United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 09-1214**
	)	**Issued: October 21, 2009**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Greensboro, NC, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 6, 2009 appellant filed a timely appeal of the March 20, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated November 24, 1998 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On July 23 and 29, 1998 appellant, then a 33-year-old mailhandler, filed a traumatic injury and occupational disease claims, respectively, alleging that he sustained work-related stress. In a July 15, 1998 report, T. Earl Coleman, Ph.D. stated that appellant should continue to

be excused from work until his follow-up examination by Dr. Douglas G. Smith, a psychiatrist. In a July 22, 1998 report, Dr. Smith opined that appellant did not sustain an emotional condition. In a July 23, 1998 report, a physician whose signature is illegible provided appellant's physical restrictions. In a July 31, 1998 letter, the employing establishment controverted appellant's claim, contending that the evidence did not establish that his stress was work related.

By letter dated August 10, 1998, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the factual and medical evidence appellant needed to submit.

Medical records dated July 8 to November 4, 1998 addressed appellant's emotional condition, physical restrictions and disability for work. In a November 4, 1998 report, Rosalyn Harris-Offutt, a certified registered nurse in psychiatry, reviewed a history that appellant was frustrated with management because it was not honest or truthful. Appellant received unfair evaluations and accusations. Ms. Harris-Offutt opined that he sustained post-traumatic stress disorder due to work-related environmental stresses.

By decision dated November 24, 1998, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. The factual evidence failed to establish a compensable factor of appellant's employment. The medical evidence failed to establish that appellant sustained an emotional condition causally related to a compensable employment factor.

In a December 22, 1998 report, Dr. Gerald I. Plovsky, a psychiatrist, reviewed a history that appellant was harassed and belittled by his supervisors. Appellant was required to clean up chemical spills which, was outside his job description. The employing establishment denied his request to attend school and to take an examination. It accused appellant of being the "Unibomber." It set him up for failure by assigning him extra work or different kinds of work. The employing establishment discriminated against appellant based on his race. The employing establishment's attitude towards appellant changed after he became a union representative. Dr. Plovsky opined that appellant's work environment caused his anxiety and personality changes which could lead to the development of post-traumatic stress disorder. He recommended that appellant stay off work until the harassment and conflicts were resolved. In a November 4, 1998 note, Dr. Plovsky advised that he had examined appellant only once and did not offer him any treatment.

In a July 8, 1998 report, a physician whose signature is illegible reviewed a history that appellant feared for his safety at work. Appellant was exposed to hazardous chemicals. The report stated that he suffered from delusional disorder and occupational problems. It recommended that appellant take time off work.

In a March 20, 2006 report, Ms. Harris-Offutt stated that appellant continued to suffer from schizotypal personality disorder. She recommended that appellant remain out of work because he was a danger to others in the work environment.

In a February 26, 2007 letter, appellant requested that the employing establishment provide all benefits owed to him resulting from his disability retirement in February 2000, due to his alleged employment-related schyzolypal personality disorder. In an October 13, 1999 report, Dr. Plovsky reiterated the history that appellant was harassed after becoming a union representative, called the "Unibomber" and assigned work duties outside his job description. He diagnosed post-traumatic stress disorder. Dr. Plovsky opined that appellant was disabled as he could not return to work in a toxic environment at the employing establishment. He stated that nearly all of appellant's symptoms had abated since being removed from such an environment.

By letter dated August 16, 2007, appellant requested reconsideration of the November 24, 1998 decision.

By decision dated April 28, 2008, the Office found that appellant's letter requesting reconsideration was dated August 16, 2007, more than one year after the November 24, 1998 merit decision and was untimely. It further found that appellant did not submit any evidence establishing clear evidence of error in the Office's denial of his emotional condition claim.

On May 2, 2008 appellant appealed the April 28, 2008 decision to the Board and requested an oral argument. In a January 30, 2009 order, the Board set aside the April 28, 2008 decision and remanded the case to the Office for proper assemblage and construction of the case record.[1] The Board found that the case record did not contain relevant medical evidence mentioned in the April 28, 2008 decision or a copy of the November 24, 1998 Office decision.

Following remand, appellant submitted Ms. Harris-Offutt's records dated August 25, 1998 to March 22, 2002. This evidence addressed his emotional condition. In an October 29, 1999 report, Ms. Harris-Offutt reviewed a history that appellant was harassed by the employing establishment after he became a union representative. Appellant was verbally and psychologically abused. Ms. Harris-Offutt reiterated her prior diagnosis of post-traumatic stress.

