

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURENCE BISSETT and U.S. POSTAL SERVICE,
POST OFFICE, Pembroke Pines, FL

*Docket No. 98-1035; Submitted on the Record;
Issued December 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further consideration of the merits of his claim under 5 U.S.C. § 8128(a), on the grounds that his request for reconsideration was not timely filed and failed to show clear evidence of error.

On January 2, 1992 appellant, then a 50-year-old manager, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he suffered clinical depression, acute stress and irritable bowel syndrome in the course of his federal employment due to a restructuring of the employing establishment, he was denied a promotion and transfer and subjected to lies and deceitful behavior by his supervisors.¹ Appellant retired effective January 3, 1993.

By decision dated March 30, 1993, the Office denied the claim finding that fact of injury was not established. In an accompanying memorandum, the Office indicated that appellant failed to implicate compensable employment factors.

By letter dated April 12, 1993, appellant requested an oral hearing before an Office representative.

A hearing was held on March 24, 1994 at which appellant, represented by counsel and his spouse, testified. Appellant provided testimony on factors of his federal employment he believed caused his disability. He explained that his new supervisor informed him his volumes were too high and when he got the numbers down, his supervisor asked when he was going to get the numbers down and changed the numbers he had to meet. Appellant also testified that he

¹ Appellant had filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he had constrictions, tightness, dizziness, nausea and "out of control headaches" on December 10, 1992.

felt a tremendous amount of continuous pressure and that due to the pressure he started to work 12 to 14 hours a day and going in on weekends whereas his normal workday had been 9 hours. Next, appellant testified regarding the restructuring and that he did not get the position he had applied for and his anxiety about his job. His wife testified to the circumstances of appellant's more severe symptoms in December 1992.

By decision dated October 20, 1994, the hearing representative denied appellant's claim. The hearing representative noted that the only compensable factor was appellant's increased work load and having to work more overtime. He further noted that none of the medical evidence, including reports from Dr. Ely D. Pelta, appellant's attending Board-certified psychiatrist and Dr. Michael Gervasi, an attending physician, attributed appellant's condition to his increased work load and having to work more overtime.

By letter dated October 20, 1995, appellant, through his counsel, requested reconsideration of the October 20, 1994 decision. In support of his application, appellant submitted an October 16, 1995 statement by Scott Goodman and a copy of an age discrimination complaint.

By decision dated September 17, 1996, the Office denied appellant's request for modification of the October 20, 1994 decision.

On October 23, 1997 appellant, through his counsel, requested reconsideration and submitted an August 7, 1997 report by Dr. Pelta, June 2, 1997 declaration by Mr. Goodman and a May 27, 1997 declaration by Stephen Woods in support of his claim. Appellant's counsel argues that appellant's increased work load is a compensable factor. In his August 7, 1997 report, Dr. Pelta attributes appellant's depression to abusive actions by his supervisor, his continuous workdays and long working hours.

By decision dated November 10, 1997, the Office denied appellant's claim.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed his appeal on February 8, 1998, the only decision before the Board is the Office's November 10, 1997 decision denying appellant's request for reconsideration.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its December 20, 1996 decision, under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present 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 and stated in relevant part:

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

“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 compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”

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. § 10.138(b)(2), provides that the Office will not review, “... a decision denying or terminating a benefits unless the application is filed within one year of the date of that decision.” The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. 8128(a).³

On October 23, 1997 appellant, through his counsel, requested reconsideration. The most recent decision on the merits prior to appellant’s request was the Office’s September 17, 1996 decision.⁴ The one-year limitation period, therefore, began to run on September 18, 1996 and appellant’s October 23, 1997 request for reconsideration was untimely.⁵

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.⁶ The Office procedures state 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. § 10.138(b)(2), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.⁷

³ *Mamie L. Morgan*, 47 ECAB 281 (1996).

⁴ In a statement of appeals rights accompanying the September 17, 1996 decision, the Office informed appellant of the following:

“RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing, that the Office of Workers’ Compensation Programs reconsider this decision. Such a request must be made within one year of the date of the decision. It must clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits or legal argument not previously made.” (Emphasis added).

⁵ *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office’s Procedure Manual provides:

“The one-year [limitation period for requesting reconsideration begins on the date of the original [Office] decision....”

⁶ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1996) states:

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be 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 merely to 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 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's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence 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.⁸

The Board finds that the evidence submitted in support of appellant's untimely October 23, 1997 request for reconsideration, fails to establish clear evidence of error. In the present case, the Office denied appellant's claim on September 17, 1996 based on the finding that he failed to submit evidence which warranted modification of the hearing representative's decision, dated October 20, 1994. The Office also found that appellant failed to submit medical evidence which established that his disability was due to his heavy work load, the only compensable claimed factor. With his reconsideration request, appellant failed to submit evidence to substantiate error in the prior Office decision. The declarations by Mr. Woods and Mr. Goodman do not show any error in the prior Office decision. In addition, Dr. Pelta's report is also insufficient to meet appellant's burden to show clear evidence of error. Dr. Pelta had previously submitted reports, which had been considered by the Office, in which he attributed appellant's emotional condition to harassment and abuse by his supervisor and did not mention appellant's long work hours or work week as a cause of appellant's disability. In his August 7, 1997 report, Dr. Pelta attributed appellant's emotional condition to both harassment by his supervisor as well as his long hours and continuous workdays. However, Dr. Pelta does not explain why he did not mention appellant's working long hours and continuous workdays as a factor in any of his earlier reports. For this reason, the evidence submitted does not raise a substantial question concerning the correctness of the Office's decision denying his claim.

The decision of the Office of Workers' Compensation Programs dated November 10, 1997 is hereby affirmed.

"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 of a miscalculation in a schedule award). Evidence such as a detailed, well rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

⁸ *Thankamma Mathews*, 44 ECAB 765 (1993).

Dated, Washington, D.C.
December 21, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member