United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 06-1316**
	)	**Issued: November 9, 2006**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Jacksonville, FL, Employer	)	

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 17, 2006 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated April 27, 2006 which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated April 12, 2004 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a), on the grounds that it was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On February 18, 1959 appellant, then a 38-year-old aircraft assembler, filed a notice of injury alleging that he sustained contact dermatitis and depigmentation of his right arm and the

right side of his face and neck due to exposure to grease, stripping components and trichlorosklene in the performance of his job duties. The Office accepted his claim for leukoderma and authorized compensation benefits for wage loss.

Appellant filed a claim for recurrence of disability alleging that he developed an emotional condition due to his chemical exposures and skin disease. The Office accepted this claim for phobic neurosis and paranoid personality as a consequence of his accepted employment exposures. It entered appellant on the periodic rolls for total disability on December 28, 1984. In a prior appeal, the Board affirmed the Office's March 4, 1991 decision denying appellant's request for an attendant allowance prior to January 13, 1986 and denying his request for an increase in the amount of his attendant allowance.[1] The facts and the circumstances of the case as set out in the Board's prior decisions are incorporated herein by reference.[2]

On December 16, 2003 the Office referred appellant and a list of specific questions for second opinion evaluations with Dr. Robert A. Baker, a Board-certified dermatologist, and Dr. Anjali A. Pathak, a Board-certified psychiatrist. The Office prepared separate lists of questions for each physician.

In a report dated February 2, 2004, Dr. Baker stated that he had reviewed the statement of accepted facts and diagnosed pigmentary disturbance of the skin of an unknown cause. He found no leukoderma and opined that appellant could return to work.

Dr. Pathak examined appellant on February 9, 2004 and diagnosed schizophrenia, residual type and early cognitive decline. He opined that appellant was disabled due to his nonemployment-related cognitive decline, but that he had no work restrictions due to his accepted psychiatric condition.

In a letter dated March 8, 2004, the Office proposed to terminate appellant's compensation benefits based on the reports of the second opinion physicians. Appellant disagreed with this proposal contending that his physician found him totally disabled. By decision dated April 12, 2004, the Office terminated his compensation and medical benefits effective April 17, 2004 finding that his injury-related disability and residuals had ceased.

In a letter dated May 14, 2004, appellant requested an "appeal." He also requested that his benefits be reinstated. On May 24, 2004 the Office directed appellant to follow one of his appeal rights.

On March 20, 2006 appellant's attorney requested reconsideration of the Office's April 12, 2004 decision. He argued that appellant's May 14, 2004 letter constituted a timely

[1] Docket No. 91-910 (issued August 14, 1991).

[2] The Board has issued several decisions in this case on ancillary issues. In Docket No. 79-622 (issued December 7, 1979), the Board found that the Office had improperly delayed appellant's claim and remanded the case for a decision on the merits. In Docket No. 87-1428 (issued December 24, 1987), the Board adopted a hearing representative's decision regarding an overpayment of compensation. In Docket No. 90-762 (issued August 9, 1990), the Board remanded appellant's claim for an attendant allowance to the Office for a merit decision. By decision dated December 29, 1998, the Board found that his claim for a back injury was untimely filed.

request for reconsideration, that the record did not contain a statement of accepted facts and that there was no indication that a statement of accepted facts was provided to the second opinion physicians as required by the Office's procedures.

By decision dated April 27, 2006, the Office declined to reopen appellant's claim for consideration of the merits finding that the March 20, 2006 request for reconsideration was not timely and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

The Office's regulations require that an application for reconsideration must be submitted in writing[8] and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."[9] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."[10]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[5] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[6] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[7] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[8] 20 C.F.R. § 10.606.

[9] 20 C.F.R. § 10.605.

[10] 20 C.F.R. § 10.607(b).

of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[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 be manifest 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's decision.[17] The Board must make 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 Office properly found that appellant's March 20, 2006 request for reconsideration was not timely filed as it was dated more than one year following the Office's most recent merit decision, the April 12, 2004 termination decision.

Appellant's attorney did not submit new evidence in support of appellant's March 20, 2006 request for reconsideration. Rather, counsel argued that the April 12, 2004 termination decision was erroneous as the second opinion physicians' opinions were not based on a proper factual background and the record did not include a statement of accepted facts associated with the second opinion referrals and list of specific questions.

On review of the record the Board finds that there is no statement of accepted facts associated with the second opinion referrals. The most recent statement of accepted facts included in the record is dated April 2, 1999. In his February 2, 2004 report, Dr. Baker, a Board-

[11] *Thankamma Mathews, supra* note 4 at 770.

[12] *Id*.

[13] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[14] *Jesus D. Sanchez, supra* note 5 at 968.

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

[16] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[18] *Gregory Griffin, supra* note 6.

certified dermatologist, stated that he had reviewed the statement of accepted facts in preparing this report. Dr. Pathak, a Board-certified psychiatrist, provided a report dated February 9, 2004, but did not mention reviewing a statement of accepted facts. Instead he stated that his report was based on a review of the medical record and appellant's history.

The Office's procedure manual requires that a second opinion physician should be provided with a description of the reasons for the requested examination, a statement of accepted facts prepared by the claims examiner and a list of questions to be answered.[19] The cases cited by appellant's attorney in support of his argument relate to instances in which the examining physician failed to conform his opinion to the provided statement of accepted facts, to other evidence in the case file or were otherwise factually inaccurate.[20] Appellant has not submitted any evidence to establish that Dr. Baker or Dr. Pathak ignored pertinent factual evidence or were inaccurate in reciting the relevant facts in this case. Moreover, the Board held in *Henry J. Smith*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992), that should the physician recite an accurate factual and medical history based on the case record, the absence of a statement of accepted facts from the case record may properly then be considered a mere "procedural anomaly" as sufficient evidence is provided by the facts relied upon by the physician in formulating his opinion. The Board finds that the absence of a statement of accepted facts from the case record is not clear evidence of error on the part of the Office such as to require review of the merits. Appellant's argument is not 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 terminating benefits.

Appellant also contends that his May 14, 2004 letter constituted a timely request for reconsideration, the Board notes that the Office's regulations and procedures define an application for reconsideration as a written request to the district Office identifying the decision for which review is sought and the specific issues along with the supporting statements and evidence.[21] Appellant did not specifically request reconsideration of the April 12, 2004 decision in his May 14, 2004 letter and did not submit any supporting statements or evidence. The Office informed him of the defects of his May 14, 2004 letter on May 24, 2004 and directed him to follow one of his appeal rights. Appellant did not respond to the Office's informational letter. His May 14, 2004 letter did not constitute a timely request for reconsideration. Appellant's argument concerning the May 14, 2004 letter does not establish clear evidence of error requiring the Office to reopen his claim for consideration of the merits.

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3(c)(1) (December 1994).

[20] *Douglas M. McQuaid*, 52 ECAB 382 (2001); *Patricia M. Mitchell*, 48 ECAB 371 (1997); *Cleopatra McDougal-Saddler*, 47 ECAB 480(1996).

[21] 20 C.F.R. §10.605; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2.a. (January 2004).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish clear evidence of error on the part of the Office. The Office properly denied his untimely request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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