

FACTUAL HISTORY

This case has previously been before the Board. In a September 8, 2008 decision, the Board found that appellant's duties requiring use of a new computer system constituted a compensable factor of employment under *Cutler*. The Board remanded the case to the Office to consider the medical evidence.² The law and facts of the previous Board decision are incorporated herein by reference.

Following remand, the Office denied appellant's emotional condition claim in a September 29, 2008 decision. It found that the employing establishment had implemented the new computer system in December 2003 and he first realized that his mental condition was due to his work on or about July 24, 2004. The Office analyzed the medical reports of record and found there was insufficient medical evidence to establish that appellant's duties under the new computer program caused his emotional condition.

On October 5, 2009 appellant, through his attorney, requested reconsideration. In an October 5, 2009 brief, appellant's attorney contended that the Office erred in rejecting appellant's claim when there was no contradictory evidence in the record. The Office failed to provide a statement of accepted facts adjudicating the specific factual issues in the claim in the September 29, 2008 decision; specifically, indicating that appellant was on temporary detail when the new accounting system was implemented on October 3, 2003 and he did not return until December 2003, when he had to learn the new computerized program. It also erred in performing a medical advisory function when it decided that his treating psychiatrist's report and statement on causation was unacceptable without first referring appellant for a second opinion. It was also alleged that the Office ignored critical facts that supported that appellant's duties while on temporary detail in Florida contributed to his emotional condition.

Appellant submitted the January 30, 2009 treatment notes and a July 23, 2009 report from Dr. James M. Wilson, Jr., a Board-certified internist, a July 30, 2009 report from Dr. Mario G. Alinea, a Board-certified family practitioner; an October 19, 2001 rating evaluation and June 29, 2009 report by Dr. C. Stephen Settle, a Board-certified physiatrist. He also submitted copies of diagnostic tests dated February 14, 2001 and July 15, 2009; a September 28, 2001 report of physical limitation and April 1, 2004 progress notes from the employing establishment health unit; a May 6, 2002 job offer and a position description for a voucher examiner.

By decision dated November 20, 2009, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

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.³ The

² Docket No. 08-841 (issued September 8, 2008). The Board found that other claimed factors were not compensable employment factors.

³ 20 C.F.R. § 10.607(a).

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.⁴

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, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ 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.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 manifest on its face that the Office committed an error.⁸ Evidence which 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 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

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

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 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.

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

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 the Office properly determined that appellant failed to file a timely request for reconsideration. 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 most recent merit decision was the Office's September 29, 2008 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration.¹⁶ Since appellant did not file his request until October 5, 2009, it was filed outside the one-year time period.

As his request was untimely, appellant must submit evidence or argument that shows clear evidence of error in the Office's decision denying his emotional condition claim. The term clear evidence of error is intended to represent a difficult standard.¹⁷ Appellant's request would have to establish on its face that the Office's denial of his claim was erroneous. As noted, appellant established only one compensable employment factor, performing his duties under a new computer system, but the medical evidence was insufficient to establish that the compensable work factor caused his emotional condition.

Appellant's request for reconsideration does not establish clear evidence of error. The factual and medical evidence submitted either predates the onset of the emotional condition or does not address the cause of appellant's emotional condition.¹⁸ The arguments raised by counsel also fail to establish clear evidence of error. Appellant alleged that the Office did not properly develop the evidence and erred in rejecting his claim as it was supported by undisputed medical evidence. However, the most recent merit decision adjudicated the medical evidence and found it did not establish a causal relationship to the accepted compensable work factor. The issue presently before the Board is not whether appellant established a *prima facie* claim but whether the Office properly found appellant's reconsideration request to be untimely and whether he presented clear evidence of error.¹⁹ Appellant has not established how the new

¹³ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁴ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008); *Alberta Dukes*, 56 ECAB 247 (2005).

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

¹⁶ *Supra* note 1.

¹⁷ *D.L.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁸ *See F.R.*, 61 ECAB ____ (Docket No. 09-575, issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

¹⁹ Even if appellant were found to have established a *prima facie* claim, this does not equate to finding that the claim should have been accepted or even that the Office should have directly obtained additional medical evidence. *See Robert P. Bourgeois*, 45 ECAB 745 (1994).

medical evidence submitted after the September 29, 2008 decision demonstrates clear error in the denial of his claim. He also asserts that the Office erred by not directing further medical development after it found the medical evidence insufficient to establish causal relation. As noted, the term clear evidence of error is intended to represent a difficult standard. 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.²⁰ The assertions regarding whether appellant established a *prima facie* claim and whether the Office properly developed the claim do not establish clear error by the Office.

Counsel alleged that the Office erred by not providing a statement of accepted facts prior to adjudicating the issue in the September 29, 2008 decision. The Board notes that only one compensable work-related factor was accepted in this case as factually established. The Office's September 29, 2008 decision clearly identified and discussed the compensable work factor as found in this case. Any failure of the Office to prepare a statement of accepted facts in these circumstances is insufficient to raise a substantial question as to the correctness of the Office's decision denying the claim. Appellant has not established evidence of error in this regard.

Appellant contends that the Office ignored critical facts that supported that his duties while on temporary detail in Florida contributed to his emotional condition. The procedural history in this case reflects that the Board previously addressed the merits of this case and only found one a compensable employment factor. As noted, the only issue before the Board is whether appellant's reconsideration request was untimely and whether he established clear evidence of error by the Office in refusing to reopen the case for further merit review. Counsel has not established error in the prior adjudication of the claim that rises to the level of clear evidence of error. As noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, clear evidence of error is not established.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

²⁰ See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 29, 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