United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 09-244**
	)	**Issued: December 10, 2009**
DEPARTMENT OF THE AIR FORCE, SACRAMENTO AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 2, 2008 nonmerit decision and an August 8, 2008 merit decision denying his emotional condition claim as untimely filed under claim number xxxxxx386. Under claim number xxxxxx325, he filed a timely appeal from a September 2, 2008 nonmerit decision denying his request for reconsideration as it was untimely filed and did not show clear evidence of error. The last merit decision of record under claim number xxxxxx325 is the May 14, 1998 Office decision denying modification of the denial of his claim. Because more than one year elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of claim number xxxxxx325. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit issue in claim number xxxxxx325 and the merit and nonmerit issues in claim number xxxxxx386.

ISSUE -- CLAIM NO. xxxxxx325

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits as his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY -- CLAIM NO. xxxxxx325

This is the fifth appeal in this case. On October 26, 1988[1] the Board found that the medical evidence appellant submitted to support that his paroxysmal atrial tachycardia arose from stress at work was sufficient to require further development and remanded the case to the Office.[2] On remand the Office accepted his claim for temporary aggravation of anxiety, palpitation, supraventricular ectopic beats and temporary adjustment disorder from August 1981 through January 1988. On June 26, 1992[3] the Board affirmed the Office's September 9, 1991 decision, finding that appellant was not entitled to a schedule award for his psychiatric or cardiovascular condition. On May 28, 1999 the Board granted appellant's request to dismiss his appeal from a May 14, 1998 Office decision.[4] On February 21, 2002 the Board affirmed the Office's April 12, 2000 nonmerit decision, finding that his request for reconsideration of the merits of its May 14, 1998 decision was untimely filed and failed to demonstrate clear evidence of error.[5] The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On July 14, 2008 appellant contended his heart condition was not temporary and requested the Office issue a decision. He continued to have residual effects as he had to take medication for his heart condition for the past 23 years. Appellant resubmitted a July 30, 1997 report from Dr. Janak Mehtani, a treating Board-certified psychiatrist and neurologist.

By decision dated September 2, 2008, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.[6] It noted that the Office had accepted a claim for hearing loss under claim number xxxxxx227.[7]

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[1] Docket No. 88-1491 (issued October 26, 1988).

[2] On November 11, 1986 appellant, then a 45-year-old aircraft mechanic, filed an occupational disease claim alleging that his paroxysmal atrial tachycardia condition was caused by work stress. He stated that he first became aware of this condition and realized that it was caused or aggravated by his employment on August 19, 1981. Appellant retired from the employing establishment effective December 3, 1987.

[3] Docket No. 92-106 (issued June 26, 1992).

[4] Docket No. 98-2367 (issued May 28, 1999).

[5] Docket No. 00-2405 (issued December 21, 2002).

[6] On September 2, 2008 the Office combined claim numbers xxxxxx325 and xxxxxx386. It noted that claim number xxxxxx386 was a duplicate of claim number xxxxxx325 and had been "created [and] adjudicated prior to transfer."

[7] On November 26, 1987 appellant, then a 46-year-old aircraft mechanic, filed an occupational disease claim

LEGAL PRECEDENT -- CLAIM NO. xxxxxx325

The Federal Employees' Compensation Act[8] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[10] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[11]

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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]

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alleging that in June 1985 he first realized his hearing loss was employment related. The Office assigned claim number xxxxxx227. By decision dated September 6, 1988, it rejected appellant's claim for a schedule award as the medical evidence did not establish a compensable hearing loss.

[8] 5 U.S.C. § 8101 *et seq.*

[9] 20 C.F.R. § 10.605.

[10] *Id*. at § 10.607(a).

[11] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[12] *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

[13] *See S.D.*, 58 ECAB ___ (Docket No. 07-1120, issued September 24, 2007); *Alberta Dukes*, *supra* note 12.

ANALYSIS -- CLAIM NO. xxxxxx325

The Board finds that 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.[14] However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[15]

The last merit decision in this case was the Office's May 14, 1998 decision, wherein it denied modification of a July 31, 1996 decision, finding that the temporary aggravation of appellant's employment injuries (*i.e.*, anxiety, palpitation, supraventricular ectopic beats and temporary adjustment disorder) ceased as of December 1987. As appellant's March 4, 2008 letter requesting reconsideration was made more than one year after the Office's May 14, 1998 merit decision, the Board finds that it was not timely filed.

To establish clear evidence of error appellant must submit evidence relevant to the issue that was decided by the Office.[16] The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's finding that he did not establish that he sustained a permanent aggravation instead of a temporary aggravation of the accepted conditions. Appellant did not submit any new evidence with his request for reconsideration. Thus, he did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

The Board further finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that the Office's denial of compensation was erroneous. Appellant has not shown how the Office committed error by failing to establish whether he sustained a permanent aggravation instead of a temporary aggravation of his accepted conditions. The Board will, therefore, affirm the September 2, 2008 decision denying appellant's request.

ISSUES -- CLAIM NO. xxxxxx386

The issues are: (1) whether the Office properly denied appellant's emotional condition claim on the grounds that it was not timely filed under section 8122 of the Act; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY -- CLAIM NO. xxxxxx386

On May 19, 2008 appellant filed an occupational disease claim alleging that in June 1985 he first realized his heart condition was caused by the work stress, anxiety and harassment.[17]

[14] 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

[15] *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, 57 ECAB 292 (2005).

[16] *G.H.*, 58 ECAB ___ (Docket No. 06-1417, issued November 27, 2006).

[17] The Office assigned claim number xxxxxx386.

