

FACTUAL HISTORY

This is the third time this case has been before the Board. The Board previously affirmed the Office's January 20 and April 24, 2006 decisions denying appellant's back condition and request for surgery as causally related to the accepted injury² as well as dismissal of appellant's application for failure to properly authorize his representative to act on his behalf.³ On May 24, 2002 appellant, a 47-year-old small parcel bundle sorter, filed a traumatic injury claim (Form CA-1) for a pulled left inner thigh and a "large lump" on his thigh that occurred while pushing a bulk mail cart. The Office accepted his claim for inguinal groin strain. By decisions dated May 24, 2004, August 23, 2005, January 20 and April 24, 2006 and August 2, 2007, the Office denied appellant's claim that he had a back condition causally related to the accepted injury.

Following the Office's August 2, 2007 merit decision, on October 28, 2008 appellant, through his attorney, requested reconsideration.

Appellant submitted an October 3, 2008 report in which Dr. Fernando G. Diaz, a Board-certified neurological surgeon, reported findings on examination, reviewed appellant's medical history and diagnosed radiculopathy "involving the left lower extremity in the S1 distribution, which includes the inguinal region." Dr. Diaz opined that appellant's condition was work related and that he has "classic S1 radiculopathy in the classic anatomical distribution of the S1 nerve root ... all associated with disc herniation at the L5-S1 level." He further opined that appellant's complaints had not changed since 2002 and that appellant had no evidence of a hernia or a hernia-related condition. Dr. Diaz also opined that the medical evaluations of appellant, which were obtained at the request of the employing establishment and paid for by the employing establishment were not truly independent and may not have been a true reflection of appellant's problem.

By decision dated July 6, 2009, the Office denied the request, finding that appellant's request was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation

² *M.L.*, (Docket No. 06-1561, issued December 27, 2006).

³ *M.L.*, (Docket No. 08-290, issued May 29, 2008).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ Office regulations and procedure provide 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(a), if the claimant's application for review shows clear evidence of error on the part of the Office.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.¹⁰ Evidence 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.¹² 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.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 Office properly determined appellant's application for review was untimely. The last merit decision in this case was August 2, 2007. Appellant requested reconsideration on

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

October 28, 2008 and thus the request is untimely as it was filed outside the one-year time limit.¹⁵ Because he filed his request more than one year after the Office's August 2, 2007 merit decision, he must demonstrate clear evidence of error on the part of the Office in denying his claim.

In accordance with internal guidelines and Board precedent, 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). It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly establish that the Office's prior decision was in error.

The Board has carefully reviewed the record. As noted earlier, the evidence submitted must be relevant to the issue which was decided by the Office, *i.e.*, whether appellant established that his back condition was causally related to the employment injury and that surgery was medically warranted.

With his reconsideration request, appellant submitted Dr. Diaz's October 3, 2008 report. While this report provides a diagnosis of appellant's back condition and an opinion in support of causal relationship, Dr. Diaz's opinion does not on its face establish manifest error in the denial of appellant's claim. Although he supports the claim specifically stating that appellant suffered an injury to the back causally related to the accepted incident, this opinion, six years after the injury, is not sufficient to establish that the Office's denial of compensation for a back condition in 2002 was clearly erroneous. Dr. Diaz's opinion is repetitive of that expressed in his earlier reports. To establish clear evidence of error, the evidence must be more than simply to suggest a contrary conclusion. It must manifest on its face that the Office's decision is clearly wrong.

Dr. Diaz also opined that the medical evaluations procured by the Office were "not truly independent and may have been not a true reflection of [appellant's] problem," but this disagreement provides no explanation as to how the Office's reliance on medical examinations procured pursuant to the Office's regulations was misplaced or improper. Therefore, this argument does not raise a substantial question as to the correctness of the Office's prior decision and, therefore, does not establish clear evidence of error such that it abused its discretion in denying merit review.

The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has not submitted sufficient evidence establishing clear evidence of error on the part of the Office in his reconsideration request dated October 28, 2008 and therefore the Office properly denied further review on July 6, 2009.

¹⁵ 20 C.F.R. § 10.607.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2010
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