

FACTUAL HISTORY

On January 20, 1988 appellant sustained a pulled muscle of the lower abdomen and a herniated disc at L4-L5 after unloading a cage of mail from a mail truck. She underwent lumbar laminectomies on November 16, 1988 and November 19, 1995 which were authorized by the Office. Appellant's claim was later expanded to include major depression and she received appropriate Office compensation for her accepted conditions. After a period of disability, she returned to limited-duty work on April 29, 1998 for four hours per day, five days per week as a modified distribution window clerk with various work restrictions. On July 16, 1996 the Office issued a formal decision determining that the position fairly and reasonably represented appellant's wage-earning capacity.

Appellant filed a claim alleging that she sustained a recurrence of disability on or about July 2, 1999.² She had a nonwork-related vehicular accident on July 13, 1999, continued working following the vehicular accident, and then stopped work on July 27, 1999. Appellant's claim for recurrence of disability was denied because the evidence of record failed to demonstrate that the claimed recurrence was causally related to the injuries stemming from the January 20, 1988 employment injury.

Appellant filed numerous subsequent reconsideration requests and the last merit decision of record was the Office's July 14, 2004 decision denying her claim on the grounds that she did not submit sufficient medical evidence to show that she sustained a recurrence of disability on or after July 27, 1999 due to her January 20, 1998 employment injury. She filed additional reconsideration requests and the Office denied her requests for further review of the merits of her claim in decisions dated March 9 and October 6, 2005.

Appellant submitted a July 17, 2006 statement, received by the Office on July 24, 2006, in which her attorney at the time, Bert L. Rose, argued that the Office improperly denied her recurrence of disability claim. Mr. Rose asserted that the Office improperly discounted certain medical evidence including August 9, August 17, December 9, 1999 and March 12, 2002 reports of Dr. Stephen C. Ulrich, an attending Board-certified family practitioner. Mr. Rose felt that the Office placed too much emphasis on appellant's nonwork-related vehicular accident in July 1999 and did not fully appreciate the seriousness of her January 20, 1988 injury. He argued that the Office unfairly discounted Dr. Ulrich's statements regarding appellant's emotional condition and its effect on her ability to work because his specialty was family practice medicine rather than psychiatry. Appellant also submitted several medical reports dated between October 2005 and July 2006 in which several attending physicians discussed her medical condition in 2005 and 2006.

By decision dated September 20, 2006, the Office denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's reconsideration request was untimely because her July 24, 2006 request was filed more than a year after the issuance of the Office's last merit decision dated July 14, 2004. The Office further found that the evidence and

² Appellant had not yet stopped work at this point.

argument submitted by appellant was not the type of probative evidence or argument which would show clear evidence of error in the Office's denial of her recurrence of disability claim.

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 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

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(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).

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

ANALYSIS

In its September 20, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on July 24, 2006, more than one year after the Office's July 16, 2004 decision, and therefore she must demonstrate clear evidence of error on the part of the Office in issuing its prior decisions.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its prior decisions. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error in denying her claim that she sustained a recurrence of disability on or after July 27, 1999 due to her January 20, 1998 employment injury.¹³

In connection with her untimely reconsideration request, appellant submitted a July 17, 2006 statement in which her attorney at the time, Mr. Rose, argued that the Office improperly denied her reconsideration request. Mr. Rose asserted that the Office improperly discounted certain medical evidence including reports of Dr. Ulrich, an attending Board-certified family practitioner. He felt that the Office placed too much emphasis on appellant's nonwork-related vehicular accident in July 1999 and did not fully appreciate the seriousness of her January 20, 1988 injury. Mr. Rose argued that the Office unfairly discounted Dr. Ulrich's statements regarding appellant's emotional condition and its effect on her ability to work because his specialty was family practice medicine rather than psychiatry.

The Board notes that Mr. Rose's statement would not tend to support appellant's recurrence of disability claim because Mr. Rose has merely provided his own opinion regarding how the medical evidence of record should have been interpreted. This medical evidence has been considered by the Office on numerous occasions and Mr. Rose has not pointed out any aspect of the evidence which would clearly show that the Office erred in denying appellant's claim. The issue in the present case is medical in nature and this statement does not constitute the type of probative evidence that would show clear evidence of error. Appellant also submitted several medical reports dated between October 2005 and July 2006 in which several attending physicians discussed appellant's medical condition in 2005 and 2006. These reports would not be relevant to the main issue of the present case as none of the reports contains an opinion that appellant sustained a recurrence of disability on or after July 27, 1999 due to her January 20, 1998 employment injury.

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior decisions and the Office properly determined that appellant did not show clear evidence of error in those decisions.

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

¹³ The Office had accepted that appellant sustained a pulled muscle of the lower abdomen, a herniated disc at L4-L5 and major depression due to the January 20, 1988 injury.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 20, 2006 decision is affirmed.

Issued: May 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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