United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
	)	**Docket No. 10-634**
and	)	**Issued: February 16, 2011**
DEPARTMENT OF THE ARMY, U.S. ARMY TROOP SUPPORT AGENCY, Fort Sill, OK, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2009 appellant filed a timely appeal from the June 26, 2009 merit decision of the Office of Workers' Compensation Programs denying his recurrence claim in File No. xxxxxx397 and the August 14, 2009 nonmerit decision denying his request for reconsideration. He also appealed the Office's August 13, 2009 nonmerit decision in File No. xxxxxx587 denying his request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a recurrence of disability on March 3, 1980 due to the accepted September 23, 1975 traumatic injury; and (2) whether the Office properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx397 pursuant to 5 U.S.C. § 8128(a); and (3) whether the Office properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx587 on the grounds that the request was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

On September 23, 1975 appellant, then a 37-year-old stock clerk, sustained an injury to his back while lifting a steel conveyor belt.[1] On March 10, 1980 he filed a traumatic injury claim for the injury.[2] The case was accepted for right lumbar muscle strain on April 1, 1980 and closed on that same day.[3]

On October 16, 1984 appellant submitted a Form CA-2a, alleging that he had sustained a recurrence of disability on March 3, 1980. He allegedly experienced headaches and back pains, which radiated down his legs. When appellant stood, his legs gave out. His work activities, which included using a knife to open boxes, caused pain in his back and the side of his neck and arm. Appellant also complained of a cyst in his lower back.

Appellant submitted an April 14, 1980 report from Dr. Steven D. Rowlan, a Board-certified orthopedic surgeon, who stated that appellant had a straight spine with minimal tenderness, noting that he had a bone cyst over the right sacrum. Dr. Rowlan indicated that appellant was interested in relating the cyst to his previous compensation claim.

The record contains September 10, 1980 hospital records, signed by Brent Keyser, a fourth-year medical student, who diagnosed organic brain syndrome. The record also contains hospital records pertaining to appellant's treatment for a mental health condition.

Appellant submitted a January 23, 1985 attending physician's report from Dr. Jerry M. Martin, a chiropractor, who noted that appellant had sustained an injury on September 23, 1975 while lifting a steel conveyor belt. Dr. Martin diagnosed acute, severe lumbar sprain/strain and cervicocranial syndrome. He indicated that the period of disability was from January 11, 1984 to the date of his report.

Appellant submitted a January 25, 1985 report from Dr. S.C. Jack, a Board-certified orthopedic surgeon, who diagnosed "cyst of lower sacrum due to unknown cause." In response to a question as to whether he believed the diagnosis was in any way related to the history provided by appellant, he stated that the cause was unknown and that appellant's wife claimed the disability was due to his workers' compensation case. Dr. Jack noted that appellant was withdrawn and seemed to have psychiatric problems. He also noted that he did not treat appellant at the time surrounding his accepted injury.

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[1] This case has been before the Board on prior appeal. By decision dated October 7, 2005, the Board dismissed appellant's appeal at his request. Docket No. 05-1682 (issued October 7, 2005). On November 30, 2006 the Board dismissed an appeal, finding that appellant did not intend to appeal a decision in this case. Docket No. 06-1338 (issued November 30, 2006). In a March 23, 2007 order, the Board dismissed appellant's appeal, again finding that he had not intended to file an appeal in this case. Docket No. 07-0684 (issued March 23, 2007). In a March 5, 2009 order, the Board set aside an August 12, 2008 decision denying reconsideration of a June 27, 2007 decision denying appellant's recurrence claim. The Board remanded the case to the Office for merit review. Docket No. 09-18 (issued March 5, 2009).

[2] OWCP File No. xxxxxx397.

[3] Appellant also sustained injuries to his head and left shoulder on April 26, 1978. His traumatic injury claim (File No. xxxxxx587) was accepted for hematoma of the scalp and contusion of the left shoulder.

