

developed asbestosis due to exposures to asbestos while stripping pipes in ship boiler rooms. He stopped work at the employing establishment on November 21, 1961. The Office accepted appellant's claim for calcified plaques due to asbestos exposure on October 8, 2002. Appellant requested a schedule award on February 13, 2004. By decision dated March 16, 2004, the Office granted appellant a schedule award for 30 percent impairment of his lungs. Appellant requested reconsideration on May 22, 2004. By decision dated June 3, 2004, the Office declined to reopen appellant's claim for consideration of the merits. The Board reviewed these decisions on December 3, 2004.¹ The Board found that appellant had no more than 30 percent impairment of his lungs and that the Office properly declined to reopen appellant's claim for consideration of the merits on June 3, 2004. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Appellant alleged that he was totally disabled in a letter dated July 13, 2004 and requested compensation payments. He completed a claim for compensation on July 13, 2004 and requested wage-loss compensation beginning in March 1997 and continuing. By decision dated September 17, 2004, the Office denied appellant's claim for wage loss finding that he had not submitted the necessary medical evidence to establish that he was disabled due to his accepted condition of calcified plaques due to asbestos exposure. Appellant requested a review of the written record on October 8, 2004. By decision dated February 18, 2005 and finalized March 8, 2005, the hearing representative denied appellant's claim finding that he had submitted no medical evidence establishing that he was disabled since 1987 due to his asbestos-related condition. The hearing representative noted that appellant worked for several years in the private sector and was currently retired.

Dr. M. Stein, a physician, examined appellant on September 25, 1984 and stated that he retired as a cab driver due to arthritis of the spine. He examined appellant for possible asbestos exposure and diagnosed chronic bronchitis. On September 28, 1984 Dr. Jan W. Patterson, a physician, examined appellant's chest x-ray and diagnosed pleural calcifications consistent with asbestosis. On April 1, 1987 Dr. Stein noted that appellant had almost passed out and diagnosed mild chronic obstructive pulmonary disease. He mentioned that appellant had a history of alcohol abuse with blackouts. In a report dated March 16, 2004, Dr. Linda H. Morse, a physician Board-certified in preventative medicine, indicated that appellant's exercise tolerance was a few blocks and diagnosed asbestos pleural plaques. In a report dated February 18, 2005, she found that appellant had significant worsening of his asbestos-related disease.² On March 10, 2005 appellant filed a claim for compensation requesting wage-loss compensation from December 1961 through January 1968 and from February 1975 through the "present." The Office requested additional factual and medical evidence regarding this claim on April 5, 2005. In a memorandum dated May 11, 2005, Dr. Morse stated that appellant was totally disabled due

¹ Docket No. 04-1867 (issued December 3, 2004).

² Appellant requested an additional schedule award on March 10, 2005. As the Office has not issued a final decision addressing this request, the Board cannot consider this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

to his asbestos-related disease. Appellant again requested continuing compensation benefits on February 18, 2006.³

On a form dated February 3, 2006 appellant requested an additional oral hearing from the hearing representative's March 8, 2005 decision. By decision dated March 9, 2006, the Branch of Hearings and Reviews denied appellant's request for an oral hearing. Appellant appealed this decision to the Board and in a decision and order dated January 23, 2007⁴ the Board affirmed the March 9, 2006 decision of the Branch of Hearings and Reviews.

Appellant requested reconsideration of the Board's January 23, 2007 decision on February 19, 2007. In support of his request, appellant submitted an x-ray report dated March 22, 1997 from Dr. Horton C. Hinshaw, a Board-certified pulmonologist, diagnosing bilateral pleural thickening typical of pleural disease due to asbestos. Appellant resubmitted Dr. Morse's February 18, 2005 report opining that appellant's asbestos-related disease had worsened. He submitted a copy of his March 16, 2004 schedule award. Appellant resubmitted a report dated May 5, 2003 Dr. Gerald B. Levine, a Board-certified pulmonologist, opining that appellant had asbestos-related pleural disease as well as chronic obstructive pulmonary disease. He submitted a January 26, 2006 pulmonary function report.

