

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. 03-887; Submitted on the Record;
Issued June 5, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

This case is on appeal to the Board for the third 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 appellant submitted in support of his request for reconsideration was either repetitive of evidence previously submitted or not relevant to the issue of whether appellant sustained a recurrence of disability on or about July 3, 1989 as a result of his July 14, 1988 employment injury. The Board therefore affirmed the Office's November 9, 1993 decision. In the second appeal, the Board dismissed appellant's appeal to the Board because the appeal, filed on November 30, 1998, was not made within one year of the Office's January 16, 1990 decision. In the third appeal, 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. The Board found that appellant's request for reconsideration was not filed within a year of the Office's March 15, 1991 decision and appellant 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 the Board denied.

By letter dated March 20, 2002, appellant requested reconsideration of the Office's March 15, 1991 decision and submitted evidence, virtually all of which the Board had previously considered. New evidence appellant submitted consisted of two magnetic resonance imaging (MRI) scans of the lumbar and cervical spine dated November 5, 2002.

¹ Docket No. 01-798 (issued October 9, 2001); Docket No. 99-739, order dismissing appeal (issued March 31, 1999); Docket No. 94-544 (issued July 19, 1995). The facts and history surrounding the prior appeals are set forth in the prior decisions and are hereby incorporated by reference.

By decision dated February 11, 2003, the Office denied appellant's request for reconsideration, stating that appellant's March 20, 2002 letter requesting reconsideration which was filed more than a year after the last merit decision on March 15, 1991 was untimely, and appellant failed to show clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed the appeal with the Board on February 21, 2003, the only decision before the Board is the Office's February 11, 2003 decision, denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed as to produce a contrary conclusion.⁹ 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.¹⁰

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. §8128(a).

⁴ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *Willie J. Hamilton*, 52 ECAB ____ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Willie J. Hamilton*, *supra* note 6; *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, *supra* note 5.

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Willie J. Hamilton*, *supra* note 6.

In this case, the Office properly found that appellant's March 20, 2002 reconsideration request was untimely because it was filed more than a year after the Office's last merit decision, dated March 15, 1991. The only new evidence appellant submitted was the cervical and lumbar MRI scans dated November 5, 2002. These, however, are not relevant to the issue of whether appellant sustained a recurrence of disability on July 3, 1989 causally related to the July 14, 1983 employment injury. They provide no rationalized medical opinion explaining the cause of appellant's disability and whether his disability is work related. The new evidence appellant submitted does not raise a substantial question as to the correctness of the Office's March 15, 1991 decision and therefore fails to demonstrate clear evidence of error.

The February 11, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member