

Office had not be made in light of a February 20, 2007 medical opinion of an Office referral physician who found that appellant was unable to perform the duties of her date-of-injury position. He contends that the medical opinion of a second Office referral physician is sufficient to establish that appellant sustained an emotional condition as a consequence of her accepted employment injuries and that she is entitled to wage-loss compensation for the claimed period.

FACTUAL HISTORY

The Office accepted that on December 10, 2001 appellant, then a 43-year-old rural carrier associate, sustained a sprain and strain of the right wrist and temporary aggravation of right carpal tunnel fracture while in the performance of duty.

In a February 20, 2007 medical report, Dr. Harold H. Alexander, a Board-certified orthopedic surgeon and Office referral physician, listed essentially normal findings on physical examination and diagnostic study. He stated that appellant's subjective complaints of pain outweighed the objective findings. Dr. Alexander advised that she had continuing residuals of her December 10, 2001 employment injuries.¹ He opined that appellant could not perform her usual work duties as a mail carrier, but could perform sedentary light-duty work with restrictions based on a functional capacity evaluation.

Appellant filed claims for wage-loss compensation for the period September 17, 2005 to June 25, 2006.

In an August 17, 2006 report, Dr. Brian K. Teliho, a Board-certified psychiatrist and Office referral physician, reviewed a history of appellant's December 10, 2001 employment injuries. He listed his findings on mental examination and diagnosed dysthymic disorder, anxiety and personality disorders, not otherwise specified and a history of right wrist injury. Appellant had a reported diagnosis of reflex sympathetic dystrophy and chronic pain, work difficulty and limited social supports. She also had a global functioning assessment of 60/60. Dr. Teliho stated that appellant most likely had an underlying personality disorder, symptoms of which included depression and anxiety. He opined that her preexisting emotional condition was likely exacerbated by her December 10, 2001 employment injuries. Dr. Teliho further opined that the degree of her anxiety, which included auditory hallucinations, was not directly caused by her accepted employment-related injuries. He advised that appellant could return to part-time work as a mail carrier with restrictions.

¹ The Board notes that it appears Dr. Alexander inadvertently stated that appellant had residuals of her October 10, 2001 rather than December 10, 2001 employment injuries. This error is harmless as Dr. Alexander correctly stated in his history of injury that the accepted injuries occurred on December 10, 2001.

By decision dated April 27, 2007, the Office denied appellant's claims for wage-loss compensation for the period September 17, 2005 to June 25, 2006. It accorded determinative weight to Dr. Teliho's medical opinion.²

In a November 16, 2009 letter, appellant, through her attorney, requested reconsideration. Counsel contended that the Office misconstrued Dr. Teliho's August 17, 2006 medical opinion in finding that appellant's diagnosed emotional condition was not causally related to her accepted December 10, 2001 employment injuries. He stated that Dr. Teliho's opinion established that her preexisting emotional condition was likely exacerbated by the December 10, 2001 employment injuries and should be accepted as a consequential injury. Counsel noted Dr. Alexander's February 20, 2007 medical opinion and contended that since the employing establishment did not offer appellant a modified position and the Office had not made a loss of wage-earning capacity determination, she was entitled to wage-loss compensation through the present. No new medical evidence was submitted.

In a December 15, 2009 decision, the Office denied appellant's November 16, 2009 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that her request was not timely filed within one year of the April 27, 2007 decision. The Office also found that the evidence submitted failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ 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 regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

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

² In a September 3, 2008 decision, the Office granted appellant a schedule award for 19 percent impairment of the right arm based on the August 29, 2008 medical opinion of an Office medical adviser. The award ran for 59.28 weeks from July 4, 2005 to August 22, 2006. Compensation was based on a weekly pay rate of \$367.00. By decision dated January 2, 2009, an Office hearing representative affirmed the September 3, 2008 decision, finding that the Office properly used the pay rate of \$367.00 a week to calculate appellant's schedule award. As more than one year elapsed from the date of issuance of the September 3, 2008 Office decision to the filing of the appeal on February 18, 2010, the Board has no jurisdiction to review the September 3, 2008 decision. *See* 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁴ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵

The Office denied appellant's claim for wage loss in an April 27, 2007 decision. Appellant requested reconsideration on November 16, 2009. She contended that the Office erred in its April 27, 2007 decision which denied wage-loss compensation for the period

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Supra* note 8.

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

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁵ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

September 17, 2005 to June 25, 2006. As appellant's November 16, 2009 reconsideration request was made more than one year after the April 27, 2007 merit decision, the Board finds that it was not timely filed.

The Board further finds that, appellant's November 16, 2009 letter does not raise a substantial question as to whether the Office's decision denying wage-loss compensation from September 17, 2005 to June 25, 2006 was in error. The request does not shift the weight of the evidence in her favor. Appellant's attorney contended that Dr. Teliho's prior August 17, 2006 report supported a consequential emotional condition and was sufficient to establish that she was totally disabled during the claimed period. The argument raised by counsel addressed the relative merits of the report, suggesting that it was generally supportive of appellant's claim. The Office previously weighed this evidence. To establish clear evidence of error, it is not enough to show that the evidence could be construed so as to produce a contrary result.¹⁶ The Board finds that counsel's contention does not raise a substantial question as to the correctness of the Office's April 27, 2007 decision and is insufficient to establish clear evidence of error.

Counsel also contended that Dr. Alexander's February 20, 2007 report established that appellant was totally disabled during the claimed period. Dr. Alexander found that she had residuals of her December 10, 2001 employment injuries. He opined that appellant could not perform her regular work duties, but was able to perform sedentary light-duty work within restrictions. Although Dr. Alexander indicated that appellant was disabled for work, he did not address how her disability was due to the accepted employment injuries. He did not explain the basis for appellant's disability during the period September 17, 2005 to June 25, 2006. The Board finds, therefore, that counsel's contention is insufficient to establish that the Office's denial of wage-loss compensation was erroneous. The evidence does not raise a substantial question as to the correctness of the Office's determination that her total disability during the claimed period was not causally related to the accepted employment injuries.

The Board finds that appellant's contention on appeal, that she is entitled to wage-loss compensation for the period September 17, 2005 to June 25, 2006 based on the medical opinions of Dr. Teliho and Dr. Alexander has not been established. As stated, this evidence does not provide a firm or definitive diagnosis and a rationalized medical opinion addressing the causal relationship between the diagnosed conditions and any resultant total disability during the claimed period and the December 10, 2001 employment injuries.

CONCLUSION

The Board finds that appellant's November 16, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

¹⁶ See *D.E.*, 59 ECAB 438 (2008); *Leona N. Travis*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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