In a June 11, 1985 letter, the Office informed appellant that the evidence submitted was insufficient to establish that he had sustained a recurrence of disability causally related to the original September 23, 1975 injury. It advised him to provide medical evidence containing a diagnosis, examination findings and an opinion explaining how his current condition was related to the accepted injury.[4]

Appellant submitted a June 19, 1985 report from Dr. Robert Simpson, a treating physician, who stated that appellant was experiencing back pain radiating to both buttock areas and the lower extremities. Dr. Simpson related appellant's report of his 1975 injury in which he hit and strained his back when he picked up a conveyor belt. X-rays revealed no evidence of fractures or calcification. Dr. Simpson noted the necessity of reviewing prior medical records to determine whether "this is indeed an industrial injury." He indicated that appellant had been unable to work since June 14, 1985.

On August 2, 1985 Dr. Martin stated that he treated appellant from January 11, 1983 through November 16, 1984 for injuries related to a September 23, 1975 industrial accident. His treatment included physiotherapy and soft tissue manipulation. Dr. Martin diagnosed acute, severe lumbar sprain/strain and cervicocranial syndrome. He opined that appellant was permanently and totally disabled.

In a July 27, 1985 letter to appellant's wife, Dr. Jack acknowledged that appellant was withdrawn and may have psychotic tendencies. He documented the wife's claim that appellant's back and head injuries caused work-related disability. Dr. Jack stated that he had no evidence to substantiate what might have caused the cyst of appellant's lower sacrum and that he did not "really know if it was a congenital cyst or whatever the cause is."

By decision dated December 23, 1985, the Office denied appellant's recurrence claim on the grounds that the medical evidence failed to establish that his alleged disability was causally related to the September 23, 1975 injury.

Appellant submitted a March 1, 2004 report from Dr. Mark W. Cotton, Board-certified in the field of family medicine, who stated that he first saw appellant on July 22, 2003.[5] Appellant's wife informed Dr. Cotton that appellant had sustained a work-related injury to his back 30 years prior. Appellant also sustained a second injury when a steel door hit him in the head. As a result of the head injury, he was in a comatose condition for several years. Dr. Cotton stated that appellant now suffered from severe organic brain syndrome, which required 24-hour care and continued to experience lower back pain.

On July 29, 2004 appellant requested reconsideration of the December 23, 1985 decision. On August 11, 2004 the Office denied his request for merit review.

On August 1, 2005 Dr. Cotton opined that appellant's organic brain syndrome condition was a result of a 1978 head injury. He stated that, because of his mental impairment, he had

[4] The Office noted that appellant's original 1975 claim, which did not result in any time lost, had been closed on April 19, 1980. It noted that the file was subsequently destroyed and would have to be reconstructed.

[5] Dr. Cotton's letter was dated March 1, 2003. The content of his letter, however, indicates that it was actually written on March 1, 2004 and that the March 1, 2003 date was a typographical error.

been unable to make decisions regarding his own affairs since the original 1978 injury and was not expected to improve.

Appellant again requested reconsideration.[6] In a merit decision dated January 27, 2006, the Office denied modification of its December 23, 1985 decision.

Appellant submitted a June 23, 1987 report from Dr. Hans von Brauchitsch, a Board-certified psychiatrist, who opined that appellant was so severely mentally impaired that he was totally unable to pursue gainful employment.

In nonmerit decisions dated May 12 and December 15, 2006, the Office denied appellant's April 15 and July 15, 2006 requests for reconsideration.[7]

On January 26, 2007 appellant again requested reconsideration. In a merit decision dated June 27, 2007, the Office denied modification of its January 27, 2006 decision, finding that the record did not contain a rationalized opinion supporting that his current condition was causally related to the September 1975 work injury.

On July 23, 2007 appellant requested reconsideration of the June 27, 2007 decision. By decision dated August 12, 2008, the Office denied his request for reconsideration on the grounds that the evidence was insufficient to warrant merit review. In an order dated March 5, 2009, the Board set aside the August 12, 2008 decision and remanded the case to the Office for merit review of the June 27, 2007 decision.[8]

In a merit decision dated June 26, 2009, the Office denied modification of the June 27, 2007 decision on the grounds that there was no well-reasoned medical opinion supporting a causal relationship between appellant's current condition and the September 23, 1975 injury.

On July 15, 2009 appellant requested reconsideration, reiterating his claim that his current disabling back condition resulted from his 1975 injury.

