United States Department of Labor
Employees' Compensation Appeals Board

G.T., Appellant	)	
and	)	**Docket No. 09-1493**
	)	**Issued: February 2, 2010**
DEPARTMENT OF THE NAVY, NAVY AVIATION DEPOT, Cherry Point, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 27, 2009, appellant filed a timely appeal from the March 17, 2009 decision of the Office of Workers' Compensation Programs, 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 August 15, 2002 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue 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

This is the fifth appeal in the present case.[1] In a January 28, 1988 decision, the Board affirmed Office decisions denying appellant's claim for a pulmonary condition causally related to his employment.[2] On May 9, 2001 the Board affirmed the Office's August 17, 2000 decision, finding that it properly terminated appellant's compensation benefits effective August 15, 1999 on the basis that he had no continuing disability due to his work-related dermatitis.[3] In an April 23, 2004 decision, the Board affirmed a September 15, 2003 Office decision, finding that the Office properly denied appellant's request for reconsideration without a merit review.[4] In a July 14, 2005 decision, the Board affirmed a December 9, 2004 Office decision that found that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.[5] The law and the facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

In a letter to the Office dated February 25, 2009, appellant requested reconsideration. He asserted that he continued to experience ongoing health problems. Appellant submitted treatment notes dated June 6, 2006 and October 14, 2008 from Dr. Dan M. Henshaw, a Board-certified dermatologist, who advised appellant that he was unable to provide a more definitive or explicit explanation for the etiology of his condition and that appellant should be "considered favorably" for workers' compensation benefits. On October 14, 2008 Dr. Henshaw noted treating appellant since June 2003 following a work history of exposure to various chemicals used in cleaning, spraying and sandblasting aircraft. He noted areas of appellant's back, arms and legs were broken out, itching and burning. Dr. Henshaw diagnosed atopic dermatitis, manifested clinically in the form of nummular eczema. He noted that in the five years since appellant's first visit, he had been treated for flare-ups of the condition, usually characterized by severe itching, burning and stinging. On July 7, 2008 appellant presented with pruritic, lichenoid and slightly popular eczematous dermatitis, which was worse on his arms and legs. Dr. Henshaw prescribed additional topical ointments. He opined that, based on history, it seemed likely that appellant would continue to have flare-ups of his condition, which would require ongoing treatment.

By decision dated March 17, 2009, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and did not establish clear evidence of error.[6]

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[1] In a decision dated February 8, 1989, the Office accepted appellant's claim for irritant dermatitis and paid appropriate wage-loss compensation. Effective August 15, 1999, the Office terminated appellant's compensation benefits on the basis that he had no continuing disability due to his work-related dermatitis.

[2] Docket No. 88-154 (issued January 28, 1988).

[3] Docket No. 01-202 (issued May 9, 2001).

[4] Docket No. 04-515 (issued April 23, 2004).

[5] Docket No. 05-808 (issued July 14, 2005).

[6] In this decision, the Office incorrectly noted that the last merit decision was September 15, 2003. The record reflects that the most recent merit decision of the Office was August 15, 2002.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[7] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[9] As one such limitation, the Office has stated that 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.[10] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[11]

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.[12] Evidence that 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.[13]

ANALYSIS

In its March 17, 2009 decision, the Office properly determined that appellant did not file a timely application for review. The most recent merit decision is the Office August 15, 2002 decision that denied modification of the termination of appellant's compensation benefits for his dermatitis condition. Appellant's February 25, 2009 request for reconsideration was more than one year after August 15, 2002. Therefore, it was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant submitted reports from Dr. Henshaw dated June 6, 2006 and

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8128(a).

[9] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[10] 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

[11] *Sean C. Dockery*, 56 ECAB 652 (2005); *Mohamed Yunis*, 46 ECAB 827, 829 (1995).

[12] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[13] *E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

October 14, 2008. Dr. Henshaw reviewed appellant's history of treatment and his most recent symptoms. He opined that appellant would likely continue to have flare-ups of his dermatitis condition and require ongoing treatment. However, this report does not address the basis on which appellant's benefits were terminated in 1999 as the condition was found not to cause disability for work. In a June 6, 2006 report, Dr. Henshaw advised appellant that he was unable to provide a more definitive explanation for the etiology of his condition but that appellant should be "considered favorably" for workers' compensation benefits.[14] Again, Dr. Henshaw did not address the prior termination of benefits based on appellant's capacity for work. His reports are insufficient to show clear evidence of error. 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. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.[15] This evidence is not so positive, precise and explicit that it manifests on its face that the Office committed an error.

Consequently, the Board finds that Dr. Henshaw's reports submitted on reconsideration are insufficient to raise a substantial question as to the correctness of the Office's decision. Thus, appellant has not established clear evidence of error by the Office in its August 15, 2002 decision.

[14] Dr. Henshaw previously submitted an October 4, 2004 report, noted in the Board's July 14, 2005 decision, *supra* note 4, which also indicated that appellant should be "considered favorably" for workers' compensation benefits.

[15] *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

CONCLUSION

The Board, therefore, finds that the Office properly determined that appellant's request for reconsideration dated February 25, 2009 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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