United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 07-673**
	)	**Issued: January 15, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Nashville, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Oral Argument November 8, 2007

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions dated March 14 and November 1, 2006 and January 8, 2007, denying his requests for reconsideration. Because more than one year has elapsed between the most recent merit decision of the Office dated June 18, 2004 and the filing of this appeal on January 16, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 29, 2002 appellant, then a 51-year-old associate supervisor, filed an occupational disease claim for an emotional condition causally related to employment factors. He first realized the disease was caused or aggravated by his employment on January 14, 2002. Appellant stopped work on January 15, 2002. The employing establishment controverted the claim.

Appellant submitted a January 13, 2002 statement describing the factors of his employment that he believed contributed to his condition. He noted filing several Equal Employment Opportunity (EEO) complaints against management, including one against Paul Robbins, the manager of distribution operations, after he was passed over for at least 12 job vacancies. Appellant alleged that his nonselection was due to personal reasons. He filed an EEO complaint on March 29, 2001 against Carolos Tidwell, the acting manager of distribution operations, for issuing "bad and incorrect" performance evaluations on March 28, 2001. Appellant stated that Ruben Rodriguez, the plant manager, questioned him on April 5, 2001 about the movie, "Remember the Titans" and suggested that this was related to a "black and white issue." He alleged that this was "malice, intimidation, very unprofessional and nothing more than harassment." Appellant also alleged that this was an attempt by Mr. Rodriguez to entice him into a racial discussion and unprofessional act, which would cause his dismissal. He filed an EEO complaint on September 11, 2001 against Mr. Robbins for lecturing him about being the worst supervisor in the plant. Appellant filed another EEO complaint against Mr. Robbins on January 7, 2002 for issuance of a warning letter. He stated that he was informed on January 7, 2002 that his work schedule was changed when he was transferred from a position in manual cases to the "OCR" machines. Appellant asserted that he was denied the opportunity to receive EEO complaint counseling. He also alleged that he was subjected to discrimination, reprisals, harassment and stress.

On December 13, 2002 the Office denied appellant's claim. It found that the employment factors alleged were not compensable as they were not in the performance of duty. It did not address the medical evidence.[1]

Appellant requested a hearing that was held on September 30, 2003. In a January 2, 2004 decision, the Office hearing representative affirmed the December 13, 2002 decision.

Appellant requested reconsideration and referenced case numbers for several EEO complaints filed against the employing establishment. He also enclosed a copy of a May 3, 2004 order from the United States District Court for the Middle District of Tennessee, which was filed by appellant against the employing establishment. The order indicated that the parties had filed

[1] The Office found that appellant had listed seven noncompensable employment factors. These included not being selected for at least 12 job vacancies; the March 29, 2001 EEO complaint filed against Mr. Tidwell; being questioned by Mr. Rodriguez about "Remember the Titans" on April 5, 2001; the September 11, 2001 EEO complaint filed against Mr. Robbins; the January 7, 2002 EEO complaint filed against Mr. Robbins; the change in appellant's work schedule on January 7, 2002; and the denial of EEO complaint counseling. The Office advised appellant that the allegations of harassment and disparate treatment by management were not substantiated by the evidence. The Office also noted that there were no findings of error or abuse related to his EEO complaints.

an Offer of Judgment and Notice of Acceptance and that he was vacating the prior order, which was entered on April 27, 2004. Appellant also enclosed medical records. He also submitted a copy of the April 21, 2004 offer of judgment, which was vacated in the May 3, 2004 order.[2]

In a June 18, 2004 decision, the Office denied modification of the January 2, 2004 decision. The Office noted that there was no finding of fault in the Offer of Judgment or order and without such a finding, there was no evidence of error or abuse in the alleged administrative matters.

On April 26, 2005 appellant requested reconsideration and again referenced his EEO complaint claims filed against the employing establishment. He enclosed another copy of the April 21, 2004 Offer of Judgment. Appellant also enclosed an April 12, 2005 letter from Waite P. Stuhl, an attorney who represented appellant in federal court. Mr. Stuhl alleged that the central focus of appellant's federal court claim was harassment at the employing establishment. Appellant also submitted a letter from S. Delk Kennedy, Jr., an assistant United States Attorney, who enclosed a copy of a proposed settlement agreement and release and an agreed order of dismissal related to the same federal court action, which were unsigned and undated. The settlement agreement noted that there was no admittance of any error, fault or legal violation of any nature, by the defendant.

By decision dated March 14, 2006, the Office denied appellant's reconsideration request without reviewing the merits of the claim.

On March 21, 2006 appellant requested reconsideration and alleged that he should be afforded reconsideration as he believed that he had one year from the June 18, 2004 merit decision to file a request for reconsideration and his request was made on April 26, 2005. He stated that he was told that he did not need to submit the confidential sworn testimonies from the EEO complaint proceedings and enclosed the transcript of testimony related to their depositions. Appellant noted that he rejected the settlement agreement and release because "the agency erred or acted abusively and I was subject to harassment and discrimination." He alleged that he did not agree to any part of the settlement agreement.