Appellant submitted reports dated May 10, 2005 and November 4, 2008 from Dr. Cotton reiterating information contained in his previously submitted March 1, 2003 report. Dr. Cotton stated that he had been treating appellant since August 2003 for lower back pain resulting from a work-related lifting injury sustained 30 years earlier, and that, since that injury, appellant had experienced continual pain in his lower back region. Appellant also sustained a work-related head injury resulting in organic brain syndrome.

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[6] The Board notes that appellant sought review by the Board on August 12, 2005. Appellant subsequently requested that the appeal be dismissed, so that he could pursue reconsideration with the Office. In an order dated October 7, 2005, the Board dismissed his appeal. Docket No. 05-1682 (issued October 7, 2005). The Board further notes that appellant submitted correspondence to the Board dated January 16, 2007, which was incorrectly interpreted as a request for review of an Office decision. An appeal was docketed as No. 07-684. In an order dated March 23, 2007, the Board dismissed the appeal.

[7] The Board notes that on June 13, 2006 appellant filed an appeal under File No. xxxxxx397, which was docketed as Docket No. 06-1338 (issued November 30, 2006). In an order dated November 30, 2006, the Board dismissed the appeal after determining that appellant did not intend to appeal a decision in this case.

[8] Docket No. 09-18 (issued March 5, 2009).

In a March 31, 1980 report, Dr. C.J. Nash, a treating physician, noted that appellant suffered from a mental condition and indicated that he suspected a brain tumor. In a letter dated November 20, 1980, Dr. Robert Shore, a Board-certified orthopedic surgeon, stated that he had treated appellant in 1975 for a work-related back injury. He indicated that appellant had recovered from that injury without permanent residuals and was released to return to work effective October 16, 1975. Appellant also submitted copies of medical reports previously submitted and considered by the Office.

By decision dated August 14, 2009, the Office denied appellant's reconsideration request on the grounds that the evidence submitted did not warrant merit review.

FACTUAL HISTORY

On April 28, 1978 appellant filed a traumatic injury claim alleging that on April 26, 1978 he sustained injuries to his head and shoulder in the performance of duty.[9] He was struck in the head by a metal door while bailing cardboard. Appellant stopped work on the date of injury and returned to full duty on April 27, 1978. His claim was accepted for contusion of the left shoulder and scalp hematoma. On March 3, 1980 appellant filed a claim for recurrence of disability.

This case has previously been before the Board. In a December 11, 2006 decision, the Board affirmed the Office's August 10, 2005 decision, finding that appellant failed to establish that he sustained a recurrence of disability in March 1980 that was causally related to his accepted April 26, 1978 employment injury.[10] By decision dated February 20, 2009, the Board affirmed the Office's July 15, 2008 decision denying appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.[11] The facts and law contained in the Board's prior decisions are incorporated herein by reference.

On July 31, 2009 appellant again requested reconsideration, contending that he timely filed all forms, including requests for reconsideration. In support of his request, he submitted December 4, 1986 progress notes and September 19, 1979 emergency room records from Comanche County Memorial Hospital; an April 26, 1978 Request for Examination and/or Treatment; and October 29, 1980 paramedical progress notes.

By decision dated August 13, 2009, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a

[9] OWCP File No. xxxxxx587.

[10] Docket No. 06-1337 (issued December 11, 2006). By order dated June 15, 2007, the Board denied appellant's petition for reconsideration. Docket No. 06-1337 (issued June 15, 2007). In an order dated April 16, 2008, the Board dismissed appellant's appeal of the December 11, 2006 decision on the grounds that he did not have the right to appeal from the final decision of the Board. Docket No. 07-2155 (issued April 16, 2008).

[11] Docket No. 09-47 (issued February 20, 2009).

previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[12] A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which he claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[13] Where no such rationale is present, medical evidence is of diminished probative value.[14] To establish that a claimed recurrence of the condition was caused by the accepted injury, medical evidence of bridging symptoms between the present condition and the accepted injury must support the physician's conclusion of a causal relationship. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[15] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[16] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[17]

ANALYSIS -- ISSUE 1

The Office found that appellant sustained an injury on September 23, 1975 and accepted his traumatic injury claim for right lumbar muscle strain. Appellant claimed a recurrence of disability as of March 1980 due to residuals of his accepted back injury. The medical evidence of record, however, is insufficient to establish that he was disabled as a result of his accepted injury. Therefore, appellant has failed to meet his burden of proof.

