United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 10-976**
	)	**Issued: December 1, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Charleston, SC, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2010 appellant filed a timely appeal from a November 20, 2009 decision of the Office of Workers' Compensation that denied his request for reconsideration because it was untimely filed and did not establish clear evidence of error. The last merit decision by the Office was issued on October 1, 2008. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the October 30, 2009 decision.

[1] For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error. On appeal, appellant asserts that the Office erred in denying his claim because at the time of the denial he had not been properly diagnosed and because of that he was not competent to proceed with his case.

FACTUAL HISTORY

On August 14, 2008 appellant, then a 44-year-old patient services supervisor, filed a traumatic injury claim alleging that on June 3, 2008 stress, anxiety, distrust, depression and uncontrollable anger were caused by slanderous lies and rumors being spread by coworkers. He stopped work that day. By letter dated August 26, 2008, the Office informed appellant of the type of evidence needed to support his claim, including a statement of specific details regarding the slanderous rumors alleged to have caused the claimed condition, the names of the employees alleged to have spread the rumors, and a physician's opinion explaining how the reported work incident caused or aggravated the claimed injury. Appellant was given 30 days to respond.

By decision dated October 1, 2008, the Office noted that appellant had not responded to the August 26, 2008 letter and denied the claim. On October 30, 2009 appellant requested reconsideration and submitted additional evidence. He stated that he was given no guidance by the employing establishment as to what was needed to be successful in gaining acceptance of his claim and that he was too emotionally distressed to provide information earlier. Appellant provided correspondence to the employing establishment protesting its request for medical information. In an April 7, 2009 report, Dr. Peter J. Sukin, a Board-certified psychiatrist, advised that appellant was being treated for severe major depression, had become very withdrawn and was too ill to work. In an April 24, 2009 report, Robert D. Cowley, Psy.D., noted appellant's report that on or about June 3, 2008 he learned that two female coworkers had started an untrue rumor concerning his sexual orientation and health status and that the rumors spread quickly which negatively impacted him. Dr. Cowley stated that on September 24, 2008 he conducted an intake interview and found appellant to be suffering from apparent anxiety and depressive disorders, stating that subsequent testing confirmed the diagnoses. He then issued a duty to warn letter to the employing establishment because he feared for appellant's safety and that of the two coworkers. Dr. Cowley diagnosed major depressive disorder, recurrent severe, with psychotic features; post-traumatic stress disorder, severe and delusional disorder. He advised that appellant had been irreversibly harmed by the experience and advised that he should not return to a workplace where either of the women worked and would likely suffer mental illness for the rest of his life. On October 21, 2009 appellant was granted disability retirement for major depression by the Office of Personnel Management.

By decision dated November 20, 2009, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[2] It 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.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[4] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of the Office regulations,[5] if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[7]

Office procedures note that 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.[8] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[9]

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[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

[4] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[5] *Id*.

[6] *Alberta Dukes*, 56 ECAB 247 (2005).

[7] *Robert G. Burns*, 57 ECAB 657 (2006).

[8] *James R. Mirra*, 56 ECAB 738 (2005).

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

ANALYSIS

The Board finds that as, more than one year had elapsed from the date of issuance of the merit decision in this case on October 1, 2008, appellant's request for reconsideration on October 30, 2009, was untimely filed.[10] Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for disability compensation.[11]

The Board also finds that appellant failed to establish clear evidence that the October 1, 2008 decision of the Office was in error. The merit issue in this case is whether appellant established that he had an emotional condition causally related to factors of his federal employment. In the October 1, 2008 merit decision, the Office denied his claim on the grounds that he submitted insufficient evidence to support his claim and did not respond to the Office's August 26, 2008 letter asking that he submit evidence including a statement describing the alleged employment incident and a medical opinion explaining how the claimed incident caused his condition.

