2002 report, he noted that appellant had tightness and numbness in the shoulder and neck regions as well as neck stiffness which she characterized as work related. Dr. Mitchell noted: “[Appellant] has had similar problems before and was doing well until this problem started again.”

By decision dated April 2, 2003, the Office denied appellant’s recurrence of disability claim, finding that she did not establish that her disability was causally related to her July 6, 1999 employment injury.

On May 28, 2003 appellant requested reconsideration. She submitted a May 14, 2003 report from Dr. Mitchell, who stated that, after he released appellant to return to work on November 4, 2002, she did apparently work until November 20, 2002, the date of her claimed recurrence of disability.

By decision dated July 22, 2003, the Office accepted appellant’s recurrence of disability claim for medical treatment only and denied modification of its April 2, 2003 decision with

regard to wage-loss compensation beginning November 21, 2002. Appellant requested reconsideration on April 13, 2004.

By decision dated July 13, 2004, the Office denied modification of its July 22, 2003 decision.

In a September 13, 2004 report, Dr. Mitchell stated that appellant complained of worsening neck and shoulder pain. He diagnosed chronic left shoulder and cervical strain. On January 10, 2005 Dr. Mitchell noted that appellant “continues to have intermittent neck and shoulder pain related to her work-related injuries.” In an April 11, 2005 report, he reported that appellant’s condition was unchanged. On July 11, 2005 Dr. Mitchell reported that appellant “states that the problems are getting worse particularly in the shoulders and her hands as well.”

On August 2, 2005 appellant requested reconsideration. By decision dated September 9, 2005, the Office denied appellant’s request for reconsideration on the grounds that it was untimely and did not present clear evidence of error.

Appellant subsequently submitted a September 6, 2005 report from Dr. Mitchell noting that her condition remained unchanged. On November 16, 2005 Dr. Mitchell explained that appellant “complains of neck pain, shoulder pain, and back pain as well. Appellant also complains of numbness of both hands as well. Essentially her condition has not changed except that she states the pain in her neck and shoulders has gotten progressively worse.” On February 22, 2006 Dr. Mitchell reported that appellant complained that her condition was worsening and becoming more painful. On May 22, 2006 he again noted that appellant’s condition was unchanged, characterizing it as “chronic.” Appellant also provided a June 20, 2006 electrodiagnostic testing report from Dr. Michael Ellman, a Board-certified physiatrist, who noted appellant’s complaints of bilateral hand pain and numbness and recorded an impression of mild right carpal tunnel syndrome with “no evidence of cervical radiculopathy, plexopathy or peripheral neuropathy.”

On September 8, 2006 appellant requested reconsideration of the Office’s July 13, 2004 decision.

By decision dated October 2, 2006, the Office denied appellant’s reconsideration request on the grounds that it was untimely and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through its regulations, has imposed limitations on the exercise of

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁴ 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).⁵

The Office's regulations provide:

“[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.”⁶

In those cases where requests for reconsideration are not timely filed, the Office must undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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

⁴ 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).

⁵ 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ 20 C.F.R. § 10.607(b).

⁷ *Thankamma Mathews*, *supra* note 2 at 770.

⁸ *Id.*

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Jesus D. Sanchez*, *supra* note 3 at 968.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹³

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The Act's implementing regulations provide that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought.¹⁴ The most recent merit decision was the Office's July 13, 2004 decision that denied modification of previous decisions denying her recurrence of disability claim. As appellant's September 8, 2006 reconsideration request was made more than one year following the Office's July 13, 2004 merit decision, the Board finds that appellant's request was untimely filed. Consequently, to have her claim reopened, appellant must show clear evidence of error made by the Office in its July 13, 2004 decision. The Board finds that in the present case appellant has failed to present evidence establishing that the Office's decision was erroneous on its face or raising a substantial question as to the correctness of the Office's decision.

With her request for reconsideration, appellant submitted several new medical reports from Dr. Mitchell and a diagnostic testing report from Dr. Ellman. Dr. Mitchell's reports, dated September 6 and November 16, 2005 and February 22 and May 22, 2006, did not present new rationale or explanations of sufficient probative weight to raise a substantial question as to the correctness of the Office's decision. Dr. Mitchell merely maintained, as in previous reports, that appellant's condition was unchanged and chronic. His reports did not demonstrate clear error on the part of the Office. Dr. Ellman's report was diagnostic in nature and did not address causal relationship between appellant's continuing condition and her initial employment injury. His report does not add sufficient probative value to raise a substantial question as to the correctness of the Office's decision. The evidence submitted is insufficient to shift the weight of the medical evidence in appellant's favor, or otherwise raise a substantial question as to the correctness of the Office's decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and did not present clear evidence of error.

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁴ 20 C.F.R. § 10.607(a).

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board