

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLYDE W. BELL, JR. and U.S. DEPARTMENT OF TREASURY,
BUREAU OF THE MINT, Philadelphia, Pa.

*Docket No. 96-1445; Submitted on the Record;
Issued May 26, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's December 27, 1995 request for reconsideration was untimely and did not establish clear evidence of error.

On August 17, 1992 appellant, then a 41-year-old former coin press operator, filed a notice of an occupational disease claiming that his anxiety and depression, of which he first became aware on February 8, 1991 were causally related to factors of his employment. Appellant's employment was terminated effective July 28, 1992 for excessive absence without leave.

In a statement dated November 25, 1992, appellant attributed his condition to having to work around noisy machines and in temperature extremes; complaints from supervisor and coworkers that he did not clean-up his work area; a supervisor that "screamed" at him regarding these complaints; receipt of a written reprimand over his threat to harm the supervisor; how criticism and threats of being fired caused him to become ill and led to his drinking heavily; how he felt that managers changed the rules of procedures on him and would belittle him for "being stupid"; how one supervisor constantly threatened firing for his losing time from work although appellant always provided legitimate medical documentation for his absences; how appellant became depressed and worried as he felt harassed and threatened by supervisors and ignored and shunned by coworkers.

A foreman at the employing establishment indicated that appellant did not follow the proper procedures in requesting leave and that he was on leave restriction for leave abuse; that appellant did not keep his assigned work areas clean; that appellant was counseled on his personal hygiene; that appellant did not cooperate with other employees assigned to work with him; and that appellant's personal hygiene was a major complaint of coworkers.

Medical evidence submitted by appellant did not specifically explain why particular employment factors would cause or aggravate an emotional condition.

In an August 12, 1993 decision, the Office rejected appellant's claim on the grounds that fact of injury was not established. The Office found that none of the medical evidence submitted supported that appellant's condition was due to any factors of employment.

By letter dated August 8, 1994, appellant, through his attorney, requested reconsideration of the Office's August 12, 1993 decision. In support of this request, appellant submitted a note from a psychiatric evaluation at Hahnemann University Hospital, a discharge summary from the hospital, hand written notes from meetings with Jefferson Family Medical Associates, two medical forms fill out by Dr. George Sowerby, a psychiatrist, and a notice of social security award.

In a letter dated October 14, 1994, appellant, through his attorney, submitted additional medical records in conjunction with his request for reconsideration. These included notes from Girard Medical Center dated February 8 to March 20, 1994 and notes from Thomas Jefferson University Hospital dated August 4 to August 5, 1992.

By decision dated October 26, 1994, the Office reviewed the merits of the claim but denied appellant's reconsideration request finding that review of the entire file failed to provide a medical opinion on the cause of appellant's condition. The Office indicated that appellant had not established that his condition was due to compensable work factors and that he had not submitted medical evidence supporting that any factors of appellant's employment caused, aggravated or precipitated appellant's psychiatric condition.

In a letter dated November 9, 1994, the Office informed appellant's attorney that his correspondence dated October 14, 1994 and accompanying documents were not associated with the file until after the October 26, 1994 reconsideration decision was rendered. The Office urged appellant to follow his appeal rights if he wished to pursue his claim.

By letter dated March 23, 1995, appellant's counsel requested the status of the claim. The Office responded on April 5, 1995, notifying appellant's counsel that no further decision would be issued until appellant pursued his appeal rights.

By letter dated December 27, 1995, appellant, through his attorney, requested reconsideration. Appellant submitted numerous exhibits which were already of record and a November 20, 1995 medical report from Dr. Gino Grosso, a Board-certified psychiatrist. He indicated that appellant had a panic disorder, phobic avoidance, depression and paranoia causally related to his working conditions. Dr. Grosso stated that the windowless work environment and temperature variations are known to trigger panic disorder. He also stated that the frequency of work site or assignment changes were a psychological overload for this cognitively limited and marginally adaptive individual. Dr. Grosso also stated that incidents that were confrontational or the expression of risky jokes impacted a panic prone and panic symptomatic individual.

By decision dated February 21, 1996, the Office found appellant's request for reconsideration untimely filed. The Office stated that it reviewed the evidence submitted with

appellant's reconsideration request and found this evidence did not establish clear evidence of error.

The only decision before the Board on this appeal is that of the Office dated February 21, 1996 in which the Office declined to reopen appellant's case on the merits because the request was not timely filed and did not show clear evidence of error. Since more than one year elapsed from the date of issuance of the Office's October 26, 1994 and August 12, 1993 decisions to the date of the filing of appellant's appeal, on April 10, 1996, the Board lacks jurisdiction to review those decisions.¹

The Board finds that the refusal of the Office to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his December 27, 1995 request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not show clear evidence of error was proper and did not constitute an abuse of discretion.

