

reconsideration and remanded the case to the Office for consideration of the merits of his claim.¹ The Board found that Dr. Alan R. Barthen, an attending chiropractor, was a physician under the Federal Employees' Compensation Act because he diagnosed subluxation of the lumbar spine as demonstrated by x-ray. The Board further found that Dr. Barthen's September 16, 1999 medical report which stated that appellant's condition was caused by his June 12, 1995 employment injury constituted relevant and pertinent new evidence not previously considered by the Office with regard to the issue of whether appellant sustained an injury in the performance of duty. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.² The facts and the history relevant to the present issue are hereafter set forth.

After further development of the record on remand, the Office accepted appellant's claim for subluxation of the spine at L2-4 and sacrum, and temporary aggravation of preexisting spondylosis.

By letter dated November 8, 2001, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Richard H. Sidell, Jr., a Board-certified orthopedic surgeon, for a second opinion medical examination to determine if he sustained any additional injuries related to the accepted employment injury. In a December 7, 2001 medical report, Dr. Sidell opined that appellant did not sustain any additional injuries due to the accepted employment injury. He further opined that appellant had no continuing residuals of the accepted employment injury. Dr. Sidell stated that the June 12, 1995 employment injury was a temporary aggravation of a preexisting condition that was not precipitated, accelerated or proximally caused by factors of appellant's employment.

In a letter dated December 17, 2001, the Office advised appellant that her accepted employment injury had ceased based on Dr. Sidell's December 7, 2001 report. It further advised him that he may be entitled to compensation for periods of disability related to the accepted employment injury and that if he used sick or annual leave due to this injury then he may request to buyback the leave used. The Office instructed appellant to file the appropriate claim forms.

On February 25, 2002 appellant filed a claim for compensation and a schedule award (Form CA-7) for the period June 13, 1995 through December 31, 1998. He submitted time analysis forms which indicated that he used sick leave for his absence from work during the period June 13, 1995 through October 23, 1998 due to his employment-related back condition. By letter dated July 15, 2003, the Office advised appellant that there was no provision under the Act for payment of a schedule award for a back condition unless it was permanent and affected a specified member of the body. It further advised him that the medical evidence of record established that his accepted employment injury had ceased. In addition, there was no medical

¹ Docket No. 00-2687 (issued June 25, 2001).

² On October 24, 1995 appellant, then a 38-year-old tractor trailer operator, filed a claim for an occupational disease. He alleged that on June 12, 1995 he first became aware of the fractured discs in his back. Appellant further alleged that on October 24, 1995 he first realized that this condition was caused by his federal employment. He injured his back when he backed under a trailer with his tractor.

evidence of record establishing his disability during the claimed period. Appellant was provided with 30 days to submit medical evidence in support of his claim.

The Office received several medical records regarding appellant's ongoing back condition and ability to work.

The Office found a conflict in the medical opinion evidence between Dr. Barthen who opined that appellant sustained a subluxation as demonstrated by x-ray due to the June 12, 1995 employment injury and Dr. Sidell who found that appellant no longer had any residuals of his employment-related subluxation. By letter dated December 19, 2003, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Avi J. Bernstein, a Board-certified orthopedic surgeon, for an impartial medical examination to determine whether his current back condition and claimed disability were causally related to the June 12, 1995 employment injury.

In a January 22, 2004 report, Dr. Bernstein reviewed a history of the June 12, 1995 employment injury. He stated that appellant had subjective complaints of low back pain and moderate to advanced degenerative disc disease of the lumbar spine. Dr. Bernstein opined that his condition was not directly caused, aggravated or precipitated by the accepted employment injury. He stated that appellant may have suffered a temporary aggravation at the time of the employment injury but he would have expected him to be at maximum medical improvement 6 to 12 weeks from the time of the injury and that no further medical treatment beyond symptomatic care was necessary. Dr. Bernstein concluded that outside of his subjective complaints, there was no medical reason why appellant could not perform full-duty work with no restrictions on a full-time basis.

By decision dated February 18, 2004, the Office found that appellant no longer had any residuals or disability causally related to his June 12, 1995 employment injury and therefore he was not entitled to compensation for total disability during the period June 12, 1995 through October 20, 1998. It accorded special weight to Dr. Bernstein's January 22, 2004 medical opinion as an impartial medical specialist. On March 9, 2004 appellant requested an oral hearing before an Office hearing representative.

In a March 7, 2005 decision, an Office hearing representative found the evidence of record insufficient to establish that appellant suffered from any residuals or disability due to his accepted employment injury after October 12, 1995 and therefore denied compensation for the claimed period of total disability and terminated appellant's medical benefits for the accepted employment injury. The hearing representative however, found that appellant was entitled to consideration of compensation for any dates he missed work from June 12 through October 12, 1995. Accordingly, the hearing representative affirmed as modified the February 18, 2004 decision. On February 24, 2006 appellant requested reconsideration.

