United States Department of Labor
Employees' Compensation Appeals Board

V.S., Appellant	)	
and	)	**Docket No. 07-457**
	)	**Issued: May 1, 2007**
DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer	)	

Appearances:
Hank Royal, 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 December 8, 2006 appellant filed a timely appeal of the June 27, 2006 decision of the Office of Workers' Compensation Programs which denied further merit review because his request for reconsideration was untimely and failed to demonstrate clear evidence of error. The most recent merit decision is dated May 21, 1997. Because appellant filed the current appeal more than a year after the last merit decision the Board does not have jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

[1] 20 C.F.R. §§ 501.2(c), 501.3(d) (2006).

FACTUAL HISTORY

This case was previously before the Board.[2] Appellant, a 58-year-old retired marine machinery mechanic, has an accepted claim for an employment-related back injury that arose on August 1, 1990.[3] The Office terminated his entitlement to wage-loss compensation effective November 12, 1995, because he abandoned suitable employment.[4] Appellant accepted an April 11, 1995 offer of full-time, limited-duty work that the Office deemed suitable. However, after accepting the assignment, he worked only four hours each day and requested leave for the remainder of his eight-hour shift.[5] The Office of Personnel Management (OPM) later granted appellant a disability retirement and he stopped working effective July 22, 1995.

The decision to terminate appellant's benefits was last reviewed on the merits by the Branch of Hearing & Review, which issued a May 21, 1997 decision affirming the termination. In the prior appeal, the Board reviewed three nonmerit decisions in which the Office denied appellant's various requests for reconsideration. In a March 20, 2001 decision, the Board affirmed the Office's decisions denying merit review.[6]

Appellant requested reconsideration on May 25, 2006. He submitted a copy of the April 11, 1995 limited-duty job offer and an April 19, 1995 memorandum from the employing establishment that proposed to terminate appellant's employment because of his injury-related disability. Appellant also submitted several documents pertaining to his OPM disability retirement and an August 5, 1995 record of leave. In a June 27, 2006 decision, the Office denied reconsideration because his request 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.[7] The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.[8] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[9] When a request for reconsideration is untimely, the Office

[2] Docket No. 99-870 (issued March 20, 2001).

[3] The Office accepted the claim for aggravation of degenerative disc disease and subluxations at C7, T2 and L5.

[4] Pursuant to 5 U.S.C. § 8106(c)(2), a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation. *See also* 20 C.F.R. § 10.517.

[5] Appellant had been performing limited-duty work on a part-time basis dating back to January 1993.

[6] The Board's March 20, 2001 decision is incorporated herein by reference.

[7] 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) (2000).

[8] 20 C.F.R. § 10.607.

[9] 20 C.F.R. § 10.607(a).

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."[10]

ANALYSIS

Appellant's request for reconsideration was dated May 25, 2006, which is more than a year after the Office's May 21, 1997 merit decision.[11] Because his request was untimely he must demonstrate "clear evidence of error" on the part of the Office in terminating benefits effective November 12, 1995.[12]

In his May 25, 2006 request for reconsideration, appellant argued that the April 11, 1995 job offer he initially accepted was not suitable because it did not take into account his preexisting carpal tunnel syndrome. Appellant, however, has not submitted with his reconsideration request any medical evidence indicating that he was physically unable to perform the required duties of the position as a result of either his accepted condition or any preexisting conditions. The record indicates that the offered position was consistent with the March 17, 1995 physical limitations imposed by appellant's then-treating physician, Dr. Bala C. Marar.

Appellant also argued that the offered position was temporary and, therefore, could not be considered suitable. He based this argument on the fact that Mare Island Naval Shipyard was scheduled for closure on April 1, 1996. The fact that appellant's position was not guaranteed beyond one year does not make it a temporary position. Although appellant was advised that the shipyard was scheduled for closure, the April 11, 1995 offer did not specifically limit the term of the appointment. An employee on limited duty is not exempt from the effects of a potential reduction-in-force.[13] Moreover, in connection with appellant's application for retirement disability, the employing establishment represented to OPM on June 9, 1995 that appellant was "currently occupying a permanent position."

The August 5, 1995 record of leave appellant submitted on reconsideration indicated that in the 6½ months preceding his July 22, 1995 retirement, appellant was absent without pay for more than 700 hours. He also used a combined 60 hours of annual and sick leave during this

[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). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[11] The Office received appellant's May 25, 2006 request on June 1, 2006.

[12] 20 C.F.R. § 10.607(b).

[13] *See* 20 C.F.R. § 10.5(x) (a recurrence of disability does not include a withdrawal of a light-duty assignment due to a reduction-in-force).

time frame. Appellant argued on reconsideration that the employing establishment tacitly approved his absence when he continued to work four-hour days after accepting the April 11, 1995 offer of full-time employment. Because of the employing establishment's approval, he could not be found to have refused suitable work. There is no merit to appellant's argument. He has not presented any evidence that the employing establishment approved his routine absences following his acceptance of the full-time limited-duty position. The leave report appellant submitted indicated that he did not have sufficient annual or sick leave available to cover his absences.

Appellant also argued that the Office could not terminate compensation under 5 U.S.C. § 8106(c) because of his election to receive a retirement disability annuity from OPM.[14] Although the termination process commenced after appellant's July 22, 1995 retirement, the Office did not terminate his benefits because he elected to retire on an OPM disability annuity. Appellant's benefits were terminated under 5 U.S.C. § 8106(c)(2), because he refused full-time, limited-duty work with the employing establishment. The employing establishment's April 19, 1995 memorandum proposing to terminate appellant's employment because of his injury-related disability is of little importance to the current issue because the proposed termination was never carried out.

As appellant failed to demonstrate clear evidence of error in his May 25, 2006 reconsideration request, there is no justification for further merit review. Accordingly, the Office properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's May 25, 2006 request was untimely and he failed to demonstrate clear evidence of error. Therefore, appellant is not entitled to further merit review.

[14] Additionally, appellant claimed that the Office issued a formal loss of wage-earning capacity determination on June 30, 1995. This notification, however, was not a formal decision, but merely a notice advising him that his monetary compensation was effectively reduced to zero because of his return to full-time employment effective April 12, 1995. The Office did not find that appellant's actual earnings of $772.00 per week fairly and reasonably represented his wage-earning capacity.

ORDER

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

Issued: May 1, 2007
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