Under nature of disease or illness, he noted the conditions of hearing loss, tinnitus and a heart problem.[18] On the back of the form, the employing establishment controverted the claim on the grounds that appellant failed to file a timely claim as he retired from the employing establishment effective December 3, 1987.

In a July 7, 2008 letter, the Office advised that the information appellant submitted for emotional/heart condition was insufficient to support his claim and advised him as to the information he should submit. Appellant was given 30 days to provide the requested information. He did not respond.

By decision dated August 8, 2008, the Office denied appellant's claim on the grounds that he failed to file it in a timely manner. It explained that appellant did not file the claim within three years of his retirement, December 3, 1987, the date he was aware of the conditions and its employment relationship. Moreover, the Office indicated that there was no evidence that the supervisor had knowledge of the injury and its employment relationship within 30 days of injury.

In a letter dated August 17, 2008, appellant contended that he had proved his claim and requested reconsideration. He denied that his claim was untimely filed and referenced claim number xxxxxx225. Appellant contended that the evidence was all in his case record and that the Office failed to take the time to research.

By decision dated September 2, 2008, the Office denied appellant's claim for reconsideration.

LEGAL PRECEDENT -- ISSUE 1 CLAIM NO. xxxxxx386

A claimant seeking compensation under the Act[19] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[20] including that he is an employee within the meaning of the Act[21] and that he filed his claim

[18] Under nature of disease or illness, appellant identified claim number xxxxxx325 for paroxysmal atrial tachycardia with June 19, 1985 as the date of injury and claim number xxxxxx327 for hearing loss and tinnitus with December 3, 1987 as the date of injury.

[19] 5 U.S.C. §§ 8101-8193.

[20] *S.B.*, 58 ECAB ___ (Docket No. 06-978, issued March 5, 2007); *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357 (1951); *see* 5 U.S.C. § 8101(1).

[21] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007).

within the applicable time limitation.[22] In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death, must be filed within three years after the injury or death.[23] Section 8122(b) of the Act[24] provides that, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.[25] The Board has held that, if any employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the date of this exposure.[26]

Under regulations promulgated under the Act, a claim for an occupational disease or illness "must be accompanied by a statement from the employee to include:

> "(1) A detailed history of the disease or illness with identification of part(s) of the body affected;
>
> "(2) Complete details of types of substances or conditions of employment believed responsible for the disease or illness;
>
> "(3) A description of specific exposures to substances or stressful conditions including locations, frequency and duration...."[27]

The Office's procedure manual states:

> "A person claiming compensation must show sufficient cause for [the Office] to proceed with processing and adjudicating a claim. [The Office] has the obligation to aid in this process by giving detailed instructions for developing the required evidence. [It] also has a responsibility to develop evidence, particularly when it is the type of information normally obtained from an employing establishment or

[22] *W.L.*, 59 ECAB ___ (Docket No. 07-1913, issued February 22, 2008) (in cases of injury on or after September 7, 1974, section 8122(a) provides that a claim for disability or death must be filed within three years after the injury or death).

[23] 5 U.S.C. § 8122(a).

[24] *Id*. at § 8122(b).

[25] *Id.*

[26] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Charlene B. Fenton*, 36 ECAB 151, 157 (1984).

[27] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3 (April 1993).

other government source. In all cases, the claimant must submit the essentials of a *prima facie* case…."[28]

ANALYSIS -- ISSUE 1 CLAIM NO. xxxxxx386

On May 19, 2008 appellant filed an occupational disease claim alleging that in June 1985 he was first aware his heart condition had been caused by the stress, anxiety and harassment at work. Under nature of disease or illness, he noted the conditions of hearing loss, tinnitus and a heart problem and prior Office claim numbers. Although the Office requested additional information, appellant was nonresponsive. Since appellant remained exposed to the implicated employment factors until his retirement on December 3, 1987, the Board finds that he was aware or should have become aware of his claimed condition as of December 3, 1987. As time began to run on December 3, 1987 and appellant did not file his claim until May 19, 2008, the Board finds that it is untimely filed.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior had actual knowledge of the injury within 30 days[29] or under section 8122(a)(2)[30] if written notice of injury was given to his immediate superior within 30 days as specified in 5 U.S.C. § 8119. The employing establishment controverted the claim citing that appellant untimely filed it. The Board finds that the evidence of record does not support that appellant provided written notice to his supervisor or that the employing establishment had actual knowledge of an injury and its relationship to his federal employment. As appellant has not satisfied either of these provisions, the Board finds that appellant has failed to timely file his claim.

LEGAL PRECEDENT -- ISSUE 2 CLAIM NO. xxxxxx386

The Act[31] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[32] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[33]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth

[28] *Id.; see also S.B.*, 58 ECAB ___ (Docket No. 06-978, issued March 5, 2007) (an employee seeking benefits under the Act has the burden of proof to establish by reliable, probative and substantial evidence the essential elements of his/her claim).

[29] 5 U.S.C. § 8122(a)(1).

[30] *Id*. at § 8122(a)(2).

[31] *Id*. at § 8101 *et seq.*

[32] *Id*. at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[33] 20 C.F.R. § 10.605.

arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[34]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[35] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[36]

ANALYSIS -- ISSUE 2 CLAIM NO. xxxxxx386

Appellant's August 17, 2008 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. Appellant also did not submit any evidence with his request for reconsideration Consequently, appellant is not entitled to a review of the merits of his claim based on the above-noted requirements under section 10.606(b)(2).

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her August 17, 2008 request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606. It further finds that appellant failed to meet his burden of proof by timely filing a claim.

[34] 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[35] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

[36] *Id*. at § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 2 and August 8, 2008 are affirmed.

Issued: December 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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