

¹ See 20 C.F.R. §§ 501.2(c) and 501.3. For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

This case has previously been before the Board. In the prior appeals, the Board issued decisions affirming the Office's refusal to reopen appellant's case for review on the merits because his applications for review were untimely filed and failed to demonstrate clear evidence of error.² The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

In a March 21, 2009 memorandum, appellant requested reconsideration of his claim and argued that the Office improperly denied his emotional condition claim by not accepting any compensable employment factors.³ He alleged that on April 5, 1989 Rodney Chock, his supervisor, committed harassment by telling him that he could not work in the Self-Help Store at his workplace. Appellant asserted that after he later returned to light-duty work at the Self-Help Store he was forced to work beyond his medical restrictions.⁴ He provided an extensive discussion of Board precedent dictating that emotional reactions to regular or specially assigned duties are compensable. Appellant alleged that in October 1988 Mr. Chock wrongly denied his request for use of sick leave, that in December 1989 he was issued an unfair rating in his annual performance appraisal and that he did not receive adequate recognition for a cost-saving idea.

Appellant submitted several documents that had not been previously considered, including October 19 and 26, 1987 documents relating to a disability rating made by the Veterans Administration for his service-related flat feet condition and an April 19, 1989 memorandum in which Mr. Chock indicated that light-duty work had been found which was within his medical restrictions.⁵

In a June 27, 2009 letter, appellant made reference to his March 21, 2009 memorandum and indicated that he wished to have "a merit decision based on all the evidence ... in my file."

In a July 16, 2009 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

² Docket No. 08-1082 (issued October 20, 2008); Docket No. 02-1096 (issued April 21, 2003); Docket No. 00-2779 (issued October 3, 2001); Docket No. 96-28 (issued January 20, 1998); Docket No. 95-1566 (issued April 15, 1997). On October 7, 2003 the Board issued an order denying appellant's petition for reconsideration in connection with Docket No. 02-1096 (issued April 21, 2003). The Office had previously denied appellant's claim that he sustained an employment-related emotional condition on the grounds that he did not establish any compensable employment factors. The last Office merit review on this issue is dated May 28, 1993.

³ Appellant also submitted previously considered memoranda dated January 14, March 3, April 2 and 4, 2008, which were produced in conjunction with prior reconsideration requests.

⁴ Appellant also claimed that the medical evidence of record showed that he had to work beyond his medical restrictions.

⁵ Appellant also submitted previously considered documents, including an April 1, 1981 disability rating made by the Veterans Administration for his service-related flat feet and skin conditions and an April 11, 1989 letter in which Mr. Chock indicated that no job was available that required absolutely no standing or walking.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁶ 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 Federal Employees' Compensation Act.⁷

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."⁸ Office regulations and procedure 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

ANALYSIS

In its July 16, 2009 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed in

⁶ 20 C.F.R. § 10.607(a).

⁷ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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)." *Id.* at Chapter 2.1602.3c.

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

March 2009, more than one year after the Office's May 28, 1993 decision denying his emotional condition claim and, therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.¹⁵

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its May 28, 1993 decision.¹⁶ He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In support of his untimely reconsideration request, appellant submitted a March 21, 2009 memorandum in which he claimed that he had established employment factors relating to such matters as harassment by supervisors, working in a job beyond his medical restrictions, improper denial of leave usage, unfair assessment of his work performance and inadequate recognition of his accomplishments. He discussed at length a number of Board cases which he believed showed that various incidents and conditions at work constituted employment factors. Appellant also made similar arguments in a September 2, 2009 memorandum he submitted on appeal to the Board.

Appellant alleged that in April 1989 Mr. Chock, a supervisor, committed harassment by telling him that he could not work in the Self-Help Store at his workplace and that after he later returned to light-duty work at the Self-Help Store he was forced to work beyond his medical restrictions. He argued that Mr. Chock wrongly denied his request for use of sick leave, issued him an unfair rating in his annual performance appraisal and did not give him adequate recognition for a cost-saving idea.¹⁷

However, the argument appellant submitted would not be relevant to the main issue of the present case as it does not tend to lend any support to his assertion that he has submitted sufficient evidence to establish various employment factors. The Office determined that appellant did not establish any compensable employment factors because he did not present adequate documentary evidence to support his allegations as factual. Appellant's mere assertions that he has proven such factors would not establish his claim or otherwise show that the Office had erred in its determination.¹⁸

Appellant also submitted several administrative documents, but these documents are not relevant as they do not help to substantiate his assertions regarding his claimed employment

¹⁵ See *supra* note 7.

¹⁶ The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.

¹⁷ Appellant also submitted previously considered memoranda dated January 14, March 3, April 2 and 4, 2008, which had been submitted in connection with prior reconsideration requests.

¹⁸ Moreover, the Board cases detailed by appellant do not show that the Office erred in its legal analysis. Appellant provided an extensive discussion of Board precedent dictating that emotional reactions to regular or specially assigned work duties are compensable, but he did not adequately explain how this precedent was relevant to the established facts of his case. The Board further notes that he presented similar arguments in previously submitted documents, including those dated June 16, 1998, September 6, 2000, November 15, 2001, December 12, 2007 and January 14, March 3, April 2 and 4, 2008.

factors or otherwise show clear error in the Office's May 28, 1993 decision. The documents from 1989 concerning available work within medical restrictions would not tend to establish appellant's claim that he had to work beyond his medical restrictions. Appellant did not explain the relevance of the documents from 1981 and 1987 relating to his service-connected disability rating and they would not show that the Office committed clear error in its May 28, 1993 decision.

For these reasons, the evidence submitted by appellant in connection with his untimely reconsideration request does not raise a substantial question concerning the correctness of the Office's May 28, 1993 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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