

FACTUAL HISTORY

This is the third appeal in the present case. In a September 30, 2004 decision, the Board affirmed the Office's decisions dated October 1, 2002 and January 22, 2003 finding that appellant had failed to establish that her seizure disorder was caused by a December 4, 1984 work incident and that the Office properly denied a request for reconsideration. In a December 16, 2009 decision, the Board affirmed the Office's February 6, 2009 decision denying appellant's request for an oral hearing. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.³

On February 3, 2010 appellant requested reconsideration. She asserted that her case file was destroyed in 2002 and as a result her records were not complete. Appellant requested a historical breakdown of her case file from 1984 to the present. She asserted that additional medical evidence was submitted from 2004 to 2009, with the most recent report submitted by Dr. William Leahy, a Board-certified neurologist, which supported her claim.

Appellant submitted a copy of the Office' May 19, 1999 claim acceptance letter noting her claim was accepted for contusion to the face, head and scalp. She submitted reports from Dr. Samuel J. Potalicchio, a Board-certified neurologist, dated June 7, 2002 to February 9, 2007, previously of record. Appellant also submitted a copy of the Board's September 30, 2004 decision. She submitted a January 14, 2009 letter from the Office to her senator that provided a history and status of her claim. Appellant submitted correspondence written to President Obama requesting assistance with her claim and providing a history of her work injury and subsequent treatment. She asserted that she was fully disabled due to her work injury and that her case file was destroyed by the Office in error. Also submitted were e-mails appellant sent to the Office from October 26, 2009 to March 14, 2010 asserting that the Office destroyed her case file and that she suffered a great injustice. Appellant alleged that she sustained a traumatic brain injury and seizure disorder and that the Office assigned the incorrect diagnosis code to her claim. She indicated that her treating physician, Dr. Potalicchio submitted medical reports supporting her claim for a traumatic brain injury but the Office did not change her diagnosis code. Appellant submitted a February 15, 2010 printout of medications requesting reimbursement. She submitted a February 18, 2010 letter to the Director of the Office, requesting a review of the initial award acceptance letter and acceptance of her claim for traumatic brain injury and a March 5, 2010 letter to the Director requesting retroactive reimbursement of medical expenses relating to her head trauma. Appellant asserted that she was fully disabled as of July 12, 2002 due to her head trauma injury. She submitted an April 22, 2010 case summary.

In letters dated January 22 to March 22, 2010, the Office noted that appellant's claim for benefits had been denied based on the evidence contained in the record. It noted that appellant had been afforded multiple appeals including to the Board and the denial of her claim for expansion to include a seizure disorder had been affirmed. In an April 19, 2010 letter, the Office responded to an April 14, 2010 inquiry from appellant's congressman into the status of appellant's claim and noted a history of the claim. It noted the initial claim was accepted as a

³ Docket No. 03-1123 (issued September 30, 2004); Docket No. 09-1461 (issued December 16, 2009). The Office accepted appellant's claim for contusion to the face or scalp from blunt trauma.

contusion to the head and appellant has attempted to have the seizure disorder accepted as work related but the claim was denied on multiple occasions.

Appellant submitted copies of e-mails she sent to the Office from March 10 to May 6, 2010 asserting that the Office destroyed her case file in error and that she was seeking justice. She asserted that she had a traumatic brain injury and seizure disorder and underwent surgery and that the Office failed to expand her claim to include these diagnoses. In an April 26, 2010 letter, appellant requested the Office to send Dr. Potolicchio a copy of all medical reports submitted by him so that he could submit an appropriate report in support of her claim for a traumatic brain injury.

In a May 7, 2010 decision, the Office denied appellant's reconsideration request finding that the request was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”⁴

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁵ However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁷

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, *supra* note 5.

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹¹

ANALYSIS

In its May 7, 2010 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision issued in the claim is the Office's November 2, 2005 decision. Appellant's request for reconsideration was dated February 3, 2010, more than one year after November 2, 2005. Thus, this reconsideration request was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant's February 3, 2010 request indicated that her case file was destroyed in 2002 and as a result her records were not complete. She asserted that additional medical evidence was submitted from 2004 to 2009 which supported her claim including reports from Dr. Leahy. While appellant addressed her disagreement with the Office's decision to deny her request to expand her claim to traumatic brain injury and seizure disorder and indicated that there were several medical reports submitted which supported her claim, her general allegations do not establish clear evidence of error as her arguments do not raise a substantial question as to the correctness of the Office's decision. Therefore, the Office properly found that appellant's statement of February 3, 2010 did not establish clear evidence of error.

In support of her request, appellant submitted a copy of the Office acceptance letter dated May 19, 1999, the Board decision dated September 30, 2004 and reports from Dr. Potolicchio, dated June 7, 2002 to February 9, 2007, all previously of record. The Board notes that the Office had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that the Office committed an error in denying appellant's request to expand her claim to include seizure disorder. It is not apparent how resubmission of these documents is sufficient to raise a substantial question as to the correctness of the Office's decision. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

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.¹²

Appellant submitted a January 14, 2009 letter from the Office to her senator which provided a summary of appellant's claim. She submitted correspondence to President Obama requesting assistance with her claim. Appellant submitted a February 18, 2010 letter to the Director of the Office, requesting acceptance of her claim for traumatic brain injury and a March 5, 2010 letter to the Director requesting retroactive reimbursement of medical expenses. This evidence is insufficient to raise a substantial question as to the correctness of the Office's decision as this evidence is not responsive to the basis of the Office's denial of the claim. As noted, the underlying deficiency in the claim is appellant's failure to submit rationalized medical evidence which establishes a causal relationship between her claimed seizure disorder and traumatic brain injury and her work injury on December 4, 1984. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹³ Therefore, this evidence is insufficient to establish clear evidence of error.

Appellant submitted e-mails asserting that she sustained a traumatic brain injury and seizure disorder causally related to her December 4, 1984 work injury and that she had submitted medical reports from Dr. Potolicchio supporting her claim. She submitted a February 15, 2010 report requesting reimbursement for medication and an April 22, 2010 case summary. However, this evidence is insufficient to establish clear evidence of error. As noted above, the underlying issue is medical in nature and this evidence is not germane to the issue on which the claim was denied and is insufficient to demonstrate clear evidence of error.¹⁴ Therefore, this evidence is insufficient to establish clear evidence of error.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision.

On appeal, appellant asserts that she has submitted sufficient evidence in support of her claim that she sustained a seizure disorder as a result of her December 4, 1984 work injury. The Board notes that this is insufficient to show clear evidence of error in an Office decision denying appellant's claim to expand her to claim to include this additional diagnoses. As noted, clear evidence of error is intended to be a difficult standard and appellant has not provided evidence or argument of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision.

¹² *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

¹³ *F.R.*, Docket No. 09-575 (issued January 4, 2010).

¹⁴ *Id.*

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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