United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 07-1693**
	)	**Issued: December 26, 2007**
DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF RESOLUTION MANAGEMENT, Little Rock, AR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from the March 7, 2007 decision of the Office of Workers' Compensation Programs denying further review of the merits of his claim on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. The latest merit decision in the case is dated January 19, 2006. Because appellant filed his appeal more than a year after the last merit decision, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has no jurisdiction over the merits of this case. The only decision properly before the Board is the Office's March 7, 2007 decision denying reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. On appeal, appellant argued that he mailed his request for reconsideration within one year of the January 19, 2006 merit decision.[1]

[1] Along with his notice of appeal, appellant submitted new factual evidence related to both the merits of his claim and the timeliness of his request for reconsideration. As these documents were not a part of the record at the time the Office made its final decision, the Board is precluded from reviewing the evidence. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On March 3, 2004 appellant, then a 47-year-old equal employment opportunity (EEO) counselor, filed an occupational disease claim, Form CA-2, alleging that he developed primary hypertension as a result of his working conditions, responsibilities and relationships.

Appellant stated that his work environment was too noisy because it contained two copiers, a fax machine, paper punches, a cutting board and a heavy duty stapler, which were used by more than 18 employees. He was subjected to inflexible work locations and poor maintenance, as evidenced by asbestos in the building. Appellant had an excessive workload, long hours, too much critical work, too much boring and repetitive work and deadline pressures. He experienced a lack of training and support, organizational change, confusion over priorities, unequal procedures and standards and heavy emotional demands. Appellant also faced bullying, harassment, discrimination, client hostility, conflicts with supervisors and managers and a negative work culture. All of these factors led to high blood pressure. When appellant returned to his employing establishment office in September 2003 after several months of working from home, his blood pressure symptoms, which had been under control, began to reemerge.

The employing establishment controverted appellant's claim. It noted that he had an office with a door to block noise from the hallway and that all asbestos had been removed from the building. Appellant was approved to work from home from March to September 2003, but was removed from the flexi-place program because he did not meet his performance standards. His position did not require overtime work. The employing establishment had no complaints from appellant on file alleging bullying or harassment. It was unaware of any poor working relationships between appellant and any coworkers or managers. The employing establishment submitted his position description, performance standards, and various documents related to his employment in 2002 and 2003.

On April 5 and May 7, 2004 the Office requested additional medical and factual information about appellant's claim. In an undated letter received on June 16, 2004, appellant stated that his workload had increased in part because he was required to use a time-consuming new web-based case tracking and scanning system. He noted that the case processing standards had been increased from 7 cases to 12 cases for an outstanding rating. Staff meetings were rife with confrontation, complaining, and personal attacks, which caused him stress and anxiety. Managers at the employing establishment classified appellant's family care leave and other medical leave as leave without pay, which caused financial hardship. He was being treated with medication and counseling for his blood pressure and emotional condition.

By decision dated June 18, 2004, the Office denied appellant's claim on the grounds that he had not established any compensable factors of employment.

On July 16, 2004 appellant requested an oral hearing, which was held on October 26, 2005. In addition to testifying about the work environment and his workload, appellant submitted medical records from October 2003 to April 2004. In October 2003 appellant sought treatment from Dr. Phillip Monroe, a family practitioner, for mold allergies and a sprained right ankle. On February 25, 2004 Dr. Monroe reported that appellant had recently experienced an episode of extreme tiredness and sweating while driving and that hospitalization had been recommended. Appellant was certain that his high blood pressure was related to workplace stress. He told Dr. Monroe that his stress came from the work environment, not the

job itself. Appellant requested a note to allow him to work from home, and indicated that he did not want to take blood pressure medication. Dr. Monroe diagnosed elevated blood pressure. He noted that he did not believe that all of appellant's stress was work-environment related and encouraged him to take medication. On April 30, 2004 Dr. Monroe diagnosed appellant with benign essential hypertension and noted that appellant had been referred to a specialist for treatment of his depression.

By decision dated January 19, 2006, the Office hearing representative modified and affirmed the June 18, 2004 decision. He found that appellant's allegations of harassment by superiors and coworkers had not been established, as factual, by probative and reliable evidence. The Office hearing representative stated that the employing establishment's management style and his interaction with managers over administrative matters were not compensable factors of employment because appellant had not established error or abuse. However, he found that appellant did establish a compensable employment factor related to his inability to complete his work in a timely manner. The Office hearing representative found that the medical evidence of record did not establish a causal relationship between appellant's condition and the compensable employment factor.

