

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NELSON L. BARBOUR and U.S. POSTAL SERVICE,
POST OFFICE, Fort Walton Beach, Fla.

*Docket No. 96-2338; Submitted on the Record;
Issued August 5, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On April 22, 1994 appellant, a clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 1994 he experienced stress due to harassment which caused pain in his back and legs. Appellant stopped work on March 7, 1994. Appellant's claim was accompanied by, *inter alia*, a narrative statement indicating that Roy Rutland, appellant's supervisor, had increased his work load and that on March 7, 1994 Mr. Rutland ordered appellant to perform work duties that could have resulted in further injury to his back rather than wait for the results of a medical reevaluation.

By letter dated June 7, 1994, the Office accepted that appellant's emotional condition was caused by the March 7, 1994 employment incident.

In a May 24, 1994 letter, the employing establishment contradicted appellant's account of the March 7, 1994 employment incident accompanied by witness statements and correspondence with appellant.

In a June 24, 1994 telephone conversation, the employing establishment requested that the Office review appellant's claim.

By decision dated September 12, 1994, the Office rescinded its acceptance that appellant's emotional condition was caused by the March 7, 1994 employment incident because the incident was not established as factual by the weight of the evidence of record.

In a September 12, 1995 letter, which was received by the Office on September 19, 1995, appellant, through his counsel, requested reconsideration of the Office's decision accompanied by medical evidence.

By decision dated May 3, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ 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.² When an application for review is not timely filed, the Office must undertake a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was erroneous.³

Since more than one year elapsed between the Office's September 12, 1994 decision and appellant's September 12, 1994 request for reconsideration which was received by the Office on September 19, 1995, the Board finds that the request was untimely filed.⁴ Further, the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The only medical evidence submitted by appellant in support of his request for reconsideration that relates to his emotional condition is the June 20, 1994 medical report of Dr. Lawrence E. Mobley, a Board-certified psychiatrist and neurologist. In his report, Dr. Mobley revealed a history of appellant's previous back injury and emotional condition, including the March 7, 1994 employment incident, family and medical treatment. Dr. Mobley noted his findings on mental examination and diagnosed major depression disorder, recurrent dysthymic disorder, dissociative disorder, post-traumatic stress disorder, and compulsive and avoidant personality traits. By history, Dr. Mobley diagnosed a herniated disc, chronic low back pain, residual lumbar radiculopathy and hiatal hernia. Dr. Mobley opined that appellant was disabled from work due to his emotional condition. The Board finds that appellant has failed to submit any reliable, probative or substantial evidence in support of his allegation.

¹ 5 U.S.C. § 8128(a).

² See 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ The Board notes that the Office's last merit decision dated September 12, 1994 was issued more than one year prior to the date that appellant filed his appeal with the Board on July 31, 1995. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim; see 20 C.F.R. § 501.3(d).

In order to establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁵ Dr. Mobely's report merely reiterated the history of the March 7, 1994 employment incident as told by appellant and Dr. Mobley's report does not manifest on its face that the Office committed error in its September 12, 1994 decision.

Inasmuch as appellant has failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.

The May 3, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
August 5, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Anthony A. Zarcone*, 44 ECAB 751 (1993).