By decision dated May 18, 2007, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed within one year from the March 8, 2005 merit decision. The Office further found that appellant did not establish clear evidence of error on the part of the Office. The Office stated that it did not have jurisdiction to review the Board's January 23, 2007 decision regarding appellant's right to an additional oral hearing and did not address that issue.⁵ The Office found that appellant had not submitted clear evidence of error regarding the most recent merit decision, the March 8, 2005 decision of the Branch of Hearings and Reviews.

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 This section vests the Office with discretionary authority to determine whether it will review an award for or against

³ The Office has not issued final decisions regarding appellant's additional claims for disability. As the Office has not issued final decisions on these claims, the Board may not address these issues for the first time on appeal. 20 C.F.R. § 501.2(c).

⁴ Docket No. 06-1019 (issued January 23, 2007).

⁵ In the absence of further review by the Office on the issue addressed in the January 23, 2007 decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Joseph A. Brown, Jr.*, 55 ECAB 542, 543 (2004). Appellant did not seek reconsideration of the Board's January 23, 2007 decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision 20 C.F.R. § 501.6(d).

⁶ 5 U.S.C. § 8128(a).

⁷ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

compensation.⁸ The Office, through regulations, 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.⁹ 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).¹⁰

The Office's regulations require that an application for reconsideration must be submitted in writing¹¹ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."¹² The 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 decision. The application must establish, on its face that such decision was erroneous."¹³

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 regulations.¹⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record

⁸ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁹ 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).

¹⁰ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 7 at 769; *Jesus D. Sanchez*, *supra* note 8 at 967.

¹¹ 20 C.F.R. § 10.606.

¹² *Id.* at § 10.605.

¹³ *Id.* at § 10.607(b).

¹⁴ *Thankamma Mathews*, *supra* note 7 at 770.

¹⁵ *Id.*

¹⁶ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁷ *Jesus D. Sanchez*, *supra* note 8 at 968.

¹⁸ *Leona N. Travis*, *supra* note 16.

and whether the new evidence demonstrates clear error on the part of the Office.¹⁹ 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's decision.²⁰ 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.²¹

ANALYSIS

Appellant filed his request for reconsideration on February 19, 2007. The most recent decision addressing the merits of his claim was the March 8, 2005 decision of the hearing representative.²² As appellant's request for reconsideration was dated more than one year following the most recent decision on the merits, the Office properly found that his request for reconsideration was untimely and subject to the clear evidence of error standard.

The March 8, 2005 decision of the Branch of Hearings and Review denied appellant's claim on the grounds that he had not submitted the necessary medical evidence to establish that he was totally disabled due to his accepted condition of calcified plaques due to asbestosis exposure beginning in 1987 as alleged. Following the hearing representative's decision, appellant submitted medical evidence addressing his accepted condition. However, he did not submit any medical evidence regarding any period of disability due to this condition. In 1984 Dr. Stein indicated that appellant was disabled due to a spine condition. In a report dated March 16, 2004, Dr. Morse, a physician Board-certified in occupational and environmental medicine, indicated that appellant's exercise tolerance was only a few blocks. She stated that appellant was totally disabled due to his asbestos-related disease on May 11, 2005. These reports are not relevant to the issue for which the Office denied his claim, whether he was totally disabled due to his asbestos exposure beginning in 1987. As the evidence does not address the central issue in appellant's claim, it is not relevant to appellant's claim and is not sufficient to establish clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that appellant's untimely request for reconsideration did not contain the necessary medical opinion evidence relevant to his claim to establish clear evidence of error on the part of the Office.

¹⁹ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

²⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²¹ *Gregory Griffin*, *supra* note 9.

²² The Board's January 23, 2007 decision did not address the merits of appellant's claim, but instead addressed whether he was entitled to a second oral hearing on the same decision of the Office. Appellant did not submit any new evidence or argument regarding this specific issue with his February 19, 2007 request for reconsideration and the Office properly declined to address this aspect of appellant's claim. See *Joseph A. Brown, Jr.*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 27, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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