

**United States Department of Labor
Employees' Compensation Appeals Board**

E.P., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, GA, Employer**

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**Docket No. 06-875
Issued: September 8, 2006**

Appearances:
E.P., 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 14, 2006 appellant filed a timely appeal from the January 23, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied his December 13, 2005 request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial of reconsideration. The Board has no jurisdiction to review the merits of appellant's case.

ISSUE

The issue is whether the Office properly denied appellant's December 13, 2005 request for reconsideration as it did not establish clear evidence of error.

FACTUAL HISTORY

On the prior appeal of this case,¹ the Board found that the Office properly denied appellant's September 2, 2003 request for reconsideration. The Board noted that the most recent

¹ Docket No. 04-64 (issued August 9, 2005).

decision on the merits of appellant's case was the Office's March 15, 1991 decision denying his claim that he sustained a recurrence of disability on or about July 3, 1989 as a result of his July 14, 1988 employment injury. The review rights attached to that decision clearly explained that any request for reconsideration must be made within one year of the date of that decision or by March 15, 1992. The Board, therefore, found that appellant's September 2, 2003 request for reconsideration was untimely.

Addressing appellant's argument that he was adversely affected by medications, the Board found that he had submitted no probative medical evidence establishing that he was "unable to communicate in any way" since before the time limitation for requesting reconsideration expired on March 15, 1992. Moreover, as the procedural history of the case showed, appellant was in fact able to communicate during this period as he filed multiple requests for reconsideration with the Office and multiple appeals to the Board.

Applying the clear evidence of error standard to appellant's untimely request, the Board found that neither the request nor the evidence submitted in support thereof showed on its face that the Office's March 15, 1991 decision denying appellant's claim of recurrence was erroneous. The Board affirmed the denial of appellant's untimely request for reconsideration. The facts of this case as set forth in prior Board decisions are hereby incorporated by reference.

On December 13, 2005 appellant requested reconsideration on the grounds that he was mentally incompetent. Stating that he wished to appeal the decision about not filing in a timely manner, appellant indicated that new information showed that he was incompetent during the time period in question. He submitted a September 14, 2004 rating decision by the Department of Veterans Affairs as evidence that he was incompetent.

In a decision dated January 23, 2006, the Office denied appellant's request. The Office found that the 2004 rating decision was cumulative or similar to material on file and previously considered. Noting the Board's August 9, 2005 discussion of his ability to communicate during the period in question, the Office denied further merit review of appellant's case.

LEGAL PRECEDENT

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

² 5 U.S.C. § 8128(a).

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

The term “clear evidence of error” is intended to represent a difficult standard.⁴ 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.⁵

ANALYSIS

Appellant’s December 13, 2005 request for reconsideration is untimely. As noted, the most recent decision on the merits of appellant’s case was the Office’s March 15, 1991 decision, which denied his claim that he sustained a recurrence of disability on or about July 3, 1989 as a result of his July 14, 1988 employment injury. Appellant had one year from the Office’s March 15, 1991 decision to request reconsideration. His December 13, 2005 request for reconsideration is almost 14 years late.

Appellant claims that he was mentally incompetent and submitted a 2004 rating decision from the Department of Veterans Affairs. That decision noted that a competency decision had found him incompetent “from December 20, 1991.” But a determination of incompetence for Department of Veterans Affairs purposes may mean only that appellant was incapable of managing the disbursement of funds without limitation. This rating decision does not establish that appellant was “unable to communicate in any way” since 1991.⁶ Indeed, appellant has well demonstrated his ability to communicate since 1991 by filing multiple requests for reconsideration with the Office and multiple appeals to the Board, including the present appeal. Appellant had until March 15, 1992 to make a timely request for reconsideration. Because his December 13, 2005 request for reconsideration is clearly untimely, he must present clear evidence of error in the Office’s March 15, 1991 decision.

The record shows that appellant filed a claim for compensation on September 1, 1989 alleging that he sustained a recurrence of disability beginning July 3, 1989 as a result of his July 14, 1988 employment injury. The Office issued a decision on January 16, 1990 denying compensation for the disability claimed because appellant failed to submit evidence sufficient to establish that his current back condition was causally related to low back strain he sustained on July 14, 1988, when he tripped and fell backward in the computer room. Appellant requested

³ 20 C.F.R. § 10.607 (1999).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

⁵ *Id.* at Chapter 2.1602.3.d(1).

⁶ 20 C.F.R. § 10.607(c) (1999).

reconsideration on November 29, 1990. In a decision dated March 15, 1991, the Office reviewed the merits of his recurrence claim and again denied compensation. The Office found that the medical evidence of record failed to demonstrate that the claimed condition or disability was causally related to the July 14, 1988 employment injury.

Appellant's December 13, 2005 request for reconsideration does not show on its face that the Office's March 15, 1991 decision was erroneous. Appellant continues to disagree with the Office's March 15, 1991 decision, but at this late date it is not enough merely to reargue the merits of his case or to show how the evidence could be construed so as to produce a contrary conclusion.⁷ Appellant has contended that he was incompetent during the period in question. But this has nothing to do with the reason the Office denied his claim of recurrence on March 15, 1991. The Office denied his claim of recurrence because he failed to submit sufficient medical opinion evidence to establish that his July 14, 1988 fall at work incapacitated him for his regular job as a computer operator beginning July 3, 1989.

Appellant's December 13, 2005 request for reconsideration does not show clear error in the Office's March 15, 1991 decision. The Board will, therefore, affirm the Office's January 23, 2006 decision denying his untimely request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's December 13, 2005 request for reconsideration. Appellant's request was untimely and failed to present clear evidence of error in the Office's March 15, 1991 decision to deny his claim of recurrence.

⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board