

April 19, 1979 while in the performance of duty.¹ The Office accepted the claim for cervical strain and bilateral thoracic outlet syndrome.² In the first appeal, the Board affirmed the February 22, 1988 Office decision which found that appellant did not have a greater than eight percent permanent loss of use of each arm.³ In the second appeal, the Board affirmed the Office's June 29 and October 23, 1995 decisions, which denied modification of a January 3, 1995 hearing representative's decision.⁴ The hearing representative affirmed the denial of appellant's claim for a recurrence of disability and terminated her compensation for medical benefits. On November 7, 2005 the Board affirmed the denial of her recurrence claim on and after April 19, 1979. The Board found that the opinion of Dr. Mary E. Reif, an impartial Board-certified neurologist, constituted the weight of the evidence on the issues of whether appellant's myofascial pain syndrome was employment related and whether she sustained a recurrence of disability.⁵ The facts and the history contained in the prior appeal are incorporated by reference.⁶

Subsequent to the Board's most recent decision, appellant requested reconsideration. The Office received copies of previously submitted evidence, including the April 1, 2005 report of Dr. Jeffrey Harrison, a treating osteopath, and from Dr. Harry S. Reese, a treating Board-certified orthopedic surgeon. The Office also received appellant's March 6, 2006 traumatic injury claim alleging that she sustained an employment injury that occurred on April 19, 1979. The Office informed appellant that this was a duplicate claim. Dr. Harrison attributed appellant's symptoms "on a more probable-than-not basis" to her employment injury. He reported that appellant continued to have complaints of bilateral upper extremity paresthesias and mild swelling intermittently. A physical examination revealed "increased thoracic kyphosis and anterior translation of her shoulders." Dr. Reese opined that appellant sustained an upper back and neck strain due to her accepted April 19, 1979 employment injury. He noted that the injury resulted in arm pain and thoracic out syndrome. Dr. Reese also opined that chronic tension on the muscles and supporting structures on the upper back have created a chronic myofascial pain syndrome.

On July 9, 2005 Dr. Reese reported that he had treated appellant since 1980 for bilateral neck, upper extremity and upper back pain. He concluded that appellant's pain pattern and nature were "not consistent with cervical radiculopathy nor fibromyalgia," the surgery she underwent "was more injurious than beneficial," and "[t]he structural alteration in the chest cave,

¹ Appellant's name was Y.D.B. at the time of injury. By letter dated May 28, 1991, she informed the Office she had legally changed her name to Y.D.J. Also, while she noted the date as "April 12, 1979" on the front of the CA-1 form, she noted "April 19, 1979" on the back and the Office used April 19, 1979 as the date of injury.

² Appellant resigned from her position on November 16, 1979.

³ Docket No. 88-806 (issued June 28, 1988).

⁴ Docket No. 96-695 (issued July 14, 1998).

⁵ The Office referred appellant on April 14, 2004 to Dr. Reif due to the conflict in the medical opinion evidence between Dr. Harry S. Reese, a treating Board-certified orthopedic surgeon, and Office referral physicians, Drs. Harry H. Kretzler, Jr., a Board-certified orthopedic surgeon, and Dr. James Crowley, a Board-certified neurological surgeon, regarding the diagnosis of myofascial pain syndrome and its relationship to her accepted April 19, 1979 employment injury.

⁶ Docket No. 05-1233 (issued November 5, 2005).

demonstrated by healed rib fractures, is compelling objective evidence of biomechanical dysfunction.”

On November 20, 2006 the Office received an undated report from Dr. Reese who opined that appellant “is suffering from a chronic pain syndrome directly related to her injury on April 19, 1979.” He noted that appellant was initially misdiagnosed with thoracic outlet syndrome and bilateral cervical strain and had two surgeries, which were approved by the Office, to correct the thoracic outlet syndrome. Dr. Reese stated that looking back “this intervention has done very little to correct and reduce the causing agent of the pain” appellant suffers.

