

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES J. MURTAGH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Atlanta, GA

*Docket No. 00-641; Submitted on the Record;
Issued September 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

On April 28, 1997 appellant, then a 38-year-old staff physician, filed an occupational disease claim alleging that his depression was causally related to periods of stress at his federal employment and was aggravated by personality conflicts. In support of his claim, he stated that his depression began in June and July 1996 during a period of intense controversy regarding his role as an employee and a potential leadership role proposed for him within the pulmonary division. Some of his colleagues objected to his potential promotion, which led to many acrimonious discussions and letters. Appellant was asked to leave the pulmonary section and start a separate section of molecular medicine research. He found this request disheartening as his career goals were centered on pulmonary medicine. He claimed that the conflict caused progressively increasing emotional difficulties, that he sought psychiatric help around August 15, 1997 and that by October the depression had worsened to the point that he required medical leave. Appellant noted that he was on medical leave on