United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 09-130**
	)	**Issued: August 4, 2009**
DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Vancouver, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2008 appellant filed a timely appeal from a July 28, 2008 decision of the Office of Workers' Compensation Programs that denied his request for reconsideration because it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error. On appeal, he requested that the medical evidence regarding his shoulder condition be reviewed.

FACTUAL HISTORY

On December 16, 1980 appellant, then a 45-year-old heavy equipment mechanic, filed a traumatic injury claim alleging that he injured his back and left shoulder in the performance of

his federal duties. The Office accepted the conditions of lumbar strain and painful arch syndrome of the left shoulder.[1] Appellant sustained a second employment-related injury on May 11, 1983 which was accepted for low back contusion.[2] On February 29, 1988 he was terminated for unacceptable job performance.[3]

By decision dated April 15, 1988, the Office denied appellant's disability claim on the grounds that he had no residuals of either employment injury. It found that the opinion of Dr. Thomas J. Rosenbaum, a Board-certified neurosurgeon selected as an impartial specialist, represented the weight of medical opinion. By decision dated August 3, 1988, the Office vacated the April 15, 1988 decision. It found that Dr. Rosenbaum's opinion was equivocal regarding whether appellant had residuals of his accepted condition. The Office notified appellant that the burden would be on him to establish that the employing establishment changed the requirements of the limited-duty work he was performing, required him to work outside his limitations, or that his employment-related medical conditions had changed so that the work was no longer suitable.

On June 15, 1989 appellant filed a Form CA-2, occupational disease claim, for injuries to his lumbar spine, back, shoulders, neck and for carpal tunnel syndrome. The claim was accepted for low back strain.[4] In December 1989 appellant was referred to Dr. Charles Belleville, a psychiatrist, Dr. Thomas Phipps, a Board-certified neurologist, and Dr. Stephen Fuller, a Board-certified orthopedic surgeon, for second opinion evaluations. Based on their reports, by decision dated June 22, 1990, the Office found that appellant had no ongoing disability causally related to his accepted employment injuries.[5]

On November 22, 1993 appellant requested reconsideration. In a nonmerit decision dated November 7, 1994, the Office denied his request. He next requested reconsideration on February 16, 2000. By decision dated July 7, 2000, the Office denied the request on the grounds that it was untimely filed and that he failed to establish clear evidence of error in the June 22, 1990 decision. In an undated letter received by the Office on November 17, 2000, appellant requested reconsideration. In letters dated November 24, 2000 and April 19, 2001, the Office

[1] The record also contains CA-1 claims for an October 20, 1976 injury to the left side of the neck and shoulder, and an August 24, 1977 injury to the right shoulder. The record does not indicate whether these claims were accepted.

[2] The 1980 injury was adjudicated under Office file number xxxxxx355 and the 1983 injury under file number xxxxxx057. On December 15, 1988 appellant filed an occupational disease claim for bilateral carpal tunnel syndrome, adjudicated under file number xxxxxx757. By decision dated March 9, 1993, Docket No. 92-995, the Board remanded the case to the Office for further development. The law and the facts of the previous Board decision are incorporated herein by reference. On July 15, 1993 the Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome. Appellant has a second appeal before the Board regarding his carpal tunnel claim, Docket No. 09-1037, that will be adjudicated separately.

[3] The record indicates that, after appellant's termination, he continued to work in private employment as a heavy equipment mechanic.

[4] The 1989 occupational disease claim was adjudicated under Office file number xxxxxx796. The Office combined the files under xxxxxx355 as the master file.

[5] In decisions dated April 10 and June 25, 1991 and January 9, 1992, under Office file number xxxxxx355, the Office denied that appellant sustained employment-related bilateral carpal tunnel syndrome.

informed appellant that his only avenue of appeal was with the Board. On April 8, 2002 appellant filed a letter with the Board, stating that he was appealing an April 19, 2001 decision. In an Order Dismissing Appeal dated August 30, 2002, the Board found that the April 19, 2001 correspondence was informational and that his letter to the Board was not submitted within one year of the Office's July 7, 2000 decision.[6]

On March 3, 2008 appellant requested reconsideration, contending that his light duty work had changed and that he needed bilateral shoulder joint replacement. He submitted copies of CA-1 claim forms for injuries on October 26, 1976 and August 24, 1977;[7] a September 26, 1984 employing establishment memorandum regarding light-duty policy; the first page of a November 1985 affidavit from Stan R. Steward; a February 12, 1988 memorandum stating that there were no employees currently assigned to light-duty work; a February 8, 1990 letter from Donald W. Wheeler, a union representative, advising that the employing establishment did not have light-duty work; the first page of undated affidavits from Thomas A. Jones and Charles M. Markee; one page of an undated "summary;" and one page of a job description.

By decision dated July 28, 2008, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[8] It 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.[9] 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.[10] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of Office regulations,[11] if the claimant's application for review shows "clear evidence of error" on the part of the Office. 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.[12]

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

[6] Docket No. 02-1278 (issued August 30, 2002).

[7] *Supra* note 1.

[8] 5 U.S.C. §§ 8101-8193.

[9] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

[10] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[11] 20 C.F.R. § 10.607.

[12] *Alberta Dukes*, 56 ECAB 247 (2005).

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. 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 evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must be of sufficient probative value to raise a substantial question as to the correctness of the Office decision.[13]

Office procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[14] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[15]

ANALYSIS

The Board finds that more than one year elapsed from the date of issuance of the last merit decision in this case on June 22, 1990 to appellant's request for reconsideration on March 3, 2008. Therefore, it was untimely filed.[16] Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for disability compensation.[17]

The Board finds that appellant failed to establish clear evidence that the June 22, 1990 decision of the Office was in error. The underlying issue in this case is whether appellant established that he had any disability causally related to his employment injuries as of February 1988 when he was terminated for unacceptable job performance.[18] On appeal appellant requested that the Board consider evidence previously of record regarding his shoulder condition. However, he submitted no medical evidence with his March 3, 2008 reconsideration request and referenced the Board's March 9, 1993 decision. That decision pertained to his

[13] *Robert G. Burns*, 57 ECAB 657 (2006).

[14] *James R. Mirra*, 56 ECAB 738 (2005).

[15] *Nancy Marcano*, 50 ECAB 110 (1998).

[16] *Supra* note 9.

[17] 20 C.F.R. § 10.607(b).

[18] Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act. *See* 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999). Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence. *Fereidoon Kharabi*, 52 ECAB 291 (2001).

bilateral carpal tunnel syndrome, which was adjudicated by the Office separately from the instant case. Appellant argued that his light-duty work was withdrawn or unavailable. The evidence submitted consisted of claim forms for injuries on October 26, 1976 and August 24, 1977, employing establishment memorandums regarding light-duty policies and noting that no employees were currently assigned to light-duty work. Donald W. Wheeler, a union representative, advised that the employing establishment did not have light-duty work. None of the evidence submitted is sufficient to establish on its face that the June 22, 1990 Office decision was clearly erroneous.[19] This evidence is of insufficient probative value to raise a substantial question as to the correctness of the Office's decision in finding that appellant no longer had disability related to his accepted conditions. The evidence submitted is largely irrelevant to this determination and fails to establish appellant's contention that light duty was no longer available.[20]

CONCLUSION

The Board finds that appellant's March 3, 2008 reconsideration request was not timely filed and he failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2008 be affirmed.

Issued: August 4, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[19] *R.C.*, 59 ECAB ____ (Docket No. 07-2042, issued June 3, 2008).

[20] 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008).