

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

---

A.B., Appellant	)	
	)	
and	)	<b>Docket No. 10-206</b>
	)	<b>Issued: February 26, 2010</b>
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 26, 2009 appellant filed a timely appeal from the October 13, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's October 13, 2009 decision.

**ISSUE**

The issue is whether the Office properly denied appellant's September 21, 2009 request for reconsideration on the basis that it was untimely and failed to establish clear evidence of error.

**FACTUAL HISTORY**

On December 27, 1978 appellant, then a 33-year-old jet engine mechanic, sustained a traumatic injury in the performance of duty while helping to move an engine fan case. The Office accepted his claim for low back strain and herniated disc at L4-5. On December 29, 1998 it terminated his compensation on the grounds that the weight of the medical evidence, as represented by the opinion of an impartial medical specialist, established that he no longer had

medical residuals of the accepted employment injury. In a July 25, 2002 decision, the Office reviewed the merits of appellant's claim and denied modification of the termination.

On September 7, 2006 the Board affirmed an Office decision to deny appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.<sup>1</sup> On June 16, 2009 the Board again affirmed an Office decision to deny appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.<sup>2</sup>

On September 21, 2009 appellant once again requested reconsideration. Seeking Office disability status with full back pay, he noted that he had not worked since 1984 and was not able to obtain employment due to his back injury. He stated that his doctor in California had not released him to go back to work. Appellant took issue with the last doctor the Office sent him to and stated he should have been given the chance to have a second opinion. He stated that he was not able to find an orthopedic specialist who would take a workers' compensation case. Appellant felt that the Office's decision was in error and should be given another consideration. He alleged that the last Office physician did not perform a proper examination. Appellant alleged that the Office decision was wrong, unjust and made no sense. He stated that the Office failed to show that he was no longer disabled.

In a decision dated October 13, 2009, the Office denied appellant's September 21, 2009 request for reconsideration. It found that his request was untimely and failed to establish clear evidence of error in its July 25, 2002 decision.

On appeal, appellant argues that because of circumstances in his congressman's office, his 2002 request for reconsideration was lost and never forwarded to the Office. He added that he has been unable to find an orthopedic surgeon who will see him. Appellant indicated that the Office should put him back on disability status due to the facts and nature of his injury. He submitted a November 10, 2009 medical report from Dr. Malcolm E. Heppenstall, an orthopedic surgeon.

### **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."<sup>3</sup>

---

<sup>1</sup> Docket No. 06-746 (issued September 7, 2006), *petition for recon. denied* (issued February 7, 2007).

<sup>2</sup> Docket No. 09-23 (issued June 16, 2009), *petition for recon. denied* (issued September 18, 2009).

<sup>3</sup> 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.<sup>4</sup>

### ANALYSIS

Appellant comes to this Board for a third time seeking review of an Office decision denying his request for reconsideration. The most recent merit decision in his case remains the Office's July 25, 2002 decision denying modification of the termination of his compensation. Appellant had one year from the date of that decision, or until July 25, 2003, to make a timely request for reconsideration.

In order for the Office to reopen his case, appellant must submit evidence or argument that shows clear evidence of error in the Office's decision. As the Board has noted on the prior appeals, "clear evidence of error" is intended to be a difficult standard. Appellant's request would have to establish on its face that the Office's termination of compensation was erroneous. It cannot be a matter of opinion. It must be a matter of proof.

Appellant's September 21, 2009 request for reconsideration does not show clear evidence of error. Appellant simply disagreed with the Office's decision. He took issue with the examination he received from the impartial medical specialist. As the Board explained to appellant in 2009, simply rearguing the merits of his case and expressing his disagreement with the Office decision is no proof that the termination of his compensation, based on the opinion of an impartial medical specialist, was erroneous. Appellant's September 21, 2009 request for reconsideration presents nothing new, and nothing that clearly proves that the Office's termination of compensation was erroneous.

The Board will therefore affirm the Office's October 13, 2009 decision denying appellant's September 21, 2009 request for reconsideration.

On appeal, appellant once again argues how his congressman's office did not forward his initial request for reconsideration to the Office and how the Office should reinstate his disability status. These are the same arguments he made previously. The Board will affirm the Office's denial of his untimely request. Appellant did submit new evidence, a November 10, 2009 medical report, but the Board has no jurisdiction to review evidence that was not in the case record that was before the Office at the time of its October 13, 2009 decision.<sup>5</sup> The Board therefore cannot review this medical report.

---

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> 20 C.F.R. § 10.501.2(c).

**CONCLUSION**

The Board finds that the Office properly denied appellant's September 21, 2009 request for reconsideration. The request was untimely and showed no proof that the Office improperly terminated his compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2010  
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