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E.P., Appellant)	
)	
and)	Docket No. 08-1121
)	Issued: November 3, 2008
DEPARTMENT OF THE AIR FORCE, ROBINS)	
AIR FORCE BASE, GA, Employer)	
)	

Case Submitted on the Record

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

On September 25, 2007 appellant filed a timely appeal of a February 28, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied his July 12, 2007 request for reconsideration as untimely filed and failing to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated March 15, 1991 and 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(d)(2).

The issue is whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This case is on appeal, to the Board for the 10th time.¹ In the first appeal, the Board found that the Office did not abuse its discretion in denying appellant merit review of his claim pursuant to 5 U.S.C. § 8128(a) because the evidence he submitted in support of his request for reconsideration was either repetitive of evidence previously submitted or not relevant to the issue of whether he sustained a recurrence of disability on or about July 3, 1989 as a result of his July 14, 1988 employment injury.² The Board therefore affirmed the Office's November 9, 1993 decision. On March 31, 1999 the Board dismissed the appeal because appellant filed it on November 30, 1998, not within one year of the Office's January 16, 1990 decision.³ On October 9, 2001 the Board found that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error.⁴ The Board found that appellant's request for reconsideration was not filed within a year of the Office's March 15, 1991 decision and he did not present evidence relevant to the issue of whether he sustained a recurrence of disability on July 3, 1989. Appellant petitioned for reconsideration of the Board's decision on October 17, 2001, which was denied on January 30, 2002. In the fourth appeal, the Board found on June 5, 2003 that appellant's March 20, 2002 request for reconsideration was not filed within a year of the Office's March 15, 1991 decision and he did not present evidence relevant to the issue of whether he sustained a recurrence of disability on July 3, 1989.⁵ On January 21, 2004 the Board issued an order remanding the case in appellant's fifth appeal as the Office failed to timely transmit the case file to the Board.⁶ In the sixth appeal, the Board found on July 12, 2005 that appellant's September 2, 2003 request for reconsideration was not filed within a year of the Office's March 15, 1991 decision and he did not present evidence relevant to the issue of whether he sustained a recurrence of disability on July 3, 1989.⁷ In the seventh appeal, the Board found on September 8, 2006 that the Office properly denied appellant's December 13, 2005 request for reconsideration as it was untimely filed and failed to present clear evidence of error in the Office's March 15, 1991 decision denying his recurrence claim.⁸ In the eighth appeal, the Board found on March 27, 2007 that the Office properly denied appellant's September 22, 2006 request for reconsideration as it was untimely filed and failed to present clear evidence of error in the

¹ On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim alleging that on July 14, 1988 he injured his back when he tripped and fell over a box. The Office accepted the claim for a low back strain. Appellant filed a claim for a recurrence of disability on July 3, 1998, which was denied in merit decisions dated January 16, 1990 and March 15, 1991. He was terminated from the employing establishment effective October 19, 1990.

² Docket No. 94-544 (issued July 19, 1995).

³ Docket No. 99-739 (issued March 31, 1999).

⁴ Docket No. 01-798 (issued October 9, 2001).

⁵ Docket No. 03-887 (issued June 5, 2003).

⁶ Docket No. 03-905 (issued January 21, 2004).

⁷ Docket No. 04-64 (issued July 12, 2005).

⁸ Docket No. 06-875 (issued September 8, 2006).

Office's March 15, 1991 decision denying his recurrence claim.⁹ In the ninth appeal, the Board issued an order dismissing appeal on January 15, 2008 on the grounds that the Board had no jurisdiction to review a July 9, 2007 communication from the Office as it was not a final decision.¹⁰ The facts of this case are set forth in the Board's prior decisions and are hereby incorporated by reference.

On July 12, 2007¹¹ appellant requested reconsideration of the Office's March 15, 1991 decision denying his recurrence claim. He resubmitted medical and factual evidence previously considered by the Office. Appellant contended that the Office erred in failing to consider his 1983 and 1987 back injuries when it denied his recurrence claim. He also contended that the Office was biased and failed to consider his mental illness or the law regarding mental competence when finding that he had filed an untimely request for reconsideration.

By decision dated February 28, 2008, the Office determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹² 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.¹³ 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.¹⁴ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear

⁹ Docket No. 07-55 (issued March 27, 2007).

¹⁰ Docket No. 07-1907 (issued January 15, 2008).

¹¹ Appellant subsequently submitted additional requests for reconsideration, which were dated November 1, 2007, January 4 and 7 and February 13, 2008.

¹² 5 U.S.C. §§ 8101-8193. 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. *See Joseph R. Santos*, 57 ECAB 554 (2006); *Adell Allen (Melvin L Allen)*, 55 ECAB 390 (2004).

¹³ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

¹⁴ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

evidence of error” on the part of the Office.¹⁵ 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.¹⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁷ The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ 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.²¹ 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 decision.²² 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.²³

ANALYSIS

Appellant seeks reconsideration of a March 15, 1991 merit decision denying his recurrence of disability claim. In the March 15, 1991 decision, the Office found that he did not sustain a recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. Appellant disagreed with the denial of his claim and filed a request for consideration in a letter dated July 12, 2007. Because he filed his request more than one year after the Office’s March 15, 1991 merit decision, the Board finds that appellant filed an untimely

¹⁵ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁸ See *Pasquale C. D’Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁹ See *Leon J. Modrowski*, *supra* note 14; *Jesus D. Sanchez* *supra* note 14.

²⁰ See *Leona N. Travis*, *supra* note 18.

²¹ See *Nelson T. Thompson*, *supra* note 16.

²² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²³ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

request for reconsideration. Thus, appellant must demonstrate clear evidence of error on the part of the Office in denying his claim.²⁴

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that the Office's denial of compensation was clearly erroneous. Appellant has not shown how the Office committed error by failing to consider injuries sustained in 1983 or 1987. In addition he did not substantiate his allegations of bias and prejudice and did not document the errors alleged. The Board will therefore affirm the February 28, 2008 decision denying appellant's request.

CONCLUSION

The Office properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that his requests for reconsideration were not timely filed and failed to demonstrate clear evidence of error.

ORDER

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

Issued: November 3, 2008
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

²⁴ 20 C.F.R. § 10.607(b). *See S.D.*, 58 ECAB ____ (Docket No. 07-1120, issued September 24, 2007).