Under section 8128(a) of the Federal Employees' Compensation Act² the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations. Section 10.138(b) provides that, "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."³ In *Leon D. Faidley, Jr.*,⁴ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. The Office is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of the Office thereby requiring merit review of the claimant's case.⁵

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of the Office.⁶

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ Section 10.138(b)(2) provides in relevant part: "Any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.

⁴ 41 ECAB 104, 111 (1989).

⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458, 466 (1990).

⁶ 20 C.F.R. § 10.138(b)(2); *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

In the present case, the Office determined on October 26, 1994 that none of the medical evidence on file supported the fact that any factors of appellant's employment caused, aggravated, or precipitated appellant's psychiatric condition. Thus, it refused to modify its prior decision which found that fact of an injury was not established. Appellant requested his third reconsideration on December 27, 1995. Thus, the Office did not receive appellant's request for reconsideration for more than one year after the most recent merit decision, the October 26, 1994 decision. Section 10.138(b)(2) is unequivocal in setting forth the time limitation period and does not indicate that the late filing may be excused by extenuating circumstances. The Office properly determined that appellant failed to file a timely application for review.

The Office thereafter properly proceeded to perform a limited review and determine whether appellant's application for review showed clear evidence of error, which would warrant the reopening of his claim pursuant to 5 U.S.C. § 8128(a).

To exercise its discretion to determine whether appellant had presented with his application for review, clear evidence that the Office's October 26, 1994 decision was erroneous, the Office reviewed the evidence submitted in support of appellant's reconsideration request, along with the evidence submitted in support of appellant's second reconsideration request which was not considered in the October 26, 1994 decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, *supra* note 6.

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Leon D. Faidley, Jr.*, *supra* note 4.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In support of his reconsideration request, appellant submitted certain hospital reports and emergency room treatment records that were previously of record. Inasmuch as this medical evidence submitted was duplicative of evidence previously submitted, it therefore cannot serve as the basis for reopening the claim.¹⁴ Other medical records that were submitted also did not address the cause of appellant's condition such that they are not of sufficient probative value to shift the weight of the evidence in appellant's favor.

Appellant also submitted a November 20, 1995 medical report from Dr. Grosso. He indicated that appellant had a panic disorder, phobic avoidance, depression and paranoia causally related to his working conditions. Dr. Grosso stated that the windowless work environment and temperature variations are known to trigger panic disorder. He also stated that the frequency of work site or assignment changes were a psychological overload for this cognitively limited and marginally adaptive individual. Dr. Grosso also stated that incidents that were confrontational or the expression of risky jokes impacted a panic prone and panic symptomatic individual.

Although Dr. Grosso's report implicated appellant's former employment, he either did not attribute the emotional condition to specific established factors of appellant's employment or, to the extent that he attributed the condition to compensable work factors, he did not explain, with medical rationale, why the condition was work related or not due solely to an underlying condition.¹⁵ For example, Dr. Grosso attributed appellant's condition to teasing and name calling by coworkers and supervisors but he did not identify specific incidents of such.¹⁶ He also did not sufficiently explain why all of appellant's conditions were due to his employment in view of a record indicating that appellant had significant emotional disturbances since the 1970's when none of the earlier medical reports specifically attribute his emotional conditions to specific factors of his employment. Thus, Dr. Grosso's report is at variance with the factual evidence in the case file and is therefore of little probative value in demonstrating a causal relationship between the appellant's psychiatric condition and his employment. Also, while the Office accepted noise and temperature extremes as compensable factors, Dr. Grosso provided insufficient medical rationale to explain why such factors would cause or aggravate appellant's condition.¹⁷ Instead, he stated a conclusion without providing any medical reasoning to support the conclusion. Thus, Dr. Grosso's report is not sufficient to *prima facie* shift the weight of the evidence in appellant's favor and to show clear evidence or error in the Office's prior decision.

¹³ *Gregory Griffin, supra* note 5.

¹⁴ *Richard L. Ballard*, 44 ECAB 146 (1992).

¹⁵ See *Lillian Cutler*, 28 ECAB 125 (1976) regarding the standard under which emotional conditions may be established under the Act.

¹⁶ See *Tanya A. Gaines*, 44 ECAB 923 (1993).

¹⁷ See *Martha L. Watson*, 46 ECAB 407 (1995); see *Donna Faye Cardwell*, 41 ECAB 730 (1990).

For these reasons, the refusal of the Office to reopen appellant's claim on the merits was proper.

The decision of the Office of Workers' Compensation Programs dated February 21, 1996 is hereby affirmed.

Dated, Washington, D.C.
May 26, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member