In a March 1, 2007 report, Dr. Kim B. Wright noted that a 2004 magnetic resonance imaging (MRI) scan revealed four levels of degenerative disc disease which was reflective of underlying osteoarthritis. The physician noted that appellant’s prior records were unavailable for review but that appellant sustained an employment-related injury in 1979. Dr. Wright attributed the onset of appellant’s neck pain to the 1979 employment injury. Due to her thoracic outlet surgery and degenerative disc changes developed in the neck, appellant remained disabled from the symptoms of chronic neck and shoulder pain and upper paresthesias. Dr. Wright concluded that appellant’s 1979 employment injury contributed “on a more probable-than-not basis” to appellant’s neck, arm and shoulder pain symptoms.

By decision dated April 20, 2007, the Office denied appellant’s request on the grounds that it was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act⁷ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁸ 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.⁹ 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.¹⁰

Title 20 of the Code of Federal Regulations, section 10.607(b), provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit, and must manifest on its face that the Office committed an error. Evidence

⁷ 5 U.S.C. § 8101 *et seq.*

⁸ 20 C.F.R. § 10.605.

⁹ 20 C.F.R. § 10.607(a).

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

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. 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. 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. 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.¹²

ANALYSIS

In its April 20, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision of record was issued by the Board on November 7, 2005. Appellant's February 1, 2007 letter requesting reconsideration was submitted more than one year after November 7, 2005 merit decision and was, therefore, untimely.

The Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly establish that the Office's prior decision was in error.

The Board finds that appellant did not establish clear evidence of error. Appellant submitted medical evidence in support of her request, much of it duplicative of evidence already received and considered by the Office. As noted above, the evidence submitted must be relevant to the issue which was decided by the Office. The evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it *prima facie* shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. Dr. Reese merely maintained, as in previous reports, that appellant's upper back and neck strain were employment related and resulted in thoracic outlet syndrome and arm pain. This is repetitive of his reports of record. The Office had already considered Dr. Reese's opinion, noted that it differed from the opinions of Drs. Kretzler and Crowley, second opinion physicians, and referred appellant for an impartial medical examination by Dr. Reif. The Office relied upon Dr. Reif's opinion to find that appellant's myofascial pain syndrome was unrelated and she did not sustain a recurrence of disability. Dr. Reese did not add any new findings. Accordingly, the evidence submitted does not show clear evidence of error on

¹¹ See *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005); see also *Leon J. Modrowski*, 55 ECAB 196 (2004).

¹² See *Alberta Dukes*, *supra* note 11.

the part of the Office in denying that appellant sustained a recurrence of disability or that her myofascial pain syndrome was employment related.

On April 1, 2005 Dr. Harrison attributed appellant's symptoms "on a more probable-than-not basis" to her employment injury. He reported appellant continued to have complaints of bilateral upper extremity paresthesias and mild swelling intermittently. A physical examination revealed "increased thoracic kyphosis and anterior translation of her shoulders." In a March 1, 2007 report, Dr. Wright diagnosed four levels of degenerative disc disease which was reflective of underlying osteoarthritis. He attributed the onset of her neck pain to the 1979 employment injury. Dr. Wright opined that appellant's 1979 employment injury contributed "on a more probable-than-not basis" to appellant's neck, arm and shoulder pain symptoms. Both Dr. Harrison and Dr. Wright's opinions regarding the cause of appellant's condition and disability are couched in speculative terms and are insufficient to establish clear evidence of error in the Office's denial of her claim.¹³

Appellant has not submitted evidence sufficient 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.

The Board finds that the arguments and evidence submitted by appellant in support of her February 1, 2007 request for reconsideration do not *prima facie* shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's denial of her claim. The evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration, as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

¹³ *Kathy A. Kelley*, 55 ECAB 206 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 20, 2007 is affirmed.

Issued: October 19, 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