

**United States Department of Labor
Employees' Compensation Appeals Board**

E.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 09-599
Issued: June 3, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 25, 2008 nonmerit decision denying his request for merit review of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. Pursuant to 20 C.F.R. § 501.2(c) and 501.3(e), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Board's July 6, 2004 decision affirming the denial of appellant's emotional condition claim. Because more than one year elapsed between the last merit decision and the filing of this appeal on December 31, 2008, the Board lacks jurisdiction to review the merits of this claim.¹

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d). Appellant requested an oral argument before the Board in connection with his appeal. In an April 23, 2009 order, the Board denied appellant's request for an oral argument.

ISSUE

The issue is whether 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.

FACTUAL HISTORY

This is the fourth appeal in this case. In the first appeal,² the Board issued a decision on July 6, 2004 finding that the Office properly denied appellant's emotional condition claim on the grounds that he had not submitted sufficient evidence to establish any compensable employment factors. In an April 3, 2003 decision, the Office initially denied appellant's emotional condition claim and, in a December 31, 2003 decision, an Office hearing representative affirmed the Office's April 3, 2003 decision.³ In the second appeal,⁴ the Board issued a decision on July 5, 2006 finding that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). In the third appeal,⁵ the Board issued a decision on August 4, 2008 finding that the Office properly 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. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

In a reconsideration request dated June 12, 2008,⁶ appellant argued that several witness statements of coworkers and other documents he previously submitted to the Office showed that he was harassed by Mr. Gant. Appellant repeated a number of his previous claims that certain incidents involving Mr. Gant and Ms. Manies constituted harassment. He also asserted that

² Docket No. 04-796 (issued July 6, 2004).

³ On June 13, 2002 appellant, then a 50-year-old mail handler, filed a claim alleging that he sustained depression and anxiety due to various incidents and conditions at work. He indicated that on July 5, 2001 Mary Ann Manies, a supervisor, called him into a room in the presence of other supervisors and accused him of lying in his injury report and threatened to report him to the postal inspector for investigation. Appellant stated that, prior to July 5, 2001, he was harassed by his supervisor, Benny Gant, and that two postal managers he complained to did not do anything about the situation. He claimed that on July 6, 2001 Mr. Gant gave him an investigative interview and told him that it could lead to a disciplinary action. Appellant asserted that he received unfair disciplinary letters, including a July 19, 2001 letter of warning regarding the July 5, 2001 incident, a September 5, 2001 letter of warning for unsatisfactory attendance and a May 8, 2002 letter of warning for arriving late to work. He alleged that Phil Perry, a supervisor, harassed him by saying that Ms. Manies had indicated that she did not want to talk to him after he had asked to speak to her. Appellant claimed that he sustained stress when Gary Banlowe, a supervisor, gave him an investigative interview on March 21, 2002. He asserted that he was wrongly prohibited from flossing his teeth in the restroom and from going to the health clinic and that Mr. Gant discriminated against him by not taking his seniority into consideration when assigning duties and by talking to coworkers about his health and work habits. Appellant also asserted that Mr. Gant harassed him by following him into the restroom and questioning him about his breaks.

⁴ Docket No. 05-1529 (issued July 5, 2006).

⁵ Docket No. 08-445 (issued August 4, 2008).

⁶ Although the statement was addressed to the Board, the Office interpreted it as a request for reconsideration of its prior merit decisions. In an August 30, 2008 letter, appellant stated that the June 12, 2008 statement was intended to show clear evidence of error in the Office's prior merit decisions.

medical evidence of record showed that he sustained an employment-related emotional condition. Appellant argued that statements of Mr. Gant and Ms. Manies in the record were not accurate.

In a November 25, 2008 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.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁷ 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.⁸

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."⁹ 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.¹⁰

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

⁷ 20 C.F.R. § 10.607(a).

⁸ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ 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). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

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.¹⁵

ANALYSIS

In its November 25, 2008 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on June 12, 2008, more than one year after the Board's July 6, 2004 merit decision.¹⁶ Therefore he must demonstrate clear evidence of error on the part of the Office in issuing its prior decisions.

The Board finds that appellant has not demonstrated clear evidence of error on the part of the Office in issuing its prior decisions concerning his emotional condition claim. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In his June 12, 2008 statement, appellant argued that several witness statements and other documents he previously submitted to the Office showed that he was harassed by Mr. Gant. He took issue with the accuracy of statements from Mr. Gant and Ms. Manies. Appellant repeated a number of his previous claims that certain incidents involving Mr. Gant and Ms. Manies constituted harassment.

These arguments, however, are not relevant to the main issue of the present case, *i.e.*, whether appellant established any compensable employment factors in his emotional condition claim. Appellant has restated the nature of some of his alleged employment factors and has generally asserted that the evidence of record (such as the statements of coworkers) supported his claim and that the statements of Mr. Gant and Ms. Manies did not support the Office's findings. These mere assertions do not establish that the Office erred in its previous decision. Appellant also asserted that medical evidence of record showed that he sustained an employment-related emotional condition, but this argument is not relevant as appellant has not established any compensable employment factors.¹⁷

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior decisions. The Office properly determined that appellant did not establish clear evidence of error in those decisions.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

¹⁷ If a claimant has not established any compensable employment factors, the Office need not consider the medical evidence of record. See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

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 Office of Workers' Compensation Programs' November 25, 2008 decision is affirmed.

Issued: June 3, 2009
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