On April 14, 1980 Dr. Rowlan stated that appellant had a straight spine with minimal tenderness, noting that he had a bone cyst over the right sacrum. He indicated that appellant was interested in relating the cyst to his previous compensation claim. Dr. Rowlan did not provide examination findings, a complete factual or medical history, or an indication that appellant was disabled. Moreover, he did not offer an opinion as to the cause of appellant's condition.

[12] 20 C.F.R. § 10.5(x).

[13] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[14] *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[15] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

[16] *G.T.*, 59 ECAB 447 (2008); *see Huie Lee Goal*, 1 ECAB 180, 182 (1948).

[17] *G.T., supra* note 16; *Fereidoon Kharabi, supra* note 15.

Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[18]

Appellant's chiropractor, Dr. Martin, diagnosed acute, severe lumbar sprain/strain and cervicocranial syndrome and opined that he was totally disabled as a result of his September 23, 1975 injury. A chiropractor is considered a physician for purposes of the Act only where he diagnoses subluxation by x-ray.[19] The evidence does not reflect that Dr. Martin diagnosed subluxation based on the results of an x-ray. Therefore, the Board finds that Dr. Martin does not qualify as a physician under the Act and his reports do not constitute probative medical evidence.

In September 10, 1980 hospital records, Brent Keyser, a fourth-year medical student, diagnosed organic brain syndrome. The record also contains hospital records pertaining to appellant's treatment for a mental health condition. As there is no indication that these reports were completed by individuals who qualify as physicians under the Act, they may not be considered as probative medical evidence.[20]

In a January 25, 1985 report, Dr. Jack diagnosed "cyst of lower sacrum due to unknown cause." In response to a question as to whether he believed the diagnosis was in any way related to the history provided by appellant, he stated that the cause was unknown and that appellant's wife claimed the disability was due to appellant's workers' compensation case. Dr. Jack noted that he did not treat appellant at the time surrounding his accepted injury. His report does not support appellant's recurrence claim. Dr. Jack failed to provide examination findings or an opinion as to the cause of appellant's cyst or on its relationship to the accepted 1975 injury. In fact, he clearly indicated that he did not know what caused appellant's condition. Therefore, Dr. Jack's opinion is of limited probative value.

On June 19, 1985 Dr. Simpson stated that appellant was experiencing back pain radiating to both buttock areas and the lower extremities and stated that he had been unable to work since June 14, 1985. Relating appellant's report of his 1975 injury, he noted the necessity of reviewing prior medical records to determine whether appellant had sustained a work-related injury. Dr. Simpson did not provide detailed examination findings or a complete factual or medical background. He did not provide a specific diagnosis or express a definitive opinion as to the cause of appellant's current condition, reserving his opinion, instead, for his full review of the medical record. As Dr. Simpson did not explain how appellant's current condition was causally related to the accepted injury, his report is of limited probative value.

Dr. Cotton noted reports of appellant's wife that he had sustained a work-related injury to his back 30 years prior, as well as a head injury in 1978, which rendered him comatose for several years. He stated that appellant continued to experience lower back pain and now suffered from severe organic brain syndrome as a result of the head injury, which required 24-hour care.

[18] *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[19] Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[20] *Id*.

Dr. Cotton's reports did not provide examination findings or an opinion that appellant was disabled as a result of his 1975 accepted back injury. Rather, he attributed appellant's claimed disability to organic brain syndrome, which has not been accepted as a consequential condition of either of his claims. Dr. Cotton did not explain how appellant's disabling condition was causally related to the employment injury. Therefore, his reports are of diminished probative value.[21] Dr. von Brauchitsch also provided an unrationalized opinion that appellant was so severely mentally impaired that he was totally unable to pursue gainful employment. As he failed to relate appellant's current condition to the 1975 injury, his report is of limited probative value.

The medical evidence of record does not contain any rationalized medical evidence of bridging symptoms between appellant's present condition, which includes organic brain syndrome and a cyst over the right sacrum and the accepted injury.[22] Thus, appellant failed to establish a causal relationship between his claimed disability and the 1975 injury.

