U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLIOTT L. HARVEY, III and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

Docket No. 02-2022; Submitted on the Record;
Issued May 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On January 27, 1998 appellant, then a 55-year-old letter carrier, filed a claim alleging that he sustained an emotional condition due to employment factors.[1] Appellant initially claimed that he sustained an emotional condition due to being racially insulted by a coworker at work on January 6, 1998. He later expanded his claim to allege that he was subjected to harassment on several occasions prior to January 6, 1998, including an incident about six months prior to January 6, 1998 when he was racially insulted. The Office accepted that appellant sustained a single episode of a major depressive disorder in the performance of duty.[2]

Appellant received treatment for his emotional condition from Drs. Sabah Chammas, an attending Board-certified psychiatrist and Larry Cammarata, an attending clinical psychologist. In a report dated October 2, 1998, Drs. Chammas and Cammarata determined that appellant was unable to return to the employing establishment for any form of work. The physicians diagnosed a single episode of major depression and indicated that appellant continued to have residuals of his employment injury.

The Office referred appellant to Dr. Charles F. Marsh, a Board-certified psychiatrist, who served as an Office referral physician, for further evaluation of his condition. In a report dated June 8, 1998 report,[3] Dr. Marsh determined that appellant had an emotional condition, which was

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[1] Appellant indicated that he experienced chest pain on January 6, 1998; he stopped work on that date and returned to work the next day. Appellant later stopped work for additional periods.

[2] The Office accepted that appellant had been subjected to a racial insult on January 6, 1998 and determined that the medical evidence showed that he sustained an emotional condition as a result of this single incident.

[3] The date May 27, 1998 appears at the top of the report but it was signed by Dr. Marsh on June 8, 1998.

related to the accepted employment factor of January 6, 1998.[4] Dr. Marsh stated that he anticipated that appellant would be able to return to work in two months or so after participating in a brief course of psychotherapy (6 to 12 sessions).

The Office determined that there was a conflict in the medical evidence regarding the cause and extent of appellant's disability and referred him to Dr. Stephen M. Stahl, a Board-certified psychiatrist, for an evaluation and opinion on this matter. In a report dated March 10, 1999, Dr. Stahl determined that appellant was capable of engaging in part-time work for an employer other than the employing establishment. He recommended that appellant participate in a vocational rehabilitation program and indicated that he eventually would be able to return to full-time work.[5]

In May 1999, the Office referred appellant for participation in a vocational rehabilitation program. The Office noted that the opinion of Dr. Stahl showed that appellant was capable of participating in such a program. By letter dated July 27, 1999, the Office advised appellant regarding the consequences of not fully participating in his vocational rehabilitation program and provided him with 30 days to participate in the program or present valid reasons for not doing so. By decision dated September 2, 1999, the Office suspended appellant's compensation effective September 12, 1999, on the grounds that he had not fully participated in his vocational rehabilitation program. The Office indicated that the weight of the evidence on this matter rested with the opinion of Dr. Stahl, the impartial medical examiner and noted that the evidence of Drs. Chammas and Cammarata did not show that appellant was unable to participate in his vocational rehabilitation program.

Appellant later began to participate again in a vocational rehabilitation program and his compensation was reinstated effective September 12, 1999. By letter dated June 3, 2002, appellant requested reconsideration of the Office's September 2, 1999 decision. In support of his request, appellant submitted a number of documents, including several medical reports. By decision dated June 20, 2002, the Office denied appellant's request for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.[6]

The Board finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

[4] In April 1998, Dr. Marsh had diagnosed an anxiety disorder and a single episode of a major depressive disorder and noted that the January 6, 1998 employment incident caused appellant's emotional condition.

[5] In a supplemental report dated April 21, 1999, Dr. Stahl stated that appellant had a preexisting, nonwork-related emotional condition, which rendered him vulnerable to anxiety and depression in a perceived hostile work environment. He indicated that on January 6, 1998 appellant sustained an employment-related aggravation of this underlying condition and posited that the employment-related component of his condition would resolve about six months after he returned to work.

[6] The record also contains a March 8, 2002 decision denying appellant's request for an oral hearing. Appellant did not appeal this decision and the matter is not currently before the Board.

The only decision before the Board on this appeal is the Office's June 20, 2002 decision denying appellant's request for a review on the merits of its September 2, 1999 decision. Because more than one year has elapsed between the issuance of the Office's September 2, 1999 decision and July 30, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 2, 1999 decision.[7]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[10] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[11]

In its June 20, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 2, 1999 and appellant's request for reconsideration was dated June 3, 2002, more than one year after September 2, 1999.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[12] 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[13]

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[7] *See* 20 C.F.R. § 501.3(d)(2).

[8] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.607(a).

[11] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[12] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence, which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[14] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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 substantial question as to the correctness of the Office decision.[19]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's September 2, 1999 decision and is insufficient to demonstrate clear evidence of error.

In connection with his June 3, 2002 reconsideration request, appellant argued that he had not received the September 2, 1999 decision, in which the Office suspended his compensation effective September 12, 1999, on the grounds that he had not fully participated in his vocational rehabilitation program. The Board has performed a limited review of the record and notes that this argument is irrelevant as it merely is an unsupported argument without basis.[20] Appellant submitted August 19 and December 27, 1999 reports, of Dr. Chammas, an attending Board-certified psychiatrist and Dr. Cammarata, an attending clinical psychologist. He also submitted

[14] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[15] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[16] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[17] *See Leona N. Travis*, *supra* note 15.

[18] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[19] *Leon D. Faidley, Jr.*, *supra* note 11.

[20] The September 2, 1999 decision, was properly addressed and duly mailed to appellant (5250 Wohlford Street, Oceanside, CA 92056) and his attorney (2859 El Cajon Boulevard, Suite 1E, San Diego, CA 92104) and appellant did not submit evidence rebutting the presumption of receipt. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

an October 29, 1999 report, of Dr. William A. Hinrichs, an attending Board-certified internist. However, these reports are irrelevant as they were previously submitted to and considered by the Office.[21] Appellant submitted a number of administrative documents, including copies of prior Office decisions, records from his participation in vocational rehabilitation in 2002, an Office letter with an attachment describing his appeal rights and extra copies of the above-noted medical reports. However, these documents bear no relevance to the correctness of the Office's September 2, 1999 determination that appellant's compensation should be suspended for failure to fully participate in vocational rehabilitation efforts. For these reasons, appellant's untimely reconsideration request did not show that the Office erred in its prior merit decision and the Office properly denied his request for merit review.

The June 20, 2002 decision of Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 28, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[21] Moreover, the October 29 and December 27, 1999 reports, contain no opinion on appellant's ability to participate in vocational rehabilitation.