

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

E.R., Appellant

and

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

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-1839
Issued: March 15, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2010 appellant filed a timely appeal from the June 24, 2010 nonmerit decision of the Office of Workers' Compensation Programs 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, 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 July 7, 2010, the Board lacks jurisdiction to review the merits of this claim.¹

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.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

This case has previously been before the Board. In a July 6, 2004 decision, the Board affirmed the April 3 and December 31, 2003 merit decisions of the Office which denied appellant's emotional condition claim.² The Board found that the Office properly denied his claim on the grounds that he had not submitted sufficient evidence to establish any compensable employment factors.³ In a July 5, 2006 decision, the Board found that the Office properly denied appellant's April 2005 request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).⁴ In August 4, 2008 and June 3, 2009 decisions, the Board found that the Office properly denied his August 2007 and June 2008 requests for further review of the merits of his claim on the grounds that his requests were untimely filed and failed to demonstrate clear evidence of error.⁵ The facts and the circumstances of the case are incorporated herein by reference.

In a June 8, 2010 letter, appellant requested reconsideration of his claim. He asserted that the evidence of record established several employment factors regarding harassment and administrative error committed by Mr. Gant and Ms. Manies and claimed that the Office did not adequately consider this evidence. Appellant claimed that his employer did not submit all relevant evidence in its possession pursuant to the Office regulations at 20 C.F.R. § 10.118(a), including evidence showing that Ms. Manies threatened and embarrassed him in front of coworkers during a July 5, 2001 meeting.⁶ He claimed that testimony by Louis Rubens, a coworker, established that Mr. Gant improperly showed his medical records to coworkers. Appellant asserted that he never stated that he was not sure whether he sustained an employment injury on July 5, 2001 and therefore Mr. Gant lied by indicating on the claim form he filed for this injury that he made such a statement. He felt that medical evidence of record did in fact

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 asserted that on July 5, 2001 Mary Ann Manies, a supervisor, called him into a room in the presence of coworkers and accused him of lying in documents relating to a claimed July 5, 2001 injury and threatened to report him to the postal inspector for investigation. Appellant alleged that he was harassed by Benny Gant, a supervisor, who lied on the claim form for the July 5, 2001 injury and improperly showed his medical records to coworkers. He claimed that on July 6, 2001 Mr. Gant conducted 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 claimed 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); Docket No. 09-599 (issued June 3, 2010).

⁶ Under this regulation, the "employer is responsible for submitting to [the Office] all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means." 20 C.F.R. § 10.118(a).

show that he sustained a work-related physical injury on July 5, 2001 and therefore the employer erred by insisting that he did not sustain such an injury.

In a June 24, 2010 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 or 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 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. § 2128(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)."

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

¹² 20 C.F.R. § 10.607(b); *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 June 24, 2010 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on June 8, 2010, 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. Appellant 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 the evidence of record showed that he was harassed by his supervisors, including Ms. Manies and Mr. Gant. He repeated a number of his previous claims that certain incidents involving Ms. Manies and Mr. Grant constituted harassment or administrative error. For example, appellant again claimed that Ms. Manies threatened and embarrassed him in front of coworkers during a July 5, 2001 meeting and that Mr. Gant improperly showed his medical records to coworkers and lied on a claim form for a July 5, 2001 injury by indicating that he was not sure whether he sustained an employment injury on that date.

Appellant's emotional condition claim was denied on the basis that he did not submit sufficient factual evidence to establish that he sustained a compensable employment factor. The argument alone advanced by him, would not tend to support his claim that he has established a compensable employment factor. Appellant has simply restated the nature of some of his alleged employment factors and has generally asserted that the evidence of record (including administrative documents and statements of coworkers) established his claim. These mere assertions do not establish error in the previous decisions. Further, the Board has already considered the relevant evidence of record and determined that it does not show the existence of any employment factors alleged to have caused an emotional condition. Appellant claimed that his employer did not submit all relevant evidence in its possession pursuant to the Office regulations at 20 C.F.R. § 10.118(a).¹⁷ However, appellant did not establish that the employer failed to submit specific documents, per the requirements of 20 C.F.R. § 10.118(a), that would have established his claim for a work-related emotional condition.

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 Under this regulation, the "employer is responsible for submitting to [the Office] all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means." 20 C.F.R. § 10.118(a).

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.

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 June 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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