United States Department of Labor
Employees' Compensation Appeals Board

JAMES WILLIAMS, Appellant	)	
and	)	**Docket No. 05-92**
	)	**Issued: May 17, 2005**
DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer	)	

Appearances:
James Williams, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 6, 2004 appellant filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated July 22, 2004, denying his reconsideration request 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 January 6, 1993 merit decision, which found the medical evidence established that appellant had no further medical residuals due to his accepted August 20, 1986 employment injury and the filling of this appeal, the Board lacks jurisdiction to review the merits of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 22, 2004 nonmerit decision.

ISSUE

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

FACTUAL HISTORY

On August 20, 1986 appellant, then a 49-year-old temporary police officer, filed a traumatic injury claim alleging that he injured his back in the performance of his federal duties.[1] The claim was accepted for a lumbar strain. Appellant received wage-loss compensation until August 26, 1986. In a June 1, 1990 decision, the Office accepted that his lumbar strain resulted in an aggravation of his preexisting condition entitling him to medical treatment, but that appellant had no disability as a result of his accepted injury. By decision dated January 6, 1993, the Office found the weight of the medical evidence established that he had no further medical residuals causally related to his accepted employment injury and thus, appellant was not entitled to "compensation or medical benefits."

This is the third appeal before the Board. In the first appeal, the issues presented were whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on February 23, 1994 and whether it properly denied his November 11, 1994 reconsideration request on the grounds that it was untimely filed and did not present clear evidence of error on December 20, 1994. In a decision issued March 24, 1997, the Board affirmed the February 23 and December 20, 1994 nonmerit decisions.[2] In the second appeal, the Board dismissed Docket No. 97-1893, as the Office had not issued a decision subsequent to the Board's March 24, 1997 decision. The Board also dismissed appellant's petition for reconsideration in Docket No. 95-1283 as untimely filed.[3] The facts and circumstances of the case as set out in the Board's prior decision are incorporated herein by reference.

On August 14, 2003 the Office received a May 2, 2003 letter from appellant regarding the rejection of his claim in 1991. He resubmitted reports dated July 23 and October 2, 1992 by Dr. B.C. Marar, an Office referral physician, and reports dated October 21, 1986 and July 24, 1991 by Dr. Donald MacDonald, a treating physician.

On October 20, 22 and 24, 2003 the Office received an October 10, 2003 letter from appellant, who resubmitted an April 24, 1990 report by Dr. Marar, letters from the Office dated March 19, 1987, June 1, 1990 and September 29, 1992, a synopsis of attachments, a March 10, 1993 supplemental physician's report by Dr. I. Chaudry, reports dated October 21, 1986 and July 19, 1991 and progress notes dated September 29, 1986 by Dr. MacDonald, a March 2, 1990 report by Dr. Robert Teasdale, Jr., a treating Board-certified orthopedic surgeon, reports dated February 4 and March 30, 1987 by Dr. Michael Meehan and an April 24, 1990 work restriction evaluation form. Appellant contended in his letter that the Office made many errors in the adjudication of his claim.

On November 6, 2003 the Office received additional factual and medical evidence, including an October 28, 2003 letter requesting reconsideration from appellant.

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[1] Appellant's employment was terminated September 6, 1986 for making false statements on his Sf-171 form.

[2] Docket No. 95-1283 (March 24, 1997).

[3] Docket Nos. 97-1893 & 95-1283 (issued July 27, 1998).

In a nonmerit decision dated December 10, 2003, the Office noted that appellant's appeal to the Board had been dismissed on July 27, 1998 and his reconsideration request was untimely filed. The Office found the arguments and evidence submitted were insufficient to establish clear evidence of error and, thus, insufficient to warrant reopening his claim.

On June 15, 2004 the Office received a letter dated April 20 and June 2, 2004 from appellant requesting reconsideration of his claim. He submitted factual and medical evidence for the period 1987 to 1994 in support of his request.

In a July 22, 2004 decision, the Office denied appellant's request, finding that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[4] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[6]

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[7] 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.[8] 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.[9] 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

[4] 5 U.S.C. § 8128(a) ("[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] *Raj B. Thackurdeen*, 54 ECAB ____ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367 (1997).

[6] 20 C.F.R. § 10.608(a); *see Veletta C. Coleman*, *supra* note 5.

[7] 5 U.S.C. §§ 8101-8193. To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision. *See* 20 C.F.R. § 10.607(a). When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act. *See Joseph A. Brown, Jr.*, 55 ECAB ___ (Docket No. 04-376, issued May 11, 2004). The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

[8] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[9] *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10] 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.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] 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.[18]

ANALYSIS

The most recent merit decision in this case is the Office's January 6, 1993 decision which found the weight of the evidence established that appellant had no medical residuals due to his accepted employment injury. The Office properly notified appellant that any request for

[10] *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).

[11] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[12] *See Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

[13] *See Pasquale C. D'Arco*, 54 ECAB ___ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[14] *See Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez supra* note 9.

[15] *See Leona N. Travis, supra* note 13.

[16] *See Nelson T. Thompson, supra* note 11.

[17] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[18] *See George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

reconsideration must be made within one year of that decision. Appellant's April 20 and June 2, 2004 requests for reconsideration are, therefore, untimely.

The question for determination is whether appellant's untimely requests for reconsideration demonstrate clear evidence of error on the part of the Office in its January 6, 1993 decision.

Appellant's April 20 and June 2, 2004 requests for reconsideration fail to demonstrate clear evidence of error on the part of the Office in its January 6, 1993 decision. The Office terminated his compensation benefits on the grounds that he no longer had any residuals or disability due to his accepted August 20, 1986 employment injury. The issue, therefore, is strictly a medical one. In support of his request, appellant resubmitted medical evidence from the period 1987 to 1992, which had previously been considered by the Office. Nothing in his April 20 and June 2, 2004 requests for reconsideration establish that the Office's January 6, 1993 decision was erroneous in finding that he had no further medical residuals causally related to his accepted employment injury.

Because appellant's April 20 and June 2, 2004 requests for reconsideration does not establish, on its face, that the Office's January 6, 1993 decision was erroneous, the Board will affirm the Office's July 22, 2004 decision not to reopen his case for a review on the merits.

CONCLUSION

The Board finds that the Office properly denied appellant's request as untimely and it failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2004 is affirmed.

Issued: May 17, 2005
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member