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LEVY HARRIS, Appellant)	
)	
and)	Docket No. 06-216
)	Issued: February 16, 2006
DEPARTMENT OF THE ARMY, ARMY AIR)	
FIELD, Fort Bragg, NC, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

On November 7, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 26, 2005 which denied 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 last merit decision dated July 28, 2003 and the filing of this appeal on November 7, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 70-year old helicopter mechanic, filed a Form CA-2a notice of recurrence of disability on May 7, 2002, alleging that he sustained a recurrence of disability on March 20, 2002, which was causally related to a May 18, 1993 right shoulder injury.¹

By letter dated June 25, 2003, the Office advised appellant that the materials he submitted indicated that he had sustained a new injury to his right shoulder. It advised appellant to submit additional factual and medical evidence including a medical report addressing whether he sustained a new employment-related injury on May 7, 2002, and providing a diagnosed condition causally related to this new injury.

By decision dated July 28, 2003, the Office denied appellant's claim on the grounds that he did not submit medical evidence sufficient to establish that the claimed medical condition was causally related to his federal employment.

On October 21, 2005 the Office received appellant's request for reconsideration of the July 28, 2003 decision.² Appellant submitted magnetic resonance imaging (MRI) reports dated February 18 and March 20, 2002 pertaining to his cervical, thoracic and right shoulder regions. The studies listed diffuse spondylosis with degenerative disc disease from C2-3 through C7-T1 and a right rotator cuff tear of the right shoulder, with arthritis. In a March 14, 2002 treatment note from Dr. Marc Pomerans, a Board-certified family practitioner, diagnosed right shoulder pain. On March 21, 2003 Dr. Pomerans noted appellant's complaint of right shoulder pain and stated that appellant indicated he had "reaggravated" this injury at work while helping to move an aircraft. He placed appellant on medical leave from March 21 to 26, 2002. In an April 12, 2002 report, Dr. Stanley K. Gilbert, a Board-certified family practitioner, stated that he initially examined appellant in 1993 for right shoulder pain and that he had returned with complaints of intermittent right shoulder pain.

In an August 30, 2003 report, Dr. Gilbert stated that, on examination, appellant had full range of motion of the right shoulder, marked point tenderness over the anterior aspect of the right shoulder, increased pain on stress of the supraspinatus, and a positive impingement sign. He advised that x-rays showed significant spurring in the subacromial space and diagnosed probable rotator cuff tear superimposed on subacromial arthritis. Dr. Gilbert stated that appellant could continue his regular work activities.

By decision dated October 26, 2005, the Office denied appellant's request for reconsideration, finding that appellant had not timely requested reconsideration and failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

¹ The record does not include documents pertaining to the May 18, 1993 work injury claim No. 060570223.

² Appellant submitted an appeal request form which he signed and dated August 4, 2003. However, the Office did not receive this form until October 21, 2005.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, the Office has stated that it 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.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁷

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ Office procedures state that the Office will reopen a case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the employee's application for review shows “clear evidence of error” on the part of the Office.⁹

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(b).

⁷ *See* cases cited *supra* note 2.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹¹ 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.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination of whether the claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on July 28, 2003. Appellant requested reconsideration on October 21, 2005; thus, his reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's October 21, 2005 request for reconsideration failed to show clear evidence of error. The evidence appellant submitted is not pertinent to the underlying issue in this case. The reports and treatment notes appellant submitted are of limited probative value as they do not provide a reasoned medical opinion on the relevant issues. The MRI scan reports and the reports from Drs. Pomerans and Gilbert provide findings on examination, relate appellant's complaints of right shoulder pain as of March 2002 and indicate various diagnoses pertaining to appellant's right shoulder. However, the reports do not contain a probative, rationalized medical opinion that appellant sustained a right shoulder injury in the performance of duty on March 20, 2002, sufficient to *prima facie* shift the weight of the evidence in favor of appellant.

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley*, *supra* note 4.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.¹⁷

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated October 21, 2005. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on October 26, 2005.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2005 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: February 16, 2006
Washington, DC

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

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

¹⁷ The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).