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| S.B., Appellant |) | |
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| and |) | Docket No. 08-1921 |
| |) | Issued: May 12, 2009 |
| DEPARTMENT OF THE NAVY, |) | |
| CHARLESTON NAVAL SHIPYARD, |) | |
| Charleston, SC, Employer |) | |
| |) | |

Oral Argument April 2, 2009

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

On June 30, 2008 appellant filed a timely appeal of the May 5, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied his April 18, 2008 request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board does not have jurisdiction over the merits of the claim.¹

The issue is whether the Office properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) as untimely and not demonstrating clear evidence of error.

¹ The last merit decision was issued on October 29, 1993, which is more than one year prior to the filing of the current appeal.

FACTUAL HISTORY

This case was previously on appeal. Appellant, a 64-year-old retired wharf builder, sustained injuries at work on August 24, 1987 when he was struck by a falling scaffold. His claim was accepted for contusions to the left shoulder, forearm and hip, as well as aggravation of preexisting disc herniation at L4-5. Appellant underwent surgery for his lumbar spine in May 1988 and April 1992.

The last merit decision in this case was issued by the Board on October 29, 1993.² That decision affirmed a February 21, 1992 Office decision denying appellant's claimed recurrence of disability beginning June 26, 1991.³ The Board also affirmed the Branch of Hearings & Reviews' September 2, 1992 decision finding that appellant abandoned his request for an oral hearing, which had been scheduled for August 20, 1992.

In June 2003, appellant filed an appeal of an Office decision purportedly issued on June 14, 2003. As there was no such decision, the Board dismissed the appeal by order dated August 27, 2003.⁴ More recently, the Board issued a November 1, 2007 decision affirming the Branch of Hearings & Reviews' April 27, 2007 denial of a hearing request.⁵ Appellant requested an oral hearing regarding a nonexistent April 13, 2007 decision.

On April 18, 2008 appellant requested reconsideration before the Office. He asked for an oral hearing to present argument about the case. Appellant also indicated that he wanted to be examined by an Office physician. He did not submit any additional medical evidence with his request for reconsideration.

By decision dated May 5, 2008, the Office denied appellant's request for reconsideration because it was untimely and he failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁶ The Office has discretionary authority in this regard and it has imposed certain limitations, one of which is that the application for

² Docket No. 93-71 (issued October 29, 1993).

³ The Office had previously accepted a recurrence of disability beginning October 14, 1987, however, the June 1991 recurrence was denied. Appellant currently receives a disability retirement annuity from the Office of Personnel Management.

⁴ Docket No. 03-1659 (issued August 27, 2003). The Board lacked jurisdiction to hear the June 20, 2003 appeal because the Office had not issued a final decision on June 14, 2003, nor had they issued any other final decisions within a year prior to the filing of the appeal.

⁵ Docket No. 07-1482 (issued April 27, 2007). The Board's August 27, 2003 order and its October 29, 1993 and November 1, 2007 decisions are incorporated herein by reference.

⁶ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a) (2006).

reconsideration must be sent within one year of the date of its decision for which review is sought.⁷ When a request for reconsideration is untimely, it will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁸

ANALYSIS

Appellant’s request for reconsideration was dated April 18, 2008, which is almost 15 years after the last merit decision was issued in the case.⁹ Because his request was untimely he must demonstrate “clear evidence of error” on the part of the Office in denying his claim for a recurrence of disability beginning June 26, 1991.¹⁰

Appellant did not submit any relevant medical evidence with his April 18, 2008 reconsideration. He also did not raise any specific argument with respect to his previously denied recurrence claim. At oral argument, appellant addressed the September 1992 finding of abandonment. However, this nonmerit issue was not subject to further review under 20 C.F.R. § 10.607(b). Moreover, the fact that appellant did not receive an oral hearing in 1992 has little or no bearing on the substantive issues regarding his claim for recurrence of disability beginning June 26, 1991. Appellant has not submitted any evidence or argument demonstrating clear evidence of error on the part of the Office in denying his claim for recurrence of disability. As such, the Office properly declined to reopen appellant’s case under 5 U.S.C. § 8128(a).

CONCLUSION

Appellant’s April 18, 2008 request for reconsideration was untimely and he failed to demonstrate clear evidence of error. Therefore, he is not entitled to further merit review.

⁷ 20 C.F.R. § 10.607(a) (2008).

⁸ *Id.* at § 10.607(b).

⁹ Although the Board’s October 29, 1993 decision is the latest merit decision for purposes of determining the timeliness of the request for reconsideration, this decision is not subject to review by the Office. The latest merit decision for purposes of review under 20 C.F.R. § 10.607 is the Office’s February 21, 1992 decision.

¹⁰ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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