

**United States Department of Labor
Employees' Compensation Appeals Board**

A.R., Appellant)
and) Docket No. 09-81
DEPARTMENT OF THE ARMY, PINE BLUFF) Issued: April 21, 2009
ARSENAL, Pine Bluff, AR, Employer)

)

Appearances:

Oral Argument March 24, 2009

Appellant, pro se

No appearance, for the Director

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated May 23, 2008 denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 23, 2006 and the filing of this appeal on October 15, 2008, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

This is the fifth appeal before the Board. In the first appeal,¹ the Board affirmed the Office's denial of his hearing request and the suspension of benefits on the grounds that he failed to attend a scheduled medical examination.² The Board, however, found the Office had abused its discretion in denying appellant's request for reconsideration regarding his failure to attend the scheduled medical examination as appellant raised new contentions not previously considered by the Office. In the second appeal, the Board affirmed the March 2, 2001 decision which denied appellant's request for modification of the suspension of his compensation benefits effective September 13, 1998 on the grounds that he failed to attend a scheduled medical examination.³ The Board, in the third appeal, set aside a June 19, 2003 decision,⁴ as the decision contained no findings of fact regarding appellant's request for retroactive compensation and remanded the case for further action on appellant's request.⁵ On July 19, 2006 the Board in the fourth appeal affirmed the Office hearing representative's January 19, 2006 decision.⁶ The hearing representative affirmed the suspension of appellant's benefits for the period September 3, 1998 to July 10, 2002 on the grounds that he failed to attend a scheduled medical examination. He found appellant's arguments that the suspension of his benefits would not have occurred had he been given a merit review at the time to have no validity and, thus, found appellant was not entitled to retroactive compensation for this period in question. On December 29, 2006 the Board granted the Director's petition for reconsideration and modified the prior decision to reflect that appellant was entitled to the resumption of his compensation on May 22, 2002 as this was the date appellant indicated his willingness to attend the scheduled examination.⁷ In the

¹ Docket No. 99-1694 (issued January 22, 2001). On March 3, 1986 appellant, then a 29-year-old protective and safety equipment repairer, alleged he injured his back, left arm and right knee when he tripped and fell on that date while moving railroad iron. The Office accepted the claim for contusions of the right knee, left arm and back and a L5-S1 bulging disc.

² In the June 23, 1998 letter referring appellant to Dr. Joe Schooler for an impartial examination, the Office informed appellant of the consequences of his refusal to submit to the examination under 5 U.S.C. § 8123(d). Appellant did not attend the initial appointment or the rescheduled appointment. The Office advised appellant by a July 9, 1998 letter of the consequences of his refusal to submit and provided him 15 days to provide reasons for his failure to attend the initial scheduled appointment. By decision dated September 1, 1998, the Office suspended compensation for refusing to submit to an examination with Dr. Schooler. The Office denied appellant's request for modification of the September 1, 1998 decision on February 2, 1999.

³ Docket No. 01-1366 (issued May 2, 2002). This decision is not contained in the record. In a letter dated May 22, 2002, appellant indicated his willingness to attend the scheduled examination with Dr. Schooler. Subsequent to the Board's decision the Office scheduled appellant for an examination on July 10, 2002, which appellant attended. In a letter dated August 28, 2002, appellant's representative requested benefits to resume including past compensation benefits.

⁴ In this decision the Office attached the findings from the March 2, 2001 decision, without addressing appellant's request for retroactive compensation benefits.

⁵ Docket No. 04-1157 (issued August 23, 2004).

⁶ Docket No. 06-713 (issued July 19, 2006).

⁷ *Order granting petition for recon. (modifying prior decision) and denying appellant's petition for recon*, Docket No. 06-713 (issued July 19, 2006).

same order, the Board also denied appellant's petition for reconsideration as appellant had not shown any error of law or fact with regard to appellant's request for retroactive pay for the period in question.⁸ The law and the facts as set forth in the Board's decision and order are incorporated by reference.

On May 5, 2008 appellant requested reconsideration of the denial of his claim for retroactive wage-loss compensation for the period September 3, 1998 to July 10, 2002. He contended that he was not in obstruction of the examination as the Office claimed.

By decision dated May 23, 2008, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁹ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹¹ 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.¹²

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit, and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the

⁸ The original period in question was September 3, 1998 to July 10, 2002. In view of the Board's granting of the Director's petition for reconsideration the period in question has been modified to September 3, 1998 to May 22, 2002. The record contains evidence that appellant was paid wage-loss compensation for the period May 22 to July 9, 2002 on October 12, 2006.

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ 20 C.F.R. § 10.605.

¹¹ 20 C.F.R. § 10.607(a).

¹² 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ See *Alberta Dukes*, 56 ECAB 247 (2005); see also *Leon J. Modrowski*, 55 ECAB 196 (2004).

evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. 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.¹⁴

ANALYSIS

The Board has duly reviewed the case record and finds that the Office properly determined that appellant's May 5, 2008 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

At oral argument appellant noted he had filed a reconsideration request with the Board following the July 19, 2006 Board decision and referenced 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607. The Board notes that 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605, 10.606 and 10.607 pertain to reconsideration requests before the Office. In order to file a timely request for reconsideration before the Office, a request must be made within one year of the last merit decision.¹⁵ The regulations governing petitions for reconsideration before the Board are located at 20 C.F.R. § 501.7. Any petition for reconsideration of a Board decision or order must be filed within 30 days of the decision or order unless another period is specified therein.¹⁶

The Board finds that the Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁷ However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸ The last merit decision in this case was the Board's December 29, 2006 order granting the Director's petition for reconsideration and denying appellant's petition for reconsideration. In its December 29, 2006 order granting the Director's petition for reconsideration, the Board modified its July 19, 2006 decision to reflect that the period in question was September 3, 1998 to May 22, 2002. As appellant's request for reconsideration was submitted more than one year after the most recent merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error in the denial of his claim for retroactive wage-loss compensation for the period September 3, 1998 to May 22, 2002.

Appellant did not submit any additional factual or medical evidence with his untimely reconsideration request. He has made no showing that the Office committed any error in finding that he was not entitled to retroactive wage-loss compensation for the period September 3, 1998 to May 22, 2002. For these reasons, the Board finds that he has not established clear evidence of error on the part of the Office.

¹⁴ See *Alberta Dukes*, *supra* note 13.

¹⁵ 20 C.F.R. § 10.607.

¹⁶ *Id.* at § 501.7(a) (2008).

¹⁷ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

CONCLUSION

The Board finds that the Office properly found appellant's application for reconsideration untimely and that it failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 23, 2008 is affirmed.

Issued: April 21, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board