

FACTUAL HISTORY

On December 21, 1987 appellant, then a 36-year-old installations planning officer, filed a traumatic injury claim alleging that he injured his right ankle when he slipped while running in the Army Corporate Fitness Program. The Office accepted the claim for a right ankle sprain with instability for which he underwent surgeries. Appellant has been in receipt of temporary total disability compensation benefits since December 21, 1987.

On February 9, 1992 appellant injured his left ankle and back while on reserve duty at Bolling Air Force Base. He subsequently claimed that the left ankle and back conditions were a consequential injury to his accepted right ankle condition. By decision dated February 8, 1992, the Office denied the left ankle and back conditions as a consequential injury. By decision dated May 5, 1993, the Office denied modification of its February 8, 1992 decision.

In a notice dated April 5, 1995, the Office proposed termination of appellant's compensation benefits on the grounds that the medical evidence demonstrated that he no longer had residuals of his accepted December 21, 1987 right ankle injury which would disable him from performing the regular duties of the position he held when injured.

By decision dated May 9, 1995, the Office terminated appellant's entitlement to compensation benefits effective May 27, 1995. The Office accorded determinative weight to the medical opinion of Dr. Robert Yanchus, a Board-certified orthopedic surgeon, who conducted a second opinion examination.

In a letter dated June 7, 1995, appellant disagreed with the Office's May 9, 1995 decision and requested an oral hearing that was held on October 23, 1995. By decision dated January 25, 1996, an Office hearing representative affirmed the May 9, 1995 termination decision. The hearing representative noted that appellant raised several arguments regarding the selection of Dr. Yanchus, the accuracy of the statement of accepted facts, and Dr. Yanchus' assessment and report. The hearing representative accepted as factual that appellant was required to perform intermittent walking "to a significant degree," was required to perform some travel and his position did not require standing. The hearing representative additionally found that appellant's arguments were without merit or had little relevance as he did not provide medical evidence which contradicted Dr. Yanchus' examination findings.

By decision dated March 8, 2006, the Office issued appellant a schedule award for a 15 percent impairment to his right leg. The award ran for the period October 19, 2005 to March 18, 2006. By decision dated April 5, 2006, the Office amended the March 8, 2006 schedule award to reflect an award period of October 19, 2005 to August 17, 2006.

In a letter dated August 19, 2006, appellant requested an "Application for a Merit Review of the Branch of Hearing[s] and Reviews' January 25, 1996 affirmation" of the termination of his compensation benefits effective May 27, 1995. He noted the procedural history of his claim and argued that the Office improperly relied on Dr. Yanchus' March 6, 1995 second opinion report in terminating his compensation benefits. Appellant contended that Dr. Yanchus' March 5, 1995 report was based on an incomplete and inaccurate statement of accepted facts; was based on

diagnostic studies that did not exist or were out of date; Dr. Yanchus did not state whether appellant's disability had ceased or was no longer related to employment and his opinion was based on a leading question by the Office. He submitted copies of medical evidence and materials previously of record. The medical evidence included an August 13, 1993 progress report from Dr. Stephen Conti, a Board-certified orthopedic surgeon, who reported on the status of appellant's condition.

By decision dated October 30, 2006, the Office denied appellant's request on the grounds that it was not timely filed and did not present clear evidence of error.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.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 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 that 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

² Subsequent to the October 30, 2006 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

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 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 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.¹³

ANALYSIS

In its October 30, 2006 decision, the Office properly determined that appellant failed to file a timely application for review. The Office issued its most recent merit decision on January 25, 1996. Appellant's August 19, 2006 letter requesting review was submitted more than one year after the January 25, 1996 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). The Office reviewed the evidence and arguments submitted by appellant in support of his application for review, but found that it did not clearly establish that the Office's prior decision was in error.

The Board finds that appellant failed to establish clear evidence of error on the part of the Office with his reconsideration request. Appellant contended that the Office erred in according determinative weight to Dr. Yanchus' March 5, 1995 report to support its termination of his compensation benefits. The record reflects that appellant's benefits were terminated based on the second opinion evaluation of Dr. Yanchus which the Office found constituted the weight of the medical opinion evidence. Accordingly, the arguments appellant raised on appeal in support of his reconsideration request must address whether he continues to have residuals from his accepted December 21, 1987 work-related injury which would disable him from performing the regular duties of an installations planning officer and also be so positive, precise and explicit as to *prima facie* shift the weight of the evidence in appellant's favor.¹⁴ The arguments appellant raised on appeal are similar to or duplicative of arguments previously raised before the Office and considered in its May 9, 1995 and January 25, 1996 decisions. They are not so positive, precise and explicit as to shift the weight of the evidence in appellant's favor. Dr. Yanchus provided a well-rationalized, comprehensive report based on a thorough evaluation of appellant,

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ See *Leona N. Travis*, *supra* note 8.

the medical documentation of record, and a correct statement of accepted facts supplied by the Office. Appellant's arguments regarding the probative value of Dr. Yanchus' report is insufficient to shift the weight of the evidence in favor of his claim as Dr. Yanchus provided a well-rationalized opinion that appellant had no residuals of his work-related injury and that he could resume his date-of-injury position. Thus, his arguments do not establish clear evidence of error.

Appellant also submitted copies of medical evidence, Office decisions, and factual material previously of record and previously considered by the Office in its May 9, 1995 and January 25, 1996 decisions. This evidence, however, does not raise a substantial question concerning the correctness of the Office's decision. The submission of factual evidence does not show clear evidence of error because it is not relevant to the main issue in the present case, which is medical in nature and should be resolved by the submission of medical evidence. The only medical evidence submitted, Dr. Conti's August 13, 1993 progress note, is prior to the Office's termination of appellant's benefits and, thus, is of little probative value to the issue in this case as to whether appellant had residuals remaining from his right ankle injury such that he could no longer perform his date-of-injury position. Dr. Conti's August 13, 1993 progress note, thus, fails to establish clear evidence of error.

For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 23, 2007
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