By decision dated May 17, 2006, the Office denied modification of the March 7, 2005 decision. The medical evidence of record was insufficient to establish that appellant was totally disabled from June 12, 1995 through October 20, 1998 based on Dr. Bernstein's January 22, 2004 impartial medical report.

In a letter dated June 25, 2007, appellant requested reconsideration. He submitted Dr. Barthen's June 11, 2007 report. On physical examination, Dr. Barthen reported pain on palpation at L4-5 with mild muscle spasms in the same area bilaterally. He stated that appellant's lumbar range of motion was significantly reduced on physical examination. On x-ray examination, Dr. Barthen reported moderate degeneration from L3-4 to L5 sacrum. He further reported osteophytic lipping and spurring of L3 to L5, as well as, nonfusion of the pars interarticulars of L5 and spondylolysis at L5. Dr. Barthen stated that his current findings were the same as his findings on his last examination of appellant in 1999. He related that his condition developed as a result of the accepted employment injury. Dr. Barthen currently witnessed the continuing progress of a low back condition that was becoming worse with age. He was convinced that appellant's low back pain was from the accepted employment-related condition. Dr. Barthen stated that his muscles and ligaments healed long ago but the biomechanics of his low back had been permanently altered as a result of the accepted employment injury and his condition still existed. He further stated that appellant's condition was progressing into post-traumatic degenerative changes classically experienced by anyone with this type of trauma.

In a July 9, 2007 decision, the Office found that appellant's letter requesting reconsideration was dated June 25, 2007, more than one year after its May 17, 2006 decision and was untimely.³ The Office found that appellant did not submit evidence to establish clear evidence of error in the prior decision finding that he was not entitled to wage-loss compensation for the period June 12, 1995 through October 20, 1998 as he no longer had any residuals or disability causally related to his accepted employment-related injury.

LEGAL PRECEDENT

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ 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.⁶

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.⁷

³ The Board notes that, in the July 9, 2007 decision, the Office inadvertently stated that appellant's May 17, 2006 letter requested reconsideration of its June 25, 2007 decision as the record establishes that the Office's decision was issued on May 17, 2006 and appellant's reconsideration request was dated June 25, 2007.

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

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 that 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 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.¹³ 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.¹⁴

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, the 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.¹⁵

The last merit decision in this case was issued by the Office on May 17, 2006. The Office found that appellant was not entitled to wage-loss compensation for the period June 13, 1995 through October 20, 1998 based on Dr. Bernstein's January 22, 2004 impartial medical opinion that appellant no longer had any residuals or disability causally related to his accepted June 12, 1995 employment-related injury. As appellant's June 25, 2007 letter requesting reconsideration was made more than one year after the Office's May 17, 2006 merit decision, the Board finds that it was not timely filed.

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

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

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

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

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ *Larry L. Litton*, 44 ECAB 243 (1992).

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's finding that he was not entitled to wage-loss compensation for the period June 13, 1995 through October 20, 1998 as he no longer had any residuals or disability causally related to his accepted June 12, 1995 employment-related injury. Appellant has not established clear evidence of error by the Office in this regard. He did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

Appellant submitted Dr. Barthen's June 11, 2007 report which provided his findings on physical examination that appellant suffered from back pain, muscle spasms and reduced range of motion. On x-ray examination, Dr. Barthen reported moderate degeneration from L3-4 to L5 sacrum, osteophytic lipping and spurring of L3 to L5, as well as, nonfusion of the pars interarticulars of L5 and spondylolysis at L5. He stated that these findings were the same as his findings in 1999, the last time he examined appellant. Dr. Barthen opined that his condition developed as a result of the June 12, 1995 employment injury. He currently witnessed the continuing progress of a low back condition that was becoming worse with age. Dr. Barthen stated that he was convinced that the low back pain was from the same condition in 1995. He stated that appellant's muscles and ligaments healed long ago but the biomechanics of his low back had been permanently altered as a result of the 1995 employment injury and his condition still existed. Dr. Barthen concluded that his condition was progressing into post-traumatic degenerative changes classically experienced by anyone with this type of trauma. Although this evidence addressed causal relationship between appellant's continuing residuals and June 12, 1995 employment injury, Dr. Barthen failed to provide medical rationale explaining how or why his continuing residuals were caused by the accepted employment injury. For this reason, the Board finds that Dr. Barthen's June 11, 2007 report does not establish clear evidence of error.

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 July 9, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board