

work duties and responsibilities. He first became aware of his condition on October 29, 1999 and related it to his employment on November 2, 1999. Appellant stopped work on June 1, 2001 and returned to work on April 1, 2002. The Office accepted the claim for acute panic disorder on November 24, 2003.¹ On May 3, 2004 appellant filed claims for compensation (Form CA-7) for wage loss due to a downgrade and use of leave without pay for the period June 2, 2001 to April 16, 2004 with supporting time analysis forms.

By letters dated May 11, 2004, the Office informed appellant that his claim for wage-loss compensation could not be processed as his claim was “being administratively closed.” In the first letter, it also informed appellant that the medical evidence was insufficient to support his claim for lost wages. In the second letter, appellant was informed that the claim forms could not be processed because they were incomplete as they had not been signed by the employing establishment.

In a letter dated May 28, 2004, appellant responded to the Office’s May 17, 2004 letters and disagreed that his claim had been administratively closed.

On June 8, 2004 appellant filed a claim for compensation for leave without pay for the period September 8, 2001 to March 23, 2002 and wage loss for a downgrade for the period June 2, 2001 to the present. He also submitted a time analysis form for the period September 8, 2001 to March 23, 2002 claiming 1,138.39 hours of leave without pay on the grounds that the employing establishment refused to accommodate him.

By letter dated June 17, 2004, appellant was informed the evidence of record was insufficient to support his claim for compensation and a wage-earning capacity decision. He was advised as to the type of evidence to submit and given 30 days to submit the requested information.

By decision dated July 19, 2004, the Office denied appellant’s claim for wage-loss compensation for the period June 2, 2001 to June 1, 2004.² It also denied appellant’s request for a loss of wage-earning capacity decision as a result of his being downgraded from his date-of-injury job.

On July 21, 2004 appellant requested an oral hearing before an Office hearing representative, which was held on July 12, 2005.

By decision dated September 28, 2005, an Office hearing representative affirmed as modified the July 19, 2004 decision. She found the evidence sufficient to establish that appellant was totally disabled for the period June 1 to July 31, 2001 and, thus, was entitled to wage-loss compensation for this period. However, the Office hearing representative found that the record was insufficient to establish that he was entitled to wage loss for total disability for the period August 1, 2001 to April 2, 2002 and his request for a loss of wage-earning capacity decision.

¹ The Office found the date of injury to be June 1, 2001, the date appellant stopped work.

² The letter lists the date of injury as June 1, 2001, which is the date appellant stopped work and is noted on subsequent Office letters and decisions.

In a letter dated September 26, 2006, appellant requested reconsideration and submitted a September 25, 2006 affidavit by Jerry B. Johnston, Senior Manager Distribution Operations; pages from a June 4, 2002 Merit Systems Protection Board hearing transcript and a transcript from December 5, 2001 Office proceedings before an Office hearing representative.

By nonmerit decision dated October 17, 2006, the Office denied appellant's request for reconsideration.

In a letter dated December 22, 2006, appellant requested reconsideration. He noted that he did not receive the September 28, 2005 hearing representative's decision until January 2006. Appellant noted that, while he had not submitted medical evidence with his prior request, he had submitted relevant factual evidence.

By decision dated March 14, 2007, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office in denying his claim for wage-loss compensation and his request for a loss of wage-earning capacity decision. It also noted that there was no evidence that appellant did not receive the September 28, 2005 hearing representative's decision until January 2006 as it was not mailed to an incorrect address and was not returned.

In a letter dated October 15, 2007, appellant requested reconsideration and submitted a December 21, 2006 report by Richard S. Schneiman, Ph.D., a clinical and consulting psychologist, who attributed his disability to a panic attack occurring at work in the performance of duty on October 29, 1999. Dr. Schneiman concluded that appellant was "medically disabled from most positions that require supervising groups of employees or working in noisy stressful environments." He added that, under certain circumstances, appellant would be capable of supervising but that as his doctor he would need to assess the position descriptions beforehand.

An appeal was filed with the Board; however, on November 29, 2007 the Board granted appellant's request to withdraw his appeal and issued an order dismissing appeal.³

By decision dated December 10, 2007, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office in denying his claim for wage-loss compensation and his request for a loss of wage-earning capacity decision. Accordingly, it declined to review the merits of his claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁴ 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

³ Docket No. 07-1501 (issued November 29, 2007).

⁴ 5 U.S.C. §§ 8101 *et seq.*

application for reconsideration.⁵ 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.⁶ 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.⁷

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.⁸ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. 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. 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

The one-year time limitation begins to run the Office issued its September 28, 2005 decision, as this was the last merit decision in the case.¹³ Appellant's latest requests for reconsideration were dated December 22, 2006 and October 8, 2007. Because he filed his requests more than one year after the Office's September 28, 2005 decision merit decision,

⁵ 20 C.F.R. § 10.605.

⁶ *Id.* at § 10.607(a).

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

⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *Jack D. Johnson*, 57 ECAB 593 (2006).

¹⁰ *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

¹¹ *James R. Mirra*, 56 ECAB 738 (2005).

¹² *See Alberta Dukes*, *supra* note 10.

¹³ *See V.B.*, 58 ECAB ____ (Docket No. 07-1320, issued September 26, 2007); *Veletta C. Coleman*, 48 ECAB 367 (1997).

appellant must demonstrate clear evidence of error on the part of the Office in denying his claim.¹⁴

The Board finds that appellant did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error in denying wage-loss compensation during the claimed period of June 2, 2001 to June 1, 2004. The September 28, 2005 decision by an Office hearing representative affirmed as modified the denial of appellant's wage-loss claim. She found the evidence established that his total disability for the period June 1 to July 31, 2001 was due to his accepted employment injury, but that he had not established that any subsequent disability was employment related and also denied the request for a loss of wage-earning capacity determination.

Following the hearing representative's decision, appellant submitted an affidavit by Mr. Johnston, a June 4, 2002 transcript from a Merit Protection Systems Board hearing and a transcript from a December 5, 2001 Office proceeding. This evidence submitted by appellant is not medical in nature and thus is not relevant to the threshold issues as it did not provide any opinion as to his condition during the claimed time period. Dr. Schneiman reported that appellant was medically disabled from working in most supervisory positions and attributed this disability to the accepted panic attack. The Board finds, however, that this report does not *prima facie* shift the burden to the Office and does not raise a substantial question as to the correctness of the Office's decision that appellant was not disabled for work or had sustained a loss of wage-earning capacity due to the accepted employment injury. Thus, appellant did not submit evidence clearly showing that the Office's determination was improper. The Board finds that appellant has not demonstrated clear evidence of error on the part of the Office in issuing its September 28, 2005 decision.

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.

¹⁴ 20 C.F.R. § 10.607(b). See *S.D.*, 58 ECAB ____ (Docket No. 07-1120, issued September 24, 2007).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 10 and March 14, 2007 are affirmed.

Issued: September 25, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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