Medical evidence submitted subsequent to the October 1, 2008 decision consists of the April 14, 2009 report of Dr. Cowley and the April 7, 2009 report of Dr. Sukin. Each of these reports confirms in significant detail that appellant suffered severe psychiatric conditions that were allegedly the result of some very ugly rumors in his workplace. The unfortunate circumstance of this case, however, is that appellant's claim was untimely filed. If this evidence had been submitted in a timely fashion it may have been sufficient to establish a *prima facie* case of his claim.[12] This same evidence, however, is not sufficient under the more stringent standard of review for untimely filed claims. When the Office denied appellant's claim on October 1, 2008, it based is decision on the evidence in the record. At that time, there was no evidence supporting the claim. Although the Office provided appellant time to further support his claim, no information or evidence was provided prior to its decision. Accordingly, the Board finds the Office properly denied his request for reconsideration as untimely filed and failing to establish clear evidence of error.

Regarding appellant's general assertion that the employing establishment did not help him with his claim, an employee seeking benefits under the Act has the burden of establishing to essential elements of his or her claim.[13] With regard to his argument on appeal that his claim was prematurely denied because he had not been diagnosed, as noted above, he was provided an opportunity to respond to the Office's August 26, 2008 letter asking for further evidence. While appellant apparently did not see Dr. Cowley until September 24, 2008, that was well within the

[10] *Supra* note 3.

[11] *Id*.

[12] *See* D.R. 61 ECAB ___ (Docket No. 09-1723, issued May 20, 2010).

[13] *L.A.*, 58 ECAB 630 (2007).

time frame that appellant could have timely requested reconsideration of the October 1, 2008 decision and submitted the report for consideration.[14]

Appellant also asserted that he was mentally incapable of submitting the evidence requested by the Office in its August 26, 2008 letter. In support of this argument, he relied on the reports from Dr. Sukin and Dr. Cowley. Dr. Sukin noted that appellant was being treated for depression, had become very withdrawn and was too ill to work. However, he did not indicate that appellant's condition rendered him mentally incompetent. Likewise, while Dr. Cowley provided a lengthy statement regarding appellant's allegations that coworkers spread rumors and diagnosed a major depressive disorder, post-traumatic stress disorder and delusional disorder, he too did not indicate that appellant was rendered mentally incompetent by the diagnosed conditions. Thus, neither report supports appellant's argument that his medical condition prevented him from filing a timely report and does not establish clear evidence of error.[15]

Moreover, the Office clearly informed appellant of his obligation to furnish a statement describing the claimed workplace incident. Appellant did not do so prior to October 1, 2008 when the Office issued the merit decision and did not do so with his October 30, 2009 reconsideration request. It has long been held that to establish a claim for an employment-related emotional condition, an employee must submit factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition.[16]

The term "clear evidence of error" is intended to represent a difficult standard, and the medical evidence and argument provided here are not the type of positive, precise and explicit evidence which manifested on its face that the Office committed an error.[17] As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the October 1, 2008 Office decision, appellant has not established that the Office committed error by its October 1, 2008 decision.[18] The Board, therefore, finds that in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence and argument submitted by appellant with his October 30, 2009 reconsideration request to ascertain whether it

[14] 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, either under its own authority or on application by a claimant. 5 U.S.C. § 8128(a). Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.606(b)(2). Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. §10.608(b).

[15] *A.F.*, 59 ECAB 714 (2008).

[16] *Leslie C. Moore*, 52 ECAB 132 (2000).

[17] *Id*.

[18] *Nancy Marcano, supra* note 9.

demonstrated clear evidence of error in the October 1, 2008 decision and correctly determined that it did not and thus denied appellant's untimely request for a merit reconsideration on that basis.[19]

CONCLUSION

The Board finds that, as appellant's October 30, 2009 reconsideration request was not timely filed and failed to establish clear evidence of error, the Office properly denied a merit review of his claim by its November 20, 2009 decision.

ORDER

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

Issued: December 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[19] 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).