

FACTUAL HISTORY

This case is on appeal for the third time. On March 17, 2000 the Board affirmed an Office decision dated September 5, 1997, on the grounds that appellant's September 2, 1997 request for reconsideration of the most recent merit decision dated November 13, 1995, was untimely filed and failed to demonstrate clear evidence of error.¹ Subsequently, the Board issued a May 11, 2000 decision, in a separate proceeding, in which it affirmed a March 27, 1997 final overpayment determination.² The facts and the history of the first appeal are incorporated by reference.³

In a letter dated November 5, 2002, appellant stated that she was requesting reconsideration of a December 20, 1994 merit decision which denied her claim for recurrent, total disability after July 8, 1994. Appellant stated that she could not understand how the reports of her physician, Dr. Phillip Krogol,⁴ were accepted in 1992, when she was off work for the same condition and then rejected in 1994. She asserted that Dr. Krogol had reported that her neck and arm problems persisted and indicated that she needed surgery. Appellant further argued that the Office had improperly determined that she had refused treatment because she declined a surgical procedure that could not guarantee repair. Appellant resubmitted a March 22, 1995 report from Dr. Krogol in support of her request. He stated:

“As you are well aware [appellant] has been under our care for herniated cervical disc. Her most recent CT [computerized tomography] scan shows persistent herniation at the C5-C6 area. A copy of this is enclosed for your review. She continues to have neck and arm radicular pain with numbness. She has decreased pin sensation at C5-C6 level with decreased bicep reflex. Surgery has been recommended to [appellant] but she at this time refuses. We believe that this is the only other alternative that may offer her relief of the above symptoms. Until that time she will continue to have flair ups of persistent and progressively worse neck and arm pain while at work.”

By decision dated December 4, 2002, the Office found that appellant's request for reconsideration was untimely filed. The Office noted that the last merit decision in the case was not the December 20, 1994 decision referenced by appellant in her request but a decision dated November 13, 1995, which reviewed all available evidence and affirmed the denial of the claim. The Office further noted that appellant's letter dated November 5, 2002 was filed more than a

¹ Docket No. 99-1603 (issued March 17, 2000). On April 12, 2000 appellant petitioned for reconsideration of the March 17, 2000 Board decision. The case record was returned to the Office and the Office mistakenly considered the petition a request for reconsideration. The Office issued an August 17, 2000 decision denying appellant's request. Appellant appealed the August 17, 2000 Office decision on August 24, 2000 which was initially docketed by the Board as No. 00-2767 and later dismissed on December 22, 2000.

² Docket No. 97-1686 (issued May 11, 2000). The Board notes that appellant also petitioned for reconsideration in this case, which was denied by the Board on December 20, 2000.

³ *Nora Martin* (Docket No. 99-1603) *supra* note 1.

⁴ Dr. Krogol, a Board-certified neurologist.

year after the Office's November 13, 1995 decision. In the December 4, 2002 decision, the Office reviewed the evidence submitted and determined that it failed to establish any clear evidence of error on the part of the Office. The Office found that appellant failed to put forth any argument sufficient enough to support that the November 13, 1995 decision was in error and the March 22, 1995 report from Dr. Krogol lacked probative value and was insufficient to demonstrate error on the part of the Office. The Office pointed out that the report did not discuss appellant's ability or inability to work, which was the critical issue in the case and therefore found that appellant failed to submit evidence which demonstrated clear evidence of error.

LEGAL PRECEDENT

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ 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.⁶ 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 a decision was erroneous.⁷

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which does not raise substantial questions concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

ANALYSIS

Appellant argues on appeal that her original request for reconsideration had been filed within one year of the December 20, 1994 decision which denied her claim for recurrence of

⁵ 5 U.S.C. § 8128(a).

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

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

⁸ *Willie J. Hamilton*, 52 ECAB ____ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *Willie J. Hamilton*, *supra* note 8; *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *See Jesus D. Sanchez*, *supra* note 7.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Willie J. Hamilton*, *supra* note 8.

disability. The record reflects that appellant did timely file a request for reconsideration of the December 20, 1994 decision on December 24, 1994 and in a nonmerit decision dated March 7, 1995 the Office denied modification of the prior decision. The subject of this appeal however is the request for reconsideration dated November 5, 2002. The Office's last merit decision was issued on November 13, 1995. The timeliness of each request for reconsideration is measured from the date of the last merit decision. Appellant's November 5, 2002 request for reconsideration was clearly made more than one year after the last merit decision of November 13, 1995.

In her request for reconsideration dated November 5, 2002, appellant argued that she could not understand how Dr. Krogol's reports were accepted in 1992, when she was off work due to the employment condition however rejected in 1994, although the physician indicated that her condition persisted and required surgery. The Board finds that the argument advanced by appellant on reconsideration fails to raise a substantial question as to the correctness of the Office determination that she had not established recurrence of disability beginning July 8, 1994. Appellant resubmitted Dr. Krogol's March 22, 1995 medical report in further support of the claim. In this regard, the Board notes that Dr. Krogol's reports through 1997, including the resubmitted March 22, 1995 report were reviewed by the Board on the last appeal and were found insufficient to establish clear evidence of error regarding appellant's claim of recurrent disability in 1994.

Regarding the medical evidence submitted, Dr. Krogol's March 22, 1995 report does indicate that appellant continues to have neck and arm radicular pain and other symptoms and further indicates that her most recent CT scan shows persistent herniation at the C5-6 area. However, he did not indicate that appellant was totally disabled from work on July 8, 1994 and beyond. To the contrary he merely noted in the report, which was authored eight months after the alleged recurrence of disability, that appellant would experience flare ups of pain while at work. The March 22, 1995 report by Dr. Krogol, has not clearly demonstrated why appellant was totally disabled for work on July 8, 1994 and beyond as required to establish error by the Office in its prior decision. Appellant, therefore, has not demonstrated clear evidence of error in the Office's November 13, 1995 decision and has failed to establish her claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member