United States Department of Labor
Employees' Compensation Appeals Board

JAMES R. GRAZER, Appellant	)	
	)	**Docket No. 06-201**
and	)	**Issued: July 26, 2006**
DEPARTMENT OF THE NAVY,	)	
NAVAL AIR WEAPONS STATION,	)	
China Lake, CA, Employer	)	

Appearances:
James R. Grazer, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On November 3, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 11, 2005 which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 17, 1990 and the filing of this appeal on November 3, 2005 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

ISSUE

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On February 15, 1984 appellant, then a 30-year-old fireman, filed a traumatic injury claim alleging that on January 14, 1984 he fell and injured his neck while pulling a fire hose. The Office accepted his claim for a neck strain, herniated disc at C5-6 and authorized a cervical

laminectomy fusion which was performed on February 17, 1984. He stopped work on January 17, 1984 and returned to light duty on May 6, 1984. On February 28, 1985 appellant was granted a disability retirement.

The record contains medical records noting appellant's course of treatment and factual evidence noting his intermittent attempts to return to work and his efforts at vocational rehabilitation.

In an undated letter, appellant requested a lump-sum payment for his compensation claim. In a letter dated January 25, 1989, he indicated that he was interested in purchasing a roller skating arena and submitted a business plan and inquired as to the amount of payoff he would receive for his compensation claim.

By decision dated March 6, 1990, the Office denied appellant's request for a lump-sum payment on the grounds that he did not demonstrate that it was in his best interest to receive the lump-sum settlement and he did not submit medical evidence indicating that he was permanent and stationary and permanently disabled due to the work-related injury.

On March 13, 1990 appellant requested an oral hearing before an Office hearing representative. The hearing was held on October 31, 1990.

In a decision dated December 17, 1990, the hearing representative affirmed the March 6, 1990 decision.

Thereafter, appellant attempted a return to work at the employing establishment as an accounting technician from April 1991 to March 1994. On May 13, 1991 the Office found that this position fairly and reasonably represented his wage-earning capacity and adjusted his compensation accordingly.

In March 1994, appellant stopped work and was hospitalized due to a psychiatric episode. In a letter dated August 4, 1994, the Office indicated that he was accepted for disability retirement due to a psychiatric condition. In August 1994, appellant filed a Form CA-2a, notice of recurrence of disability, alleging that he developed an emotional condition that was caused or aggravated by his work duties. After further development of his claim, the Office accepted that he developed a permanent aggravation of paranoid schizophrenia unspecified.

On June 20 and September 11, 2003 appellant filed claims for a schedule award.

In a decision dated February 3, 2004, the Office granted him a schedule award for 14 percent impairment of the right upper extremity. The period of the schedule award was from January 25 to November 25, 2004. In a letter dated February 26, 2004, appellant requested an oral hearing before an Office hearing representative. The hearing was held on October 19, 2004. In a decision dated December 6, 2004, the hearing representative affirmed the decision of the Office dated February 3, 2004. In an undated letter, appellant, through his attorney, requested reconsideration of the Office decision and submitted additional medical evidence. In a decision dated April 12, 2004, the Office vacated its decisions dated February 3 and December 6, 2004. The Office granted appellant an additional schedule award for 4 percent impairment of the right

arm for a total award of 18 percent impairment of the right arm. The period of the award was from November 26, 2004 to February 21, 2005.[1]

In an undated letter received on August 5, 2005, appellant requested reconsideration of the "1991" decision denying his request for a lump-sum payment for his disability claim. He disagreed with the Office decision which determined that it was not in his best interest to be paid in a lump-sum compensation payment. Appellant noted that he was still disabled but had been found permanent and stationary for a long time.

By decision dated October 11, 2005, the Office denied appellant's application for reconsideration on the grounds that the request was not timely filed and that he did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[3]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[4]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but

[1] Appellant has not appealed this decision.

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L Billingsley*, 50 ECAB 210 (1998).

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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.[5]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[9]

ANALYSIS

In its October 11, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision denying his request for a lump-sum payment on December 17, 1990 and appellant's request for reconsideration was received on August 5, 2005 which was more than one year after December 17, 1990. Accordingly, appellant's request for reconsideration was not timely filed.

The Board notes that appellant did not submit any evidence with his reconsideration request sufficient to shift the weight of the evidence in his favor and concludes that he has not established clear evidence of error. In an undated letter received on August 5, 2005, he requested reconsideration of the decision denying the "payoff" of his disability. Appellant disagreed with the Office decision from "1991" which determined that it was not in his best interest to be paid in a lump-sum compensation payment. He noted that he was still disabled but has been permanent and stationary for a long time. Appellant also indicated that he proceeded with gaining an increase in his schedule award as a step toward his payoff.

The Board notes that appellant's reconsideration request, noting his desire for a lump-sum compensation payment did not raise a substantial question as to the correctness of the Office's most recent merit decision, on the lump-sum issue which affirmed a denial of his claim for a lump-sum payment. Although he noted that he was still disabled but was permanent and stationary, this information does not establish that the Office's denial of a lump-sum payment was improper.

The Board further notes that federal regulations codified at 20 C.F.R. § 10. 311(a) which became effective on August 10, 1992,[10] states: "(a)(1) In exercise of the discretion afforded by

[5] *Annie L. Billingsley*, *supra* note 3.

[6] *Jimmy L. Day*, 48 ECAB 652 (1997).

[7] *Id.*

[8] *Id.*

[9] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[10] 20 C.F.R. § 10.311(a) (1992).

section 8135(a), the Director has determined that lump-sum payments will no longer be made to individuals whose injury in the performance of duty as a federal employee has resulted in a loss of wage-earning capacity." The Office's current regulation, 20 C.F.R. § 10.422(a),[11] continues this policy, stating that: "In exercise of the discretion afforded under 5 U.S.C. § 8135(a), the Office has determined that lump-sum payments will not be made to persons entitled to wage-loss benefits (that is, those payable under 5 U.S.C. §§ 8105 and 8106). Therefore, when the Office receives requests for lump-sum payments for wage-loss benefits, the Office will not exercise further discretion in the matter." Board precedent makes clear that the Office's prohibition on lump-sum payments for wage-loss benefits became effective to all pending cases on August 10, 1992.[12]

Therefore, the Office properly found that appellant's reconsideration request received on August 5, 2005 did not establish clear evidence of error. The Office properly denied his reconsideration request.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration received August 5, 2005 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[11] 20 C.F.R. § 10.422(a) (2006).

[12] *See David P. Toth*, 47 ECAB 314, (1996) (where the Board noted that 20 C.F.R. § 10.311(a) states unequivocally that it is applicable to all pending cases). Thus, the fact that appellant may have initiated his request for a lump-sum payment before August 10, 1992, does not allow the Office to further consider his request.