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RANDOLPH E. GREEN, Appellant)	
)	
and)	Docket No. 04-1569
)	Issued: January 4, 2005
DEPARTMENT OF THE ARMY, ARMY)	
SOLDIER SYSTEMS COMMAND,)	
Natick, MA, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

On June 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated March 11, 2004, which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated August 6, 1990 to the filing of this appeal June 1, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

The Office accepted that on April 8, 1964 appellant, then a 43-year-old welder, sustained a right elbow contusion during the performance of his federal duties. He returned to light-duty work on April 9, 1964. On February 2, 1965 he resigned from the employing establishment. Also on February 2, 1965 appellant filed a claim for compensation alleging severe right arm and elbow injury, permanent nerve damage, neuritis and nervous breakdown due to the April 9, 1964 work incident. The Office accepted that appellant sustained a “nervous condition” as a result of his April 8, 1964 work injury. The Office determined that his emotional condition was temporary in nature and ceased on November 22, 1965. The Office further determined that appellant’s right arm reached maximum medical improvement on November 22, 1965. He was paid compensation benefits from February 2 to November 22, 1965. The Office also awarded appellant a 20 percent schedule award for permanent impairment to his right arm for the period November 26, 1965 to February 5, 1967.

By decision dated June 4, 1985, the Office denied appellant’s claim that his current emotional condition was causally related to the accepted injury of April 8, 1964. The Office found that the accepted emotional condition had ceased by November 22, 1965. The Office further noted that there had been no increase in permanent impairment for the right arm subsequent to the issuance of the schedule award and that no wage benefits were payable subsequent to the award for permanent impairment.

By letter dated June 12, 1985, appellant, through his counsel, requested an oral hearing before an Office hearing representative. By decision dated July 15, 1985, the Office denied appellant’s request for a hearing and advised that he could request reconsideration.

By letter dated November 5, 1985, appellant requested reconsideration. By decision dated December 4, 1985, the Office denied modification of its prior decision. Appellant again requested reconsideration and, by decisions dated September 14, 1989 and August 6, 1990, the Office denied modification of its prior decisions.

By letter dated September 11, 2003, appellant again requested reconsideration. He argued that his current psychiatric disorder was causally related to his April 8, 1964 right elbow contusion. Appellant further argued that he was entitled to a greater schedule award than the 20 percent award he received in 1967. Copies of previously submitted medical reports, which the Office had previously considered in its decisions of June 4, 1985 and August 6, 1990, were submitted for review¹ along with a May 28, 2003 report from Dr. Stephen E. Dubin, a Board-certified psychiatrist. In his report, Dr. Dubin noted that appellant had been a patient since November 1998 and opined that he had been disabled due to a psychiatric and a physical impairment since April 1964. He stated that shortly after appellant’s work injury, which rendered him unable to perform his work duties, appellant was admitted to the Bedford’s Veterans Administration Hospital psychiatric unit with the diagnosis of Schizophrenia,

¹ The previously submitted medical reports were: a January 15, 1990 letter from Dr. John Papajohn; a September 23, 1981 letter from Dr. Harilos T. Sakellardes; an unsigned medical report dated July 30, 1981; a July 9, 1979 report from Dr. Daniel Weiss; an August 12, 1974 and a February 14, 1967 reports from Dr. Stephen Meager; and September 25, 1964 and an August 24, 1964 reports from Dr. Jordan Joseph.

Schizoaffective type, manifested by withdrawal, depression and paranoid thinking. Dr. Dubin noted that prior to admission, he was noted to be withdrawn, anxious, preoccupied and depressed, clearly signs of major depression. He noted that appellant was discharged from Bedford, VA on November 19, 1965 and thereafter filed his claim for disability for his psychiatric condition. Dr. Dubin advised that, when he examined appellant in November 1998, he presented with symptoms similar to those he had during his first psychiatric admission back in 1965, but with no signs of being below average in intelligence. Based on the current criteria, Dr. Dubin opined that appellant has major depression, recurrent with one episode of major depression with psychotic features and a history of dysthymic disorder, chronic. He opined that he disagreed with the previous diagnosis of schizophrenia as appellant did not fit the criteria for that diagnosis. Dr. Dubin further opined that had appellant been diagnosed with major depression and been treated accordingly, the dysthymic disorder which has developed over several decades may have been avoided. He noted that it is reported in psychiatric literature that approximately 40 percent of major depression is precipitated by some sort of major stressors in the patient's life just prior to the onset of the illness.

By decision dated March 11, 2004, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

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, explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.607 (1999); *see also* Alan G. Williams, 52 ECAB 180 (2000).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b) (1999).

⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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 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.⁷

ANALYSIS

The Office properly determined in this case, that appellant failed to file a timely application for review.⁸ In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁹ The most recent merit decision in this case was the Office's August 6, 1990 decision, which affirmed that there was no causal relationship between appellant's emotional condition and the April 8, 1964 injury. The August 6, 1990 decision also incorporated by reference the previous decisions which affirmed that he had not established that he was entitled to greater than the 20 percent impairment to his right arm, for which he had received a schedule award. As appellant's September 11, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record, the Office's August 6, 1990 decision, it was untimely.

As appellant's request was filed more than one year after the Office's August 6, 1990 decision, he must demonstrate "clear evidence of error" on the issue which was decided by the Office. The Board finds that Dr. Dubin's May 28, 2003 report is insufficient to demonstrate clear evidence of error with regard to the issue of whether appellant's current emotional condition is causally related to the April 8, 1964 work injury. Dr. Dubin noted his findings and observations, however, he did not specifically address how and why the 1964 work injury would have caused or contributed to an emotional condition for which he did not begin treating appellant until 1998, more than 30 years later. At best, his report demonstrates that appellant has a long history of an emotional condition and that there are diverse opinions regarding appellant's current emotional condition. This is insufficient to *prima facie* shift the weight of the evidence

⁷ *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

⁸ This case may be distinguished from a case requesting an additional schedule award because appellant did not submit new evidence. See *Linda T. Brown*, 51 ECAB 115 (1999).

⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

in favor of appellant and raise a substantial question regarding the correctness of the Office's August 6, 1990 decision.¹⁰

Other evidence submitted by appellant on reconsideration was already of record. He did not indicate how the Office's prior consideration of this evidence was erroneous or that this evidence would otherwise establish clear evidence of error. Moreover, appellant's assertions on reconsideration are insufficient to *prima facie* shift the weight and raise fundamental question as to the correctness of the August 6, 1990 decision. The Board notes that, although appellant's counsel argued for an increased schedule award, this case may be distinguished from a case requesting an additional schedule award because appellant did not submit new medical evidence supporting increased impairment.¹¹

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his application for review do not raise a substantial question as to the correctness of the Office's August 6, 1990 decision and, thus, are insufficient to demonstrate clear evidence of error.

CONCLUSION

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

¹⁰ See *Pete F. Dorso*, *supra* note 7.

¹¹ See *Linda T. Brown*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member