

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL L. PITTS and DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, Warner Robins, GA

*Docket No. 01-798; Submitted on the Record;
Issued October 9, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs acted within its discretion in denying appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

In the prior appeal of this case,¹ the Board found that the Office acted within its discretion in denying appellant's August 26, 1993 request for reconsideration. Most of the evidence supporting this request was repetitious. One medical report not previously considered failed to address the issue, namely, whether appellant sustained a recurrence of disability on or about July 3, 1989 as a result of his July 14, 1988 employment injury. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

In a letter received on December 8, 1995, appellant again requested reconsideration. In a decision dated December 14, 1995, the Office denied the request on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence.

Thereafter appellant submitted several requests for reconsideration. In a decision dated March 6, 1996, the Office denied appellant's requests on the grounds that they were not filed within a year of the most recent merit decision in the case, issued on March 15, 1991. The Office further found that the requests presented no evidence that the Office had improperly denied his claim of recurrence.

Appellant again sought modification. He argued that he was not in the right state of mind for some years after his employment injury, which should not be held against him. He argued that he had in fact met his burden of proof. Appellant submitted medical records, including diagnostic reports; a medical report supporting that he sustained a cervical and lumbar disc herniation as a result of his fall on July 14, 1988 and was unable to function mentally due to

¹ Docket No. 94-544 (issued July 19, 1995).

some of the medication he was taking; physical therapy notes; and an itemization of medical services provided.

In a decision dated November 27, 2000, the Office denied appellant's request on the grounds that it was untimely and failed to demonstrate clear evidence of error.

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority 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."²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority 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.³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ See *Leona N. Travis*, *supra* note 5.

and whether the new evidence demonstrates clear error on the part of the Office.⁸ 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.⁹ 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 a merit review in the face of such evidence.¹⁰

The last decision on the merits of appellant's claim was the Office's March 15, 1991 decision denying appellant's claim of recurrence. Because appellant made his most recent requests for reconsideration or modification more than one year after this merit decision, his requests are untimely. The question for determination therefore becomes whether he has demonstrated clear evidence of error in the Office's March 15, 1991 decision.

The Board has reviewed appellant's letters and the evidence submitted after the Office's March 6, 1996 nonmerit decision denying reconsideration. Appellant presented arguments concerning his state of mind together with medical evidence showing the nature of his physical condition. None of this evidence, however, is relevant to the issue that was decided by the Office on March 15, 1991, namely, whether appellant sustained a recurrence of disability on or about July 3, 1989 as a result of his July 14, 1988 employment injury. This is a medical issue, and none of the medical opinion evidence submitted by appellant addresses this particular issue. Because the evidence fails to establish that the Office committed a clear error in denying appellant's claim of recurrence, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

Appellant has submitted evidence indicating that he was unable to function mentally due to medication he was taking. However, section 10.607(c) provides that the time for requesting reconsideration shall not run against an individual who "is unable to communicate in any way and that his testimony is necessary in order to obtain modification of the decision." Although appellant may have had periods with hallucinations and was medicated since 1988, the record does not establish that he was "unable to communicate in any way" during the entire 12 month period after the March 15, 1991 merit decision.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The November 27, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 9, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member