

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN COCHRAN and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

*Docket No. 01-956; Oral Argument Held June 13, 2002;
Issued July 15, 2002*

Appearances: *Melvin Cochran, pro se; Julia Mankata-Tamakloe, Esq.,*
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated November 30, 1999 was not timely filed and failed to present clear evidence of error.

On January 20, 1998 appellant, then a 42-year-old clerk, filed a claim alleging that he sustained headaches and muscle spasms of the low back due to harassment and threats of his supervisor. He stopped work on January 3, 1998 and did not return.¹

By letter dated February 23, 1998, the Office requested that appellant submit additional factual and medical evidence to support his claim and afforded him 30 days within which to do so.

In a letter dated March 21, 1998, appellant requested that the Office correspond directly with his psychologist, Dr. Benjamin F. Isom, as he was unable to respond in a timely manner to the Office's request for information. Appellant included a note from Dr. Isom indicating he has been treating him since January 2, 1998.

In a letter dated April 7, 1998, appellant alleged that he was harassed on many occasions by his supervisor. He noted that he was threatened by his manager and forced to waive his rights to attend the hospital of his choice; and he was also threatened by his supervisor for standing and stretching at his workstation.

¹ The record reflects that appellant had three prior claims for injuries to his lower back. These claims were adjudicated by the Office under file numbers: A06-0533918, A06-0691715 and A06-0508365.

In a decision dated April 24, 1998, the Office denied appellant's claim as the evidence was not sufficient to establish that he sustained an injury on January 2, 1998 as alleged.

By letter dated October 22, 1998, appellant requested reconsideration of his claim. He noted that no attempt was made by the Office to contact his physician to gather the requested medical information. Appellant indicated that his file was not complete until the medical information by his psychologist was provided.

In a decision dated November 23, 1998, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

By letter dated November 30, 1999, appellant requested reconsideration of the Office decision dated November 23, 1998. He submitted a statement indicating that he requested the Office to deal directly with his psychologist to acquire the necessary evidence to establish his claim. Appellant noted that he was initially refused a claim form and that his supervisor's reports in connection with his claim were false.

In a decision dated February 17, 2000, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that he did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated February 17, 2000. Since more than one year elapsed from the date of issuance of the Office's April 24, 1998 merit decision to the date of the filing of appellant's appeal, February 13, 2001, the Board lacks jurisdiction to review this decision.²

The Board finds that the Office properly determined that appellant's request for reconsideration dated November 30, 1999 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may -

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a)

² See 20 C.F.R § 501.3(d).

³ 5 U.S.C. § 8128(a).

provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

In its February 17, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 24, 1998 and appellant's request for reconsideration was dated November 30, 1999, which was more than one year after April 24, 1998. Accordingly, his petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁶

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹⁰

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act. The Office found that it did not clearly show that the Office's prior decision was in error.

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB __ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board notes that appellant did not submit any evidence with his reconsideration request and concludes that he has not established clear evidence of error in this case. His reconsideration request indicated that he requested the Office to deal directly with his psychologist to acquire the necessary evidence to establish his claim and noted that the Office failed to retrieve the necessary medical information from his physician. Appellant indicated that he previously submitted a letter noting he was incapable of corresponding or providing the information on his own. He noted that he was initially refused a claim form and that his supervisor's reports in connection with his claim were false. These statements do not establish clear evidence of error as they do not raise a substantial question as to the correctness of the Office's most recent merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.¹¹ Appellant submitted no new medical evidence to support his contentions.

Consequently, appellant has not established clear evidence of error on the part of the Office.¹²

The decision of the Office of Workers' Compensation Programs dated February 17, 2000 is hereby affirmed.

Dated, Washington, DC
July 15, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² The decision of the Board does not preclude appellant from pursuing his claim for a back condition/back spasm as this issue was not previously adjudicated by the Office.