

FACTUAL HISTORY

On July 31, 2001 appellant, then a 60-year-old clerk, sustained injuries to his head, back, arm and leg when a letter case toppled over and struck him. On September 24, 2002 the Office accepted the claim for right eye laceration. Appellant stopped work on August 3, 2001. His doctor released him to light-duty work four hours a day with restrictions on December 17, 2001. However, the employing establishment was unable to accommodate appellant's restrictions. On August 30, 2006 appellant underwent a nonwork-related aortic valve replacement procedure. On September 9, 2006 he underwent a nonwork-related repair of the right femoral artery false aneurysm.

On January 6, 2003 appellant filed a claim alleging that his back and leg conditions were also due to the July 31, 2001 injury. On February 4, 2003 the Office advised him to submit medical documentation from his physicians relating how the July 31, 2001 work incident caused or aggravated his preexisting back condition.

Appellant submitted medical reports from Dr. D. Mark Murphy, a neurosurgeon, dated March 27 and April 3, 2003. Dr. Murphy opined that appellant's low back symptoms were related to the July 31, 2001 work injury. He treated appellant on May 1, 1997 for low back pain after a farm incident. Dr. Murphy stated that appellant overcame those symptoms and was asymptomatic until the July 31, 2001 work injury. When he first saw appellant on November 19, 2001 for low back and thigh pain, appellant related that a heavy letter case fell on the back of his head and jammed his back down. Dr. Murphy noted that he had no way of independently corroborating appellant's history of injury, but ascribed the symptoms appellant described to the injury. Appellant had no history of preexisting similar symptoms. Dr. Murphy noted that appellant's low back pain from heavy farm work on May 1, 1997 and November 19, 2001 was of the same character. He recommended a weight lifting belt and avoiding physically intensive work. The results of an April 9, 1997 and October 25, 2001 magnetic resonance imaging scans showed degenerative disc disease at L2-3 with convexity of the posterior annulus to the right at L4-5.

By decision dated July 15, 2003, the Office denied appellant's back condition.

In an October 29, 2003 report, Dr. Murphy diagnosed aggravation of degenerative disc disease at L2-3 with a lower back injury and pain; a right L4-5 disc protrusion; and probable low back sprain or strain. He reviewed the history of injury and opined that the July 31, 2001 work incident aggravated appellant's degenerative disc disease to the point it became symptomatic and caused his current symptoms and disability. Dr. Murphy explained that appellant was largely asymptomatic and had no leg pain prior to the July 31, 2001 injury.

On August 14, 2003 appellant requested an oral hearing. By decision dated February 11, 2004, the Office denied his request for a hearing on the grounds that it was not timely filed and because the issue could be addressed equally as well on reconsideration by submitting new evidence.

In a letter dated June 19, 2007, appellant, through his representative, requested reconsideration. He addressed why appellant delayed seeking medical care for his back condition and why it did not manifest at the time of the accepted injury. Appellant's representative also discussed the medical evidence concerning the delayed manifestation of appellant's back problems following the July 31, 2001 injury. He referenced the July 9, 2002 report of Dr. Joseph N. Herren, a Board-certified internist, which was previously of record, and a September 19, 2002 report from Dr. Murphy. Dr. Herren advised that appellant called his office on October 15, 2001 after several weeks of severe pain associated with radicular pain in both legs. He noted that the pain began shortly after a heavy metal case of several hundred pounds fell on appellant while he was at work. Dr. Herren opined that appellant's back problems were directly related to the work injury. Dr. Murphy advised that appellant had fluctuating mechanical low back pain, an on-the-job injury of July 31, 2001 and degenerative disc disease at L2-3. He recommended that appellant be allowed to return to work with restrictions and on part-time duty on September 16, 2002.

By decision dated July 17, 2007, the Office denied appellant's request for reconsideration. It found that appellant's June 19, 2007 request was untimely and that he had not presented clear evidence of error on the part of the Office in denying his back condition claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).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 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

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765 (1993).

³ *Id.* at 768.

⁴ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB 247 (2005).

⁵ *Thankamma Mathews*, *supra* note 2 at 769.

⁶ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

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 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 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's decision.¹¹ 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.¹²

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The implementing federal regulations provide that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought.¹³ The most recent merit decision is the Office's July 15, 2003 decision denying appellant's claim for a back condition arising out of the July 31, 2001 injury. As appellant's June 19, 2007 reconsideration request was made more than one year following July 15, 2003, it was untimely filed. Consequently, to have his claim reopened, appellant must establish clear evidence of error by the Office in its July 15, 2003 decision.

The Board finds that appellant has not presented evidence establishing that the Office's decision was erroneous or which raises a substantial question as to the correctness of the Office's decision. The Office found that he did not establish that his back condition was causally related to the July 31, 2001 work incident. In support of his June 19, 2007 reconsideration request, appellant's representative addressed why appellant initially delayed seeking medical treatment for his back condition following the accepted injury. These contentions, however, do not establish clear evidence of error because they are not relevant to the underlying medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹⁴

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

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

⁹ *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *Darletha Coleman*, *supra* note 9.

¹² *Pete F. Dorso*, 52 ECAB 424 (2001).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Gloria J. McPherson*, 51 ECAB 441 (2000).

Appellant submitted medical evidence from Dr. Herren and Dr. Murphy. Dr. Herren's medical report was previously reviewed by the Office. As noted, the evidence submitted must be relevant to the issue which was decided by the Office. The evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it *prima facie* shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. Dr. Herren's opinion that appellant's back problems were directly related to the work injury was previously considered and found it was insufficient to establish causal relationship. The subsequent submission of the same report does not raise a substantial question as to the correctness of the Office's decision. Accordingly, Dr. Herren's report does not show clear evidence of error on the part of the Office in denying appellant's claim.

Appellant also submitted reports from Dr. Murphy whose September 19, 2002 report noted that appellant had fluctuating mechanical low back pain, an on-the-job injury of July 31, 2001 and degenerative disc disease at L2-3. However, Dr. Murphy offered no opinion on causal relationship. On October 29, 2003 he opined that the July 31, 2001 work incident aggravated appellant's degenerative disc disease to the point it became symptomatic and caused appellant's current condition and disability. Although Dr. Murphy addressed causal relationship, his report is insufficient to shift the weight of the evidence in favor of appellant's claim. As noted, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. Appellant did not explain how this evidence established that the Office erred in the prior denial of his claim. The Board finds that Dr. Murphy's September 19, 2002 and October 29, 2003 reports are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim. For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review of the evidence and argument submitted by appellant with his June 19, 2007 reconsideration request to ascertain whether it demonstrated clear evidence of error. It properly determined that it did not and thus properly denied appellant's untimely request for reconsideration of the merits of his claim.¹⁵

CONCLUSION

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

¹⁵ 20 C.F.R. § 10.607(b).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 17, 2007 is affirmed.

Issued: December 5, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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