

**United States Department of Labor
Employees' Compensation Appeals Board**

A.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Knoxville, TN, Employer**

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**Docket No. 07-2057
Issued: January 17, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 2, 2007 appellant filed a timely appeal of the August 23, 2006 and July 3, 2007 nonmerit decisions of the Office of Workers' Compensation Programs. The most recent merit decision is dated March 7, 2006. Because appellant filed the current appeal more than one year after the latest merit decision, the Board does not have jurisdiction over the merits of the claim.¹

ISSUES

The issues are: (1) whether the Branch of Hearings & Review properly denied appellant's August 8, 2006 request for a hearing; and (2) whether the Office properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

¹ 20 C.F.R. §§ 501.2(c), 501.3(d) (2007).

FACTUAL HISTORY

On November 5, 2005 appellant, then a 46-year-old automation clerk, filed an occupational disease claim for mental stress. He identified September 23, 2005 as the date he first became aware of his illness. Appellant indicated that he previously injured his neck, right shoulder and right arm at work on January 31, 1998. He attributed his current emotional condition to the “red tape” he had to put up with ever since filing a claim for his January 31, 1998 injury. Appellant alleged that the employing establishment had a problem with him being injured and, because of this, he encountered difficulties with work assignments and scheduling. He alleged that he was harassed at work and that certain injury-related medical bills had not been paid by the Office. Appellant was sued for one unpaid medical bill and his wages were garnished as a result. He stated that there were rumors circulating at work that he had divorced his wife and came out of the closet acknowledging that he was homosexual. Another reported incident involved an employee who feigned striking appellant. The medical evidence indicated that appellant was diagnosed with organic affective syndrome.

The Office denied the claim on March 7, 2006 finding that appellant did not provide sufficient information regarding the employment incidents that were allegedly responsible for his diagnosed psychiatric disorder.

On August 8, 2006 appellant requested an oral hearing. The Branch of Hearings & Review denied the request on August 23, 2006. It found that appellant’s request was untimely because it was not made within 30 days of the March 7, 2006 Office decision. Therefore, appellant was not entitled to a hearing as a matter of right. He was also denied a discretionary hearing. The Branch of Hearings & Review advised appellant that he could pursue his emotional condition claim by requesting reconsideration before the Office.

On April 26, 2007 the Office received a handwritten, undated request for reconsideration. Appellant described the medical billing issue that he previously encountered and how he had filed a claim for stress, which the Office denied. He asked the Office to reconsider the prior denial, but he did not submit any additional evidence or argument in support of the request.

By decision dated July 3, 2007, the Office denied appellant’s request for reconsideration. The Office found that appellant’s April 26, 2007 request was untimely and that he had not presented clear evidence of error on the part of the Office in denying his November 5, 2005 emotional condition claim.

LEGAL PRECEDENT -- ISSUE 1

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or a review of the written record.² A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.³ If the request is not made within 30 days, a claimant is

² 5 U.S.C. § 8124(b) (2000); 20 C.F.R. § 10.616(a).

³ 20 C.F.R. § 10.616(a).

not entitled to a hearing or a review of the written record as a matter of right. Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority to either grant or deny a hearing request and the Office must exercise its discretion.⁴

ANALYSIS -- ISSUE 1

Appellant filed his hearing request approximately five months after the Office's March 7, 2006 decision. Because he failed to meet the 30-day filing requirement, he is not entitled to a hearing as a matter of right. In its August 23, 2006 decision, the Branch of Hearings & Review also denied appellant's hearing request because the pertinent issue could alternatively be addressed by requesting reconsideration before the Office and submitting additional relevant evidence. This particular basis for denying his hearing request is considered a proper exercise of its discretionary authority.⁵ There is no evidence of record establishing that the Branch of Hearings & Review abused its discretion. Accordingly, the Board finds that the denial of appellant's untimely hearing request was proper.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁶ The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.⁷ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸ When a request for reconsideration is untimely, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."⁹

⁴ See *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

⁶ This section provides in pertinent part: "[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).

⁷ 20 C.F.R. § 10.607.

⁸ 20 C.F.R. § 10.607(a).

⁹ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration is undated. The Office received the request on April 26, 2007, which is more than a year after the March 7, 2006 merit decision denying the claim. Because appellant's request was untimely, he must demonstrate "clear evidence of error" on the part of the Office in denying his claim for an emotional condition.¹⁰ Appellant, however, did not submit any additional evidence regarding the employment incidents he alleged were responsible for his psychiatric disorder. Thus, there is no clear evidence of error, and further merit review is unwarranted. Accordingly, the Office properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Branch of Hearings & Review properly denied appellant's August 8, 2006 request for a hearing. The Board also finds that appellant's April 26, 2007 request for reconsideration was untimely and he failed to demonstrate clear evidence of error. Therefore, he is not entitled to further merit review.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2007 and August 23, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 17, 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

¹⁰ 20 C.F.R. § 10.607(b).