

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD M. MILLER and U.S. POSTAL SERVICE,
POST OFFICE, Covina, CA

*Docket No. 99-2360; Submitted on the Record;
Issued October 24, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs in its March 23, 1999 decision properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On February 14, 1997 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim alleging that false charges, which were "maliciously fabricated by his postmaster, Karen Martin, as promised on January 8, 1996," caused him extreme anxiety and stress and prevented him from performing his work duties.

The employing establishment asserted in a challenge to appellant's claim that an investigation had been commenced on January 31, 1997 and continued on February 14, 1997 concerning appellant's fraudulent conduct in submitting a PS 3996 form for overtime pay on January 27, 1997 and failure to follow instructions, and that the investigation had been conducted in a professional manner. The employing establishment asserted further that, after the February 14, 1997 interview, appellant requested to see his union steward and later submitted his traumatic injury claim form. Appellant stopped work on February 14, 1997 and did not return. He was terminated from the employing establishment effective May 31, 1997.

Appellant submitted a work injury progress report from Dr. James Skalicky, attending psychologist, which noted that appellant was unable to work from February 14 to 28, 1997 due to an adjustment disorder. On March 11, 1997 the Office requested additional factual and medical evidence. A February 28, 1997 progress report from Dr. Skalicky was submitted on March 20, 1997.

By decision dated April 16, 1997, the Office denied appellant's claim. The Office found that the evidence of record established that appellant underwent an investigation at work, which amounted to an administrative matter of the employing establishment. The Office therefore

found that as the alleged incident was not the result of his regular work duties, performance of duty had not been established.

By letters dated April 22 and May 1, 1997, appellant requested an oral hearing and submitted new evidence.

A hearing was scheduled with the Branch of Hearings and Review for January 27, 1998, but appellant failed to appear on time. Appellant later requested reconsideration in a letter received by the Office on February 1, 1999 and submitted new evidence. He alleged in his reconsideration request that on February 14, 1997 Ms. Martin falsely accused him of misconduct and notified him that he would be terminated for “trying to deceive management and committing fraud.” Appellant stated that he was discriminated against and wrongfully terminated by the employing establishment in retaliation for engaging in activities protected under Title VII, and that such discrimination had caused the claimed condition. He further stated that he was harassed and discriminated against because he was denied continuation of pay benefits and forced to charge his missed time from work to his annual leave and leave without pay. Appellant stated that he filed an Equal Employment Opportunity (EEO) complaint as a result of the alleged discrimination, which resulted in proceedings before the Equal Employment Opportunity Commission (EEOC) and the California Unemployment Insurance Appeals Board (CUIAB). On reconsideration, appellant submitted a detailed progress report from Dr. Skalicky dated April 4, 1997 and a partial transcript of the EEOC proceedings and decision from the CUIAB for the record.¹

By decision dated March 23, 1999, the Office found that appellant’s reconsideration request was untimely filed and did not establish clear evidence that the Office’s final decision was erroneous.

The Board finds that the Office in its March 23, 1999 decision properly determined that appellant’s request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is the March 23, 1999 decision, in which the Office denied appellant’s request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office’s merit decision dated April 16, 1997 and the filing of appellant’s appeal on July 1, 1999, the Board lacks jurisdiction to review the merits of appellant’s claim.²

¹ The Board notes that the proceedings held before the EEOC and the CUIAB on charges of discrimination are not dispositive with regard to questions arising under the Federal Employees’ Compensation Act. However, some evidence may be given weight by the Office and the Board. *Shelby Rycroft*, 44 ECAB 795 (1993).

² 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish on its face that such decision was erroneous.⁵

In its March 23, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the April 16, 1997 decision, which stated that, if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. As appellant's February 1, 1999 reconsideration request was outside the one-year time limit, which began the day after April 16, 1997, appellant's application for review was untimely.

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether the application establishes "clear evidence of error." 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(a).

⁵ 20 C.F.R. § 10.607(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992). The Office regulations promulgated at 20 C.F.R. § 10.138(b) have since been revised and will be utilized in Office decisions issued after January 1, 1999. The new Office regulations will be interpreted with the same applicability as in prior decisions, with regard to time limitations for reconsideration requests and the clear evidence of error standard.

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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 decision.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In support of his February 1, 1999 request for reconsideration, appellant argued that Ms. Martin, the postmaster, falsely accused him of misconduct and notified him that he would be terminated for “trying to deceive management and committing fraud.” He further argued that he was discriminated against and wrongfully terminated by the employing establishment in retaliation for engaging in activities protected under Title VII, and that such discrimination caused the claimed condition. Appellant also argued that he was further discriminated against when denied continuation of pay benefits. He submitted a partial hearing transcript from proceedings before the EEOC and a decision from the CUIAB and an updated progress report from Dr. Skalicky in which he opined that appellant’s adjustment disorder was causally related to employment factors. The Office in its March 23, 1999 decision determined that none of the evidence submitted on reconsideration established that the Office’s April 16, 1997 decision was in error, or raised a substantial question as to the correctness of that decision. No further evidence was submitted with appellant’s February 1, 1999 request.

The critical issue in the case at the time the Office issued its April 16, 1997 decision was whether appellant had established that he sustained an injury in the performance of duty as alleged. The evidence of record established that appellant underwent an investigation for failure to follow instructions and for fraudulent conduct surrounding a submission of an overtime form, for which he was ultimately terminated. The Office found in its April 16, 1997 decision that appellant’s reaction to the investigation was not considered to be in the performance of his regular assigned work duties and that no other injury arising out of the employment was shown.

The additional evidence submitted with appellant’s request for reconsideration does not establish clear evidence of error in the Office’s April 16, 1997 decision. The Board has held that administrative functions such as conducting investigations of employee misconduct and enforcing disciplinary actions are functions of the employer and can only be considered employment factors where the evidence discloses error or abuse on the part of the employing

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ See *Gregory Griffin*, 41 ECAB 458 (1990).

establishment.¹⁴ The decision from the CUIAB addressed appellant's willful misconduct and was not in error by the employer. The partial hearing transcript addressed whether the employing establishment's denial of continuation of pay was in error. Dr. Skalicky's progress report is irrelevant to the issue of whether appellant established compensable work factors as defined by the Act. Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence, which on its face shows that the Office made an error, appellant has failed to establish clear evidence of error with respect to its April 16, 1997 decision.

The decision of the Office of Workers' Compensation Programs dated March 23, 1999 is hereby affirmed.

Dated, Washington, DC
October 24, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

¹⁴ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).