In an undated letter, received by the Office on January 24, 2007, appellant requested reconsideration. He submitted a December 14, 2005 report from Dr. James Sims, a psychiatrist, who opined that various work incidents contributed to appellant's depression. Dr. Sims stated that appellant began feeling overworked in May 2001 because of the imbalances between the work assigned to him and his coworkers. The employing establishment did not assist him in resolving this situation. From September 2003 to September 2004 appellant was required to commute eight hours per day from Springfield, Missouri to Little Rock, Arkansas in order to have time at home to help his wife with their sick child. The combination of his workload and the commute adversely affected his emotional condition. Appellant was also threatened with termination, which was rescinded at the last moment. He reported that he was under constant scrutiny following this incident and feared being terminated again. Dr. Sims stated that this continual stress was detrimental to appellant's mental health. He opined that appellant's job stress was a major contributing factor to his depression and anxiety because he had no similar psychiatric symptoms prior to May 2001. Appellant submitted the statement of a coworker and administrative records related to his requests for alternative work arrangements in 2003 and 2005 and a termination action that was initiated and then rescinded in 2005.

On February 27, 2007 the employing establishment submitted a response to the evidence supplied by appellant.

By decision dated March 7, 2007, the Office denied further review of the merits of the claim on the grounds that the request was filed more than one year after the January 19, 2006 decision and appellant had not presented clear evidence of error on the part of the Office. The Office found that Dr. Sims' report did not establish that appellant's condition was related to the compensable factor of his employment.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority.[5] One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[6] If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.[7] In the absence of this evidence, the Office procedures state that date of the reconsideration request letter should be used to determine timeliness.[8] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error in accordance with section 10.607(b) of its regulations.[10] The Office's regulations provide that the application must establish, on its face, that the appealed decision was erroneous.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Thankamma Mathews*, 44 ECAB 765, 658 (1993).

[4] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[5] The Board has concurred in the Office's limitation of its discretionary authority. *See Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[6] 20 C.F.R. §§ 10.607; 10.608(b).

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[9] 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

[10] *Thankamma Mathews*, *supra* note 3 at 770.

[11] 20 C.F.R. § 10.607(b).

[12] *Id.*

[13] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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's decision.[17]

ANALYSIS

The Board finds that appellant's request for reconsideration was untimely. As noted above, a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought. The one-year time limitation began to run the day following the issuance of the last merit decision, dated January 19, 2006.[18] The regulations provide that, if the request is submitted by mail, the application will be deemed timely if postmarked within the time period allowed.[19] The Office received appellant's undated request for reconsideration on January 24, 2007. The record does not include a copy of the envelope in which appellant's request was delivered or any other evidence of mailing or receipt that would establish a timely filing. As the request was undated and the record is devoid of any additional information that would render appellant's request timely, the Board finds that the Office properly relied on the January 24, 2007 date of receipt, rendering the request untimely. Consequently, to have his claim reopened on the merits, appellant must show clear evidence of error by the Office hearing representative in his January 19, 2006 decision.

The Board finds that appellant did not present evidence establishing that the Office's decision was erroneous or raising a substantial question as to the correctness of the Office's decision. The Board finds that the coworker statement and the administrative records appellant submitted do not clearly establish any new compensable factors of employment or establish the allegations that appellant previously advanced. Specifically, they do not on their face prove any incidents of harassment or discrimination directed at appellant or error or abuse on the part of the employing establishment in its administrative decisions. Therefore this evidence is not sufficient to establish that the January 19, 2006 decision was clearly erroneous.

The Board also finds that report of Dr. Sims is insufficient to establish clear error in the January 19, 2006 decision, which found that the medical evidence did not show a causal relationship between appellant's emotional condition and the accepted employment factor.

[14] *Jesus D. Sanchez, supra* note 4 at 968.

[15] *Leona N. Travis, supra* note 13.

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

[17] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[18] *See Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000) (explaining that the date the decision is issued is not included in the year limit).

[19] 20 C.F.R. § 10.607(a).

Although Dr. Sims' report discusses the accepted factor of being unable to complete his assigned work, it also includes discussions of several other employment-related issues that were not accepted by the Office. Dr. Sims addresses all of these issues together and does not explain how appellant's emotional condition was caused by the accepted factor as opposed to the other factors he discussed. Because the report does not contain a properly rationalized opinion as related to the accepted factor, the Board finds that Dr. Sims' opinion does not establish clear evidence of error on the part of the Office hearing representative.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2007 is affirmed.

Issued: December 26, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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