

FACTUAL HISTORY

On October 20, 1979 appellant, then a 35-year-old letter carrier, filed a claim for a traumatic injury alleging that he experienced pain in his stomach and groin while lifting a sack of mail. The Office accepted the claim for right groin strain and later expanded it to include right inguinal hernia and atrophy of right testicle. Appellant underwent right hernia repair on March 27, 1980. He was out of work from March 26 to June 1, 1980 and returned on June 2, 1980.

On December 7, 1993 appellant filed a Form CA-7 claiming compensation for a schedule award. By decision dated June 10, 1994, the Office issued a schedule award for five percent permanent impairment of the right testicle. The period of the award ran for 2.6 weeks from October 1 to 19, 1988.

On April 26, 1995 the Office issued an amended schedule award for 25 percent permanent impairment of the right testicle. Appellant received 13 weeks of compensation for the period October 1 to December 30, 1988, which represented the balance due from the 25 percent award minus the 5 percent award previously received.

On April 15, 1996 appellant requested reconsideration of the April 26, 1995 decision. By decision dated June 28, 1996, the Office denied modification of its prior decision.

By letter dated March 8, 2010, appellant requested reconsideration of the June 28, 1996 Office decision. He advised that the medical evidence showed there was 100 percent effective loss of use of his right testicle, which he argued entitled him to 52 weeks of compensation under 5 U.S.C. § 8107. In support of his argument, appellant cited to the case of *Herbert Hale*,³ wherein the Board found the employee was entitled to a schedule award for a 100 percent permanent impairment of the right testicle which equaled 52 weeks of compensation.

The medical evidence of record received since the June 28, 1996 decision included: an October 28, 1998 report from Dr. James E. Eshleman, a Board-certified pathologist, which indicated that appellant was receiving medication for hypogonadism, a condition which resulted from his work-related hernia operation; numerous prescriptions at increasing amounts for Depo-Testosterone; copies of progress notes regarding the injections of Depo-Testosterone; and progress notes on appellant's medical conditions.

By decision dated May 21, 2010, the Office found appellant's request for reconsideration was untimely and failed to show clear evidence of error. It found that since the evidence of record did not establish that appellant sustained total loss of the right testicle it was insufficient to support his allegation of "clear evidence of error."

³ Docket No. 97-855 (issued January 14, 1999).

LEGAL PRECEDENT

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, it has stated that it 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 The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹⁰ In accordance with this holding the Office has stated in its procedure manual that it 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.¹¹

The term clear evidence of error is intended to represent a difficult standard. 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 be 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

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁷ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁸ 20 C.F.R. § 10.607(a).

⁹ *See Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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 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 request for reconsideration in the present case was dated March 8, 2010. Since this is more than one year after the June 28, 1996 decision, it is untimely.

The June 28, 1996 decision denied modification of its previous decision which awarded appellant a schedule award for 25 percent permanent impairment of the right testicle. Appellant argued there was error in the Office's most recent merit decision as the medical evidence supported an increased impairment due to his accepted conditions. It is noted that appellant may seek an increased schedule award if the evidence establishes that he sustained increased impairment at a later date causally related to the accepted employment injury.¹⁹ However, the evidence of record since the June 28, 1996 decision does not shift the weight of the evidence in favor of appellant regarding impairment of the right testicle. In fact, none of the medical evidence of record since the June 28, 1996 decision addresses the issue of permanent impairment. Appellant must show by positive, precise and explicit evidence that the Office committed an error in finding that he was entitled to more than 25 percent permanent impairment of the right testicle.²⁰ It is not enough to merely allege that the evidence could be construed to produce a different conclusion. Appellant did not raise any substantial question concerning the correctness of the Office's prior merit decision and thus failed to establish clear evidence of error.²¹

While appellant, before the Office and on appeal, properly notes a 100 percent permanent impairment of the testicle would entitle him to 52 weeks of compensation,²² the determination of permanent impairment is a medical determination and the evidence before the Board does not

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (January 2010).

²⁰ See *G.H.*, 58 ECAB 183 (2006).

²¹ See *R.C.*, 59 ECAB 546 (2008).

²² 20 C.F.R. § 10.404(a).

establish clear evidence of error by the Office in its impairment determination.²³ Nothing in appellant March 8, 2010 request for reconsideration establishes, on its face, that the Office's June 28, 1996 decision was clearly erroneous.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 21, 2010 is affirmed.

Issued: April 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²³ If a claimant submits additional medical evidence regarding permanent impairment at a date subsequent to a prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations. See *B.K.*, 59 ECAB 228 (2007); *Linda T. Brown*, 51 ECAB 115 (1999).