By decision dated November 1, 2006, the Office denied appellant's March 21, 2006 request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

On November 20, 2006 appellant requested reconsideration. He repeated his arguments. Appellant alleged that his complete file showed that he had been subjected to racial discrimination, harassment, retaliation and improper treatment by the employing establishment. He alleged that he thought he had until June 18, 2005 to file his request for reconsideration and

[2] The Offer of Judgment indicated that an offer of settlement was made to appellant that would be comprised of compensatory damages in the amount of $52,500.00 and up to $20,000.00 dollars in attorney's fees. The offer indicated that it encompassed all outstanding claims including his claim of race discrimination, nonreceipt of a promotion in January 2001 and claims upon which appellant alleged discrimination based on retaliation from March 2001 through January 2002.

submit new evidence. Appellant also alleged that the Office refused to review testimony from his EEO complaint claim.

By letter dated December 6, 2006, the Office informed the employing establishment that appellant had filed a timely request for reconsideration. The employing establishment was allotted 20 days to submit a response or comments. On December 20, 2006 the employing establishment noted that appellant's EEO complaints were finalized, with no finding of fault.

By decision dated January 8, 2007, the Office denied appellant's November 20, 2006 request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[4]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[5]

ANALYSIS -- ISSUE 1

Appellant's claim for an emotional condition was denied by the Office in merit decisions dated December 13, 2002, January 2 and June 18, 2004. He disagreed with the denial of his claim for an emotional condition and requested reconsideration on April 26, 2005.

Appellant referred to a list of several EEO complaints which had been filed against the employing establishment and submitted a copy of the April 21, 2004 Offer of Judgment pertaining to an EEO complaint claim. However, this reference to the EEO complaints was not

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b).

[5] *Id*. at 10.608(b).

new as he had previously referred to the EEO complaints in his prior request for reconsideration. The Offer of Judgment was not new as it was previously submitted and considered by the Office. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6]

In the April 12, 2005 letter, Mr. Stuhl merely indicated that he had represented appellant in his federal court action, the focus of which had been harassment at the employing establishment. This is not relevant and pertinent new evidence. Counsel's representation of appellant is not relevant to the claim for an emotional condition. Simularly, Mr. Kennedy enclosed a copy of a proposed settlement agreement and release an agreed order of dismissal related to the same federal court action. This is not relevant and pertinent new evidence as it does pertain to whether the alleged instances of harassment or discrimination were established as factual. The evidence, while new, is not relevant as there were no findings of any kind.

Consequently, the evidence submitted by appellant on reconsideration was insufficient to warrant reopening the claim for a merit review. Therefore, the Office properly denied his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[7] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[8] Office regulation states that it will reopen a claimant's case for merit review, notwithstanding the one year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.[10] To show clear

[6] *James W. Scott*, 55 ECAB 606 (2004).

[7] 20 C.F.R. § 10.607; *Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

[8] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[9] 20 C.F.R. § 10.607(b).

[10] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[11]

ANALYSIS -- ISSUE 2

In its November 1, 2006 and January 8, 2007 decisions, the Office properly determined that appellant failed to file a timely application for review. The Office issued its most recent merit decision on June 18, 2004. Appellant's March 21 and November 20, 2006 requests for reconsideration were submitted more than one year after the June 18, 2004 merit decision and were, therefore, untimely.

In accordance with internal guidelines and with the 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 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 decision and is insufficient to demonstrate clear evidence of error. In its last merit decision dated June 18, 2004, the Office found that appellant did not establish that he sustained an emotional condition in the performance of duty.

By letters dated March 21 and November 20, 2006, appellant requested reconsideration. He contended that he had one year from the June 18, 2004 merit decision to file a request for reconsideration and his request was made on April 26, 2005. As noted under issue number one, the Office denied further merit review on March 19, 2006. Thereafter, appellant's March 21 and November 20, 2006 requests for reconsideration were untimely as they were made more than one year after the Office's June 18, 2004 merit decision. Therefore, these subsequent requests were untimely.

Appellant alleged that he was told that he did not need to submit the confidential sworn testimonies of the parties from his EEO complaint proceedings and enclosed the transcript of testimony related to their depositions. However, this contention does not establish his allegations of harassment or discrimination as factual or established. As submitted, testimony from proceedings related to his EEO complaint proceedings alone do not substantiate appellant's allegations. He has not shown that any findings were ever made in relation to his EEO

[11] *Id.*

proceedings. Appellant's argument does not raise a substantial question as to the correctness of the Office's decision denying his claim for an emotional condition.[12]

Appellant stated that he rejected the settlement agreement and release because "the agency erred or acted abusively and I was subject to harassment and discrimination." He also repeated his belief that he was subjected to racial discrimination, harassment, retaliation and improper treatment while at the employing establishment. However, appellant's arguments are not new and do not establish his allegations. He failed to submit evidence that raises a substantial question as to the correctness of the Office's June 18, 2004 decision.

Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.[13]

Consequently, appellant has not established clear evidence of error on the part of the Office. The Board finds that the Office properly declined to reopen appellant's claim for a merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim with respect to the April 26, 2005 reconsideration request. The Office also properly determined that appellant's March 21 and November 20, 2006 requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

[12] *See Leon J. Modrowski*, 55 ECAB 196 (2004) (submission of a settlement agreement found to be insufficient to raise a substantial question as to the correctness of the Office's denial of the claimant's emotional condition claim).

[13] *Annie L. Billingsley*, 50 ECAB 210 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 8, 2007, November 1 and March 14, 2006 are affirmed.

Issued: January 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board