

FACTUAL HISTORY

This is the fifth appeal in this case. In the first appeal, the Board issued an order granting appellant's request to dismiss his appeal on December 14, 1995.¹ In the second appeal, the Board issued an order remanding the case as the case record had not been received from the Office.² In the third appeal, the Board affirmed a September 10, 2003 decision, which denied appellant's request for a merit review of the Office's July 3, 2002 decision.³ The Board, in the fourth appeal, affirmed the Office's January 3, 2005 decision, which denied appellant's request for a merit review on the grounds that it was untimely filed and failed to establish clear evidence of error.⁴ The facts of this case are set forth in the Board's prior decisions and are hereby incorporated by reference.

In a letter dated February 27, 2006, appellant requested reconsideration on claim number 160249308 and submitted medical and factual evidence previously of record including his 1994 claim form, an October 11, 1994 supervisor's form and patient records for 2000. He reiterated his allegations regarding fraud by the employing establishment.

Subsequently, the Office received evidence previously submitted including a September 14, 2001 affidavit by Edward Evans, a September 21, 2001 affidavit by Mary J. Munoz, an August 15, 1996 statement by Gilberto Lopez and an August 2, 1997 statement by appellant.

In a letter dated November 16, 2006,⁵ appellant requested reconsideration of the Office decision dated January 3, 2005.

By letter dated November 30, 2006, appellant again requested the Office to act on his prior requests for reconsideration dated February 27 and August 26, 2006. He noted his requests involved claim number 160249308. Appellant also inquired as to the status of claim number 160270740.⁶

¹ Docket No. 96-197 (issued December 14, 1995); Office File No. 160249308. On September 28, 1994 appellant, a 51-year-old aircraft mechanical parts work leader, filed a traumatic injury claim alleging that he sprained his cervical and lumbar regions when he attempted to control an automated guided vehicle that rammed against a stationary scooter with a flatbed. By decision dated March 23, 1995, the Office denied appellant's claim on the basis that he failed to establish an injury in the performance of duty. By decision dated July 26, 1995, the Office denied appellant's request for modification. It found that the medical evidence contained inconsistencies in the way the injury occurred when compared with the CA-1 form and the witness report.

² Docket No. 97-339 (issued April 27, 1998); Office File No. 160249308.

³ Docket No. 04-422 (issued April 19, 2004); Office File No. 160249308. By the July 3, 2002 decision, the Office denied modification of its prior decision finding that appellant failed to establish fact of injury in the performance of duty.

⁴ Docket No. 05-858 (issued November 4, 2005); Office File No. 160249308.

⁵ The Office noted the date as November 15, 2006, which was the date of the letter appellant sent to the Board regarding the Office's failure to act on his reconsideration requests.

⁶ The Board notes that there is no appealable final decision under Office File No. 160270740.

By decision dated March 7, 2007, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁷ 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.⁸ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁹ The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

⁷ 5 U.S.C. §§ 8101-8193. 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. *See Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

⁸ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁹ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[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." 20 C.F.R. § 10.607(b).

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Leon J. Modrowski*, *supra* note 9; *Jesus D. Sanchez*, *supra* note 9.

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, *supra* note 11.

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.¹⁷ 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.¹⁸

ANALYSIS

The Office found that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office 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.¹⁹ The last merit decision in this case is the Office's July 3, 2002 decision denying appellant's claim on the grounds that he failed to establish that he sustained an injury in the performance of duty. As his February 27 and November 16, 2006 letters requesting reconsideration were submitted more than one year after this decision, the requests were untimely. Consequently, appellant must demonstrate clear evidence of error on the part of the Office in denying his claim.²⁰

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its July 3, 2002 merit decision. Appellant's February 27, November 16 and 30, 2006 requests for reconsideration fail to demonstrate clear evidence of error on the part of the Office. The Office denied his claim for neck and back injuries of September 28, 1994 on the basis that fact of injury was not established due to the inconsistencies in how the injury occurred and the failure by appellant to submit any evidence resolving the inconsistencies. Appellant resubmitted affidavits by Ms. Munoz and Mr. Evans and his own statement. However, this evidence had previously been reviewed and found to be insufficient to resolve the time, place and manner of the alleged incident. Nothing in appellant's requests for reconsideration suggests that the Office's March 7, 2007 decision was erroneous in finding that fact of injury had not been established.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review on March 7, 2007. His reconsideration requests were untimely and failed to establish clear evidence of error.

¹⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁸ *See George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

²⁰ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2007 is affirmed.

Issued: March 11, 2008
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