United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 09-23**
	)	**Issued: June 16, 2009**
DEPARTMENT OF THE AIR FORCE, NORTON AIR FORCE BASE, CA, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 2, 2008 appellant filed a timely appeal from the May 7, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. As the most recent merit decision dated July 25, 2002 was issued over a year prior to filing of the appeal on October 2, 2008, the Board has jurisdiction over the merits of the case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial.

ISSUE

The issue is whether the Office properly denied appellant's April 25, 2008 request for reconsideration because it was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

On December 27, 1978 appellant sustained a traumatic injury in the performance of duty. The Office accepted his claim for low back strain and herniated disc at L4-5. On December 29, 1998 it terminated appellant's compensation on the grounds that the weight of the medical

evidence, as represented by the opinion of the impartial medical specialist, established that he no longer had residuals of the accepted employment injury.

In a decision dated July 25, 2002, the Office reviewed the merits of appellant's case and denied modification of its decision to terminate compensation. It addressed appellant's arguments and found that an additional report by his attending physician was insufficient to overcome the opinion of the impartial medical specialist. In an attached statement of appeal rights, the Office notified appellant that any request for reconsideration must be made within one year of that date of that decision.

On a prior appeal,[1] the Board affirmed an Office January 30, 2006 decision denying appellant's January 12, 2006 request for reconsideration. Appellant's request was untimely and failed to show clear evidence of error in the Office's July 25, 2002 decision denying modification of the termination. The Board explained that there was no provision in the law to excuse the failure to meet the time limitation for requesting reconsideration. The Board also noted that in both his September 10, 2002 and January 12, 2006 letters, appellant merely reargued the merits of his case, expressing his disagreement with the Office's evaluation of the evidence and in particular with the special evidentiary weight accorded the opinion of the impartial medical specialist. The Board found that it was not enough merely to argue that the evidence could be construed so as to produce a contrary conclusion. Rather, appellant's untimely request for reconsideration must manifest on its face that the termination was erroneous. The Board held that his July 12, 2006 request did not meet this difficult standard.

On April 25, 2008 appellant again requested reconsideration. He argued, without going into detail, that the Office did not follow what was printed on a Form CA-550 pamphlet dated February 1983. Appellant argued that the Office failed to follow the contract he had signed. He stated that he should not be denied reconsideration due to the time limit but should be reinstated into its disability program due to the facts and nature of his injury. Appellant stated that the Office had not met its burden of proof. He stated that it sent him to a doctor of its choosing and to date no one has given him a complete physical or proven his status with any kind of testing. Instead, appellant stated, all the physicians to whom the Office sent him "went by what they read." He indicated that he retired on disability but chose to receive benefits from the Office since his was a job-related injury. Appellant argued that "rules are a guideline for you to follow and what I have seen is that you bend the rules to suit the way you want the program to work for you." He stated that he could not continue on the pay he was living on now and asked the Office to put him back on disability status.

In another letter dated April 25, 2008, appellant took issue with his examination by the impartial medical specialist. He stated that the impartial medical specialist was biased because he, the impartial medical specialist, had been in line for a promotion. Appellant alleged that the specialist gave him a 10-minute examination without diagnostic testing and sent him home. He argued that the Office had no right to change his status. Appellant demanded to be put back on disability status. He noted that he was in constant pain and had uncontrollable back spasms even with medication. Appellant stated that he just wanted what was due him. He added: "If you feel

[1] Docket No. 06-746 (issued September 7, 2006).

that I am still not eligible for disability retirement, then please find out why OPM has me listed as being on DISABILITY RETIREMENT, status due to an on the job injury. That does not make any sense."[2]

In a decision dated May 7, 2008, the Office denied appellant's April 25, 2008 request for reconsideration on the grounds that it was untimely and failed to provide clear evidence that the Office erred in issuing its merit decision on July 25, 2002. It noted that appellant's latest request simply referred to the same issues he had raised in previous letters, issues that were addressed in previous formal decisions.

LEGAL PRECEDENT

Section 8128(a) of the Act vests the Office with discretion to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[3]

The Office, through regulations, has imposed limitations on the exercise of its discretion under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[4]

[2] The Board addressed this issue in the case of *Hazelee K. Anderson*, 37 ECAB 277 (1986): "Appellant submitted a copy of a decision of the Social Security Administration which awarded her benefits. In this regard, it appears that she is under the impression that because she was awarded disability benefits for retirement purposes she is *ipso facto* disabled for compensation purposes under the Federal Employees' Compensation Act. This is not so and, as the Board has stated, entitlement to benefits under one Act does not establish entitlement to [benefits under] the other. The findings of other administrative agencies have no bearing on proceedings under the Federal Employees' Compensation Act which is administered by the Office and the Board and a determination made for disability retirement purposes is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes. The two relevant statues (Social Security Act and the Federal Employees' Compensation Act) have different standards of medical proof on the question of disability; disability under one statute does not prove disability under the other. Furthermore, under the Federal Employees' Compensation Act, for a disability determination, appellant's conditions must be shown to be causally related to her federal employment. Under the Social Security Act, conditions which are not employment-related may be taken into consideration in rendering a disability determination."

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607 (1999).

The term "clear evidence of error" is intended to represent a difficult standard.[5] If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[6]

ANALYSIS

The basic status of this case has not changed since the last appeal in 2006. The most recent decision on the merits of appellant's case remains the Office's July 25, 2002 decision to deny modification of the termination of his compensation. Any request for reconsideration had to be made within one year of the date of that decision or by July 25, 2003. Appellant's April 25, 2008 request for reconsideration, therefore, is nearly five years too late. As the Board previously explained to him, the Board has no power to make an exception to this time limitation for any claimant regardless of circumstance.

Because appellant's request is untimely, the standard he must meet to obtain a merit review of his case is a difficult one. His request must show on its face that the Office's termination of compensation was erroneous. As the Board previously explained to appellant, simply rearguing the merits of his case and expressing his disagreement with the Office's evaluation of the evidence is no proof that the termination was erroneous. But there is really nothing new here, certainly appellant has failed to meet his burden of proof to show that the Office erred in its termination of his compensation.

CONCLUSION

The Board finds that the Office properly denied appellant's April 25, 2008 request for reconsideration.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

[6] *Id*. at Chapter 2.1602.3.d(1).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board