United States Department of Labor
Employees' Compensation Appeals Board

EARL L. PITTS, Appellant	)	
and	)	**Docket No. 04-64**
	)	**Issued: August 9, 2005**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, Warner Robins, GA, Employer	)	

Appearances:
Earl L. Pitts, pro se
Miriam D. Ozur, Esq., for the Director

Oral Argument July 12, 2005

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On October 9, 2003 appellant filed a timely appeal from the October 7, 2003 nonmerit decision of the Office of Workers' Compensation Programs, which denied his September 2, 2003 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 7, 2003 nonmerit decision. The Board has no jurisdiction to decide whether appellant sustained a recurrence of disability on July 3, 1989 as a result of an accepted employment injury or whether he is otherwise entitled to compensation. The only issue on this appeal is whether the Office properly denied appellant's September 2, 2003 request for reconsideration of his claim.

ISSUE

The issue is whether the Office properly denied appellant's September 2, 2003 request for reconsideration.

FACTUAL HISTORY

The history of this case is set forth in the Board's prior decisions and is hereby incorporated by reference.[1] Basically, appellant filed a claim alleging that he sustained a recurrence of disability on July 3, 1989 as a result of his July 14, 1988 employment injury. The Office denied this claim on January 16, 1990, finding that he failed to submit evidence sufficient to establish that his current back condition was causally related to his July 14, 1988 employment injury. On November 29, 1990 appellant made a timely request for reconsideration. On March 15, 1991 the Office granted his request, reviewed the merits of his claim and denied modification of its prior decision. The Office found that the medical evidence failed to demonstrate that the claimed condition or disability for work was causally related to appellant's accepted employment injury.

This was the last decision on the merits of appellant's claim of recurrence. The statement of appeal rights accompanying the Office's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of the decision, or within one year of March 15, 1991.

On September 2, 2003 appellant again requested reconsideration. He offered arguments and enclosed a few documents for the Office's review.

In a decision dated October 7, 2003, the Office found that appellant's September 2, 2003 request for reconsideration was untimely and failed to show clear evidence of error in the March 15, 1991 decision.

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]

The Office, through regulations, has imposed limitations on the exercise of its discretion 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

[1] Docket No. 94-0544 (issued July 19, 1995); Docket No. 99-0739 (issued March 31, 1999) (order dismissing appeal); Docket No. 01-0798 (issued October 9, 2001); Docket No. 03-0887 (issued June 5, 2003).

[2] 5 U.S.C. § 8128(a).

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 year in which a claimant has to timely request reconsideration shall not include any period subsequent to an Office decision for which the claimant can establish through probative medical evidence that he is unable to communicate in any way and that his testimony is necessary in order to obtain modification of the decision.[4]

ANALYSIS

The most recent decision on the merits of appellant's case was the Office's March 15, 1991 decision denying appellant's claim of recurrence. Appellant had one year beginning March 15, 1991 or until March 15, 1992 to request reconsideration of this Office decision. The appeal rights attached to the Office's March 15, 1991 decision clearly explained this one-year limitation. Because appellant made his September 2, 2003 request for reconsideration more than 11 years after this time limitation expired, the Board finds that his request was untimely.

The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an Office decision for which the claimant can establish through probative medical evidence that he is unable to communicate in any way and that his testimony is necessary in order to obtain modification of the decision. Appellant argues that he was adversely affected by medications, but he has submitted no probative medical evidence establishing that he was "unable to communicate in any way" for a period of some 11 years or from sometime before the time limitation expired on March 15, 1992 through, more or less continuously, sometime after September 2, 2002. A psychiatric admission report from Dr. Joseph Butler indicates that appellant received treatment for his nerves beginning May 1, 1990, but this does not establish that he was unable to communicate in any way for the next 12 or 13 years. As the procedural history of this case shows, appellant was in fact able to communicate during this period when he filed multiple requests for reconsideration with the Office and multiple appeals to this Board. His September 2, 2003 request for reconsideration remains untimely.

The question for determination, therefore, is whether appellant's untimely September 2, 2003 request for reconsideration demonstrates clear evidence of error on the part of the Office in its March 15, 1991 decision. The Board finds that it does not, as neither the request, nor the evidence submitted in support thereof shows on its face that the Office's March 15, 1991 decision denying appellant's claim of recurrence was erroneous. The magnetic resonance imaging (MRI) scan reports from Dr. Paul Chandler, showing the state of appellant's lumbar and cervical spine on November 5, 2002, are no evidence that he sustained a recurrence of disability on July 3, 1989 as a result of his July 14, 1988 employment injury, nor are the diagnostic radiology reports obtained on November 10, 1998. Dr. Hugh F. Smisson, III does not address this issue in his November 2, 1998 report. Neither does Dr. Lee in his October 23, 1989 report, Dr. Benjamin M. Johnston in his July 22, 2003 report; or Dr. Harvey A. Jones in his various reports. Dr. Jones was of the opinion that appellant sustained a cervical and lumbar disc

[3] 20 C.F.R. § 10.607 (1999).

[4] *Id*. § 10.607(c).

herniation as a result of the fall he had on July 14, 1988, but he expressed no opinion on the issue decided by the Office's March 15, 1991 decision, namely, whether appellant stopped work on July 3, 1989 as a result of his July 14, 1988 employment injury. In the report he dictated on July 7, 1989, Dr. Jones described the history of injury that appellant related to him, but he expressed no opinion on whether his July 14, 1988 employment injury caused him to stop work on July 3, 1989. The discharge summary from Middle Georgia Hospital shows that appellant underwent surgery on July 18, 1989 but does not address whether he stopped work on July 3, 1989 as a result of the July 14, 1988 employment injury.

On October 2, 1989 Dr. Peter O. Holiday, III, appellant's neurological surgeon, reported as follows:

> "[Appellant] is about 2 months status post bilateral discectomy at L5-S1 and a lateral fusion. Prior to surgery he had severe pain down both legs, at times, one worse than the other. He says that now his left leg is not bothering him at all and sensation is returning nicely in his right foot. He does walk outdoors. On exam[amination], straight leg raise is negative in a seated position to 60 degrees bilaterally. Bowstring sign is negative bilaterally. His reflexes are 2+ and equal at the knee, 1+ at the left ankle, ½+ at the right ankle. He is looking good. I will check him in another six weeks and hope to see some x-rays at that point."

This report does not address the issue decided by the Office's March 15, 1991 decision. On its face, this report does not establish that appellant sustained a recurrence of disability on July 3, 1989 as a result of his July 14, 1988 employment injury.

The "clear evidence of error" standard for untimely requests is intended to be a difficult one.[5] Unless the Office, on its own motion, reopens his case for a merit review on the issue of recurrence, any further request for reconsideration will be subject to the same difficult standard.

CONCLUSION

The Board finds that the Office properly denied appellant's September 2, 2003 request for reconsideration. His request was untimely and failed to demonstrate clear evidence of error on the part of the Office in its March 15, 1991 merit decision.[6]

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[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b (May 1991).

[6] In addition to finding that appellant's request failed to show clear evidence of error, the Office found as follows:

> "You have not submitted evidence to show that the Office erroneously applied or interpreted a specific point of law; or advance a relevant legal argument not previously considered by the Office; or constitute relevant and pertinent new evidence not previously considered by the Office supporting that the Office erred in issuing the decision of March 15, 1991."

These findings indicate that the Office inappropriately discussed the standard of review for timely requests. 20 C.F.R. § 10.608(a) (1999). The Board finds that the Office committed harmless error in doing so because its decision explicitly denied appellant's untimely request on the grounds that it presented no clear evidence of error, which is the proper standard of review.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board