United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 06-1038**
	)	**Issued: October 12, 2006**
DEPARTMENT OF THE AIR FORCE, HOLLOMAN AIR FORCE BASE, NM, Employer	)	

Appearances:
Leo J. Aubel, Esq., for the appellant
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 April 6, 2006 appellant filed a timely appeal from a February 21, 2006 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. He also appealed a January 9, 2005 Office decision, which denied his request for reconsideration. Because more than one year has elapsed from the last merit decision dated February 19, 1997 to the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's February 9, 2006 request for review was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In a December 20, 1991 decision, the Board found that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion.[1] In a December 10, 1996 decision, the Board found that an August 1994 decision had been timely filed and remanded the case to the Office for further proceedings.[2] The law and the facts as set forth in the Board's prior decisions, are hereby incorporated by reference.[3]

Subsequent to the Board's December 10, 1996 decision, by decision dated February 19, 1997, the Office denied modification of the prior decisions. On November 4, 2005 appellant requested reconsideration and submitted employing establishment certificates and forms and a January 12, 2000 x-ray report of the cervical, thoracic and lumbar spine. It demonstrated degenerative changes in all parts, particularly the mid to lower cervical spine and at L5-S1. He also submitted a February 11, 2003 report in which Dr. Dan H. Moezzi, a family practitioner, advised that appellant was under his care for severe back pain. In a January 19, 2005 report, Dr. Andrew J. Palafox, Board-certified in orthopedic surgery, noted that appellant was seen for evaluation of lumbar back pain. Dr. Palafox reported a history that appellant was injured in 1974 while working as a fireman and had experienced back pain since that time. Findings on examination included limitations of range of motion, localized tenderness and right lower extremity hypesthesia. Dr. Palafox advised that lumbar spine x-rays demonstrated the presence of marked marginal osteoarthrosis with marked narrowing of the interspace at L5-S1. He diagnosed lumbar discogenic pain and chronic pain syndrome and concluded: "[i]t is with reasonable medical probability that the patient's complaints are a direct result of his injury in 1974. He will require supportive orthopedic medical care indefinitely, as his condition is permanent."

By decision dated December 13, 2005, the Office denied appellant's reconsideration request. On February 7, 2006 appellant, through his representative, again requested reconsideration, stating that Dr. Palafox's report was sufficient to establish entitlement to compensation. In a February 21, 2006 decision, the Office found that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the

[1] Docket No. 91-1238 (issued December 20, 1991).

[2] Docket No. 95-888 (issued December 10, 1996).

[3] On March 19, 1974 appellant, then a 43-year-old firefighter, sustained an injury to his back in the performance of duty. The claim was accepted for chronic lumbar discogenic syndrome and aggravation and he received appropriate compensation benefits. On November 2, 1984 the Office terminated appellant's compensation on the grounds that his disability had ceased. Appellant had sustained a previous work-related back injury in 1966 and further injured his back in 1968 while working for a private employer.

Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[6] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[7]

ANALYSIS -- ISSUE 1

It is noted that, as more than one year had elapsed from the date of issuance of the February 19, 1997 Office decision, the last merit decision in this case and appellant's November 2005 reconsideration request, this request was untimely filed. However, section 10.610 provides that an award for or against payment of compensation may be reviewed at any time on the Director's own motion.[8]

On November 2, 1984 the Office terminated appellant's compensation benefits. The burden thereafter shifted to him to establish any continuing work-related disability.[9] In a November 4, 2005 letter requesting reconsideration, appellant merely inquired about the status of his claim. Consequently, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[10]

With respect to the third requirement under section 10.606(b)(2), appellant submitted employing establishment certificates and forms that are irrelevant to the underlying issue in this case and are thus insufficient to warrant merit review.[11] He also submitted x-ray reports dated January 12, 2000 that demonstrated degenerative changes in his cervical thoracic and lumbar spines and a February 11, 2003 report in which Dr. Moezzi advised that appellant was under his care for severe back pain. 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.[12] These reports are insufficient to warrant further merit review as they do not address whether appellant has any continuing disability related to his accepted claim. In a January 19, 2005 report, Dr. Palafox opined that appellant's complaints were caused by his 1974 employment injury.

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.608(b).

[6] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[7] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[8] 20 C.F.R. § 10.610.

[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[10] *See supra* note 4.

[11] *Id.*; *see Kevin M. Fatzer*, *supra* note 7.

[12] *Jacqueline E. Brown*, 54 ECAB 583 (2003).

However, the physician did not provide a discussion of the mechanics of the injury and did not address disability. The Board, therefore, finds that this report does not constitute relevant and pertinent new evidence warranting a merit review.[13] The Office properly denied appellant's November 4, 2005 reconsideration request.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act[14] and 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.[15] 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.[16]

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. 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 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.[17]

ANALYSIS -- ISSUE 2

The Board notes that more than one year had elapsed from the date of issuance of the last merit decision on February 19, 1997 and appellant's request for reconsideration dated February 7, 2006. The request was, therefore, untimely. The Board finds that appellant failed to establish clear evidence of error.

With his reconsideration request, appellant reiterated his contention that Dr. Palafox's report established entitlement to compensation. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face

[13] 20 C.F.R. § 10.606(b)(2)(3); *see Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

[16] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[17] *Nancy Marcano*, 50 ECAB 110 (1998).

that the Office committed an error.[18] Dr. Palafox's January 19, 2005 report is insufficient to establish clear evidence of error as it is not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of the Office decision.[19] There is, therefore, no positive, precise and explicit evidence in this case to show that the Office committed error in denying his claim after 1987.[20] Consequently, appellant has not met his burden to establish clear evidence of error on the part of the Office such that the Office erred in denying merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) in its December 13, 2005 decision and that, as he failed to establish clear evidence of error, the Office properly denied a merit review of his claim in its February 21, 2006 decision.[21]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 21, 2006 and December 13, 2005 be affirmed.

Issued: October 12, 2006
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

[18] *Id.*

[19] *See George C. Vernon*, 54 ECAB 313 (2003).

[20] *Id.*

[21] Appellant submitted new evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to that evidence which was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).