Appellant resubmitted a July 8, 1998 progress note from Prime Care of Greensboro. A July 8, 1998 progress note from The Moses H. Cone Memorial Hospital stated that he was paranoid and delusional. Progress notes dated August 4 and 24, 1998 from the Bland Clinic indicated that appellant underwent psychological evaluation. Documents dated October 4, 1999 to July 20, 2007, addressed his disability retirement.

By decision dated March 20, 2009, the Office found that appellant's August 16, 2007 letter requesting reconsideration was dated more than one year after the November 24, 1998 merit decision and was untimely. It also found that appellant did not submit any evidence establishing clear evidence of error in the Office's denial of his emotional condition claim.[2]

[1] Docket No. 08-1558 (issued January 30, 2009).

[2] In an August 19, 2009 order, the Board denied appellant's request for oral argument in the present appeal. Docket No. 09-1214 (issued August 19, 2009).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[5]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[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 manifest on its face that the Office committed an error.[8] Evidence that 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 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

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[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] *Id.* at § 10.607(b).

[7] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

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

[9] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[10] *Leona N. Travis*, *supra* note 8.

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

[12] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[13]

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the November 24, 1998 merit decision. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[14]

In the November 24, 1998 decision, the Office found that appellant did not sustain an emotional condition in the performance of duty as he failed to establish any compensable employment factors that caused his emotional condition. The appeal rights attached to the decision notified appellant of his rights to request reconsideration and submit additional evidence to the Office within one year of the decision. As appellant's August 16, 2007 letter requesting reconsideration was made more than one year after the Office's November 24, 1998 merit decision, the Board finds that it was not timely filed.

The Board finds that appellant has not submitted evidence establishing clear evidence of error by the Office in finding that he did not establish any compensable employment factors that caused or contributed to his emotional condition. Appellant did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error. Dr. Plovsky's December 22, 1998 and October 13, 1999 reports stated that he was harassed by the employing establishment as he was belittled by his supervisors, required to work outside his job description by cleaning up chemical spills, accused of being the "Unibomber," and denied permission to attend school and to take an examination. He also stated that the employing establishment discriminated against appellant based on his race. However, the Office did not accept that appellant established his allegations as factual. This impacts on the medical history as reported by Dr. Plovsky. The July 8, 1998 report of a physician whose signature is illegible stated that appellant feared for his safety at work as he was exposed to hazardous chemicals. It also stated that appellant suffered from delusional disorder and occupational problems which required time off work. Again, the Office has not accepted an exposure to chemicals as factually established. Appellant has only made a general allegation of work-related stress without specifying any particular incident or event. Moreover, the fear of future injury is not a basis for an award of benefits.[15] The Board finds that this evidence does not shift the weight of the evidence in favor of appellant's claim or raise a substantial question as to the correctness of the Office's November 24, 1998 decision denying his claim.

Dr. Plovsky's November 4, 1998 note stated that he only examined appellant once and did not offer him any treatment. This evidence is not sufficient to shift the weight of the

[13] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[14] *Larry L. Litton*, 44 ECAB 243 (1992).

[15] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

evidence in favor of appellant or raise a substantial question as to the correctness of the Office's decision. Dr. Plovsky failed to identify any specific compensable employment factors alleged by appellant to have caused his emotional condition.[16] Further, he did not opine that appellant sustained an emotional condition causally related to a compensable employment factor.

The October 29, 1999 report of Ms. Harris-Offutt, a certified registered nurse, noted the alleged employment factors and offered an opinion on causal relationship. The Board finds that the report is of no probative medical value as a nurse is not considered to be a physician as defined by the Act.[17] The Board finds, therefore, that Ms. Harris-Offutt's report does not raise a substantial question as to the correctness of the Office's decision and, therefore, does not establish clear evidence of error. Her other reports were previously of record and reviewed by the Office. Material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim.[18] The Board finds, therefore, that this material does not establish clear evidence of error in the Office's decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

[16] *See Dean D. Beets*, 43 ECAB 1153 (1992) (to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office).

[17] *See* 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007).

[18] *Lawrence Ellis Myers*, 27 ECAB 262 (1976).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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