U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE A. MIRELES and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, San Antonio, TX

*Docket No. 98-2496; Submitted on the Record;*
*Issued April 7, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138; and (2) whether the Office properly denied appellant's June 3, 1998 request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed, and appellant failed to present clear evidence of error.

On November 7, 1996 appellant, then a 51-year-old application clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained an emotional condition while in the performance of duty. He explained that he suffered from stress and tension due to the amount of work and pressure from his supervisor. Appellant alleged that his supervisor constantly intimidated him and insulted him in front of coworkers.

In a statement attached to appellant's Form CA-2, his supervisor, Irma Ruiz, indicated that she had always spoken to appellant in private and that she never embarrassed him or picked on him or talked down to him. Ms. Ruiz further indicated that she was very lenient with appellant because she suspected he may have had some emotional problems and that she assigned him the simplest clerical work. She also stated that, while she tolerated appellant's low productivity, he would become very stressed whenever she inquired about what he had been working on or what he had accomplished in a given day.

In response to the Office's January 10, 1997 letter, appellant submitted treatment records from Dr. Malathi V. Koli, a Board-certified psychiatrist, as well as a statement dated February 12, 1997. In his statement, appellant indicated that on several occasions Ms. Ruiz insulted and degraded him in front of coworkers. While he did not provide specific dates, appellant indicated that Ms. Ruiz began treating him in this manner after she became a supervisor and that the practice intensified after 1989.

By decision dated April 30, 1997, the Office denied appellant's claim for compensation on the basis that he failed to establish any compensable factors of employment. The Office explained that, absent evidence of error or abuse on the part of the employing establishment, the mere fact that appellant was not granted a transfer did not constitute a compensable factor of employment. Additionally, the Office explained that appellant had failed to substantiate his allegations that Ms. Ruiz constantly criticized his performance, publicly berated him and harassed him.

On December 3, 1997 appellant, through his congressional representative, filed a request for reconsideration. The request was accompanied by an undated report from Dr. Koli in which he diagnosed presenile dementia. Appellant also submitted a July 29, 1997 letter wherein he reiterated his earlier allegations that Ms. Ruiz yelled at him in front of other employees.

In a decision dated March 2, 1998, the Office denied appellant's request for reconsideration on the basis that the evidence submitted in support of the request for review was both duplicative and irrelevant.

Appellant filed a second request for reconsideration on June 3, 1998.[1] By decision dated June 15, 1998, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed, and that he failed to present clear evidence of error. Appellant subsequently filed an appeal with the Board on August 10, 1998.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed his appeal with the Board on August 10, 1998, the Board lacks jurisdiction to review the Office's merit decision dated April 30, 1997. Consequently, the only decisions properly before the Board are the Office's March 2 and June 15, 1998 decisions denying appellant's requests for reconsideration.

The Board finds that the Office properly denied to reopen appellant's case for a merit review under 20 C.F.R. §10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated

[1] Appellant essentially reiterated the contentions raised in his first request for reconsideration filed on December 3, 1997.

[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§501.2(c) and 501.3(d)(2).

[3] 20 C.F.R. §10.138(b)(1).

under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.[4]

Appellant's December 3, 1997 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, appellant did not advance a point of law or a fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office correctly noted that Dr. Koli's medical report was irrelevant to the issue of whether appellant had established any compensable factors of employment. Dr. Koli's report did not mention appellant's employment history or provide an opinion regarding the cause of appellant's diagnosed condition of presenile dementia. As such, this evidence is not relevant to the issue on reconsideration.[5] With respect to appellant's July 29, 1997 statement, appellant merely reiterated his earlier contention that Ms. Ruiz yelled at him in front of other employees. Appellant did not provide any additional evidence to substantiate his allegations. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.[6] Consequently, the repetitive nature of this evidence renders it insufficient to warrant reopening of appellant's claim on the merits.[7] Inasmuch as the newly submitted evidence on reconsideration is both repetitious and irrelevant, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).

The Board also finds that the Office properly denied appellant's June 3, 1998 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[10] The Office, through regulations, has imposed limitations on the exercise of

[4] 20 C.F.R. §10.138(b)(2).

[5] Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

[6] *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[7] Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995).

[8] 5 U.S.C. § 8128(a).

[9] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[10] Under Section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

its discretionary authority under section 8128(a).[11] One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.[12] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[13]

In its June 15, 1998 decision, the Office correctly noted that the only merit decision of record was issued on April 30, 1997 and that appellant's most recent request for reconsideration was dated June 3, 1998, more than one year after the Office's April 30, 1997 decision denying compensation. Consequently, the Office properly determined that appellant failed to file a timely request for reconsideration.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."[14] Consistent with Board precedent, Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[15]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[16] The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.[17] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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 substantial question as to the correctness of the Office decision.[20]

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[11] *See* 20 C.F.R. § 10.138.

[12] 20 C.F.R § 10.138(b)(2).

[13] *See Leon D. Faidley, Jr., supra* note 9.

[14] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

[16] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[17] *See Leona N. Travis*, 43 ECAB 227 (1991).

[18] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[19] *See Leona N. Travis, supra* note 17.

[20] *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr., supra* note 9.

In determining whether claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.[21] The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[22] In accordance with Board precedent and the Office's own internal guidelines, the Office performed a limited review of the record to determine whether appellant's request for reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

In his June 3, 1998 request for reconsideration, appellant again reiterated his allegations that Ms. Ruiz yelled at him in front of other employees. Once again, appellant did not offer any additional evidence in support of his allegations. None of the information submitted following the Office's April 30, 1997 decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. Appellant's general and unsubstantiated allegations of harassment and intimidation do not establish the presence of any compensable factors of employment. Additionally, Dr. Koli's most recent report is of no probative value in determining whether appellant has identified any compensable factors of employment. As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation.

The decisions of the Office of Workers' Compensation Programs dated June 15 and March 2, 1998 are affirmed.

Dated, Washington, D.C.
April 7, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[21] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[22] *Thankamma Mathews, supra* note 20; *Gregory Griffin*, 41 ECAB 458 (1990).