As noted, a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.[23] Appellant submitted absolutely no rationalized medical evidence supporting that he experienced a spontaneous change in his medical condition due to the accepted injury. Rather, he reported to the Office and to his physician that, when he stood at work, his legs gave out. Appellant's work activities, which included using a knife to open boxes, caused pain in his back and the side of his neck and arm. These work activities constitute intervening factors, which take his claim outside the parameters of a recurrence claim.

On appeal, appellant contends that the medical evidence establishes that his current disabling condition is causally related to the 1975 injury. However, as noted, he did not meet his burden of proof to establish a recurrence of disability.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[24] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[25] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year

[21] *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[22] *C.W.*, 60 ECAB ___ (Docket No. 07-1816, issued January 16, 2009).

[23] *See supra* note 12.

[24] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[25] 20 C.F.R. § 10.606(b)(2).

of the date of that decision.[26] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[27] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[28]

ANALYSIS -- ISSUE 2

Appellant's July 15, 2009 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted reports dated May 10, 2005 and November 4, 2008 from Dr. Cotton reiterating information contained in his March 1, 2003 report, which was previously received and considered by the Office. These reports are therefore cumulative and duplicative in nature.[29] For similar reasons, copies of medical reports previously submitted and considered by the Office are insufficient to warrant merit review.

In a March 31, 1980 report, Dr. Nash noted that appellant suffered from a mental condition and indicated that he suspected a brain tumor. In a letter dated November 20, 1980, Dr. Shore stated that he had treated appellant in 1975 for a work-related back injury, indicating that appellant had recovered from that injury without permanent residuals. These reports do not address the issue upon which the Office denied appellant's claim in its June 26, 2009 decision, namely, whether appellant had established a causal relationship between his current condition and the September 23, 1975 injury. Therefore, the Board finds the reports of Dr. Shore and Dr. Nash to be irrelevant. The Board finds that the evidence submitted by appellant does not constitute relevant and pertinent new evidence not previously considered by the Office.[30] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his July 15, 2009 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 3

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on

[26] *Id*. at § 10.607(a).

[27] *Id*. at § 10.608(b).

[28] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[29] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

[30] *See Susan A. Filkins*, 57 ECAB 630 (2006). *See also supra* note 29 and accompanying text.

application.[31] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). 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.[32] 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.[33]

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[34] 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.[35]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[36] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[37] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[38] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[39] 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.[40] 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.[41]

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[31] 5 U.S.C. § 8128(a).

[32] 20 C.F.R. § 10.607(a).

[33] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[35] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

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

[37] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[38] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[39] *See M.L.*, 60 ECAB ___ (Docket No. 09-956, issued April 15, 2010). *See Leona N. Travis*, *supra* note 37.

[40] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[41] *Pete F. Dorso*, 52 ECAB 424 (2001).

ANALYSIS -- ISSUE 3

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[42] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[43] As appellant's July 31, 2009 request for reconsideration was submitted more than one year after the date of the last merit decision of record on December 11, 2006, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim.[44]

Appellant's contention that he timely filed his request is sufficient to warrant merit review. It does not allege or establish error on the part of the Office, but merely repeats arguments considered previously. Therefore, his argument is insufficient to raise a substantial question concerning the correctness of the Office's decision.

Medical evidence submitted by appellant is insufficient to establish that the Office committed an error. Progress notes, emergency room records, a Request for Examination and/or Treatment and paramedical progress notes essentially repeat information contained in prior documents and fail to raise a substantial question as to the correctness of the Office's decision. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.[45] Moreover, the documents were not relevant to the issue decided by the Office, namely whether appellant's current conditions were causally related to the accepted work injury. Therefore, they cannot establish clear evidence of error.[46]

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence disability commencing March 3, 1980 due to his accepted September 23, 1975 employment injury.

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[42] *Supra* note 32.

[43] *Robert F. Stone*, 57 ECAB 292 (2005).

[44] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[45] *Joseph R. Santos*, 57 ECAB 554 (2006).

[46] *See supra* note 40 and accompanying text.

The Board also finds that the Office properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx397 pursuant to 5 U.S.C. § 8128(a).

The Board further finds that the Office properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx587 on the grounds that the request was untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 14 and June 26, 2009 in File No. xxxxxx397 are affirmed. It is further ordered that the decision dated August 13, 2009 in File No. xxxxxx587 is affirmed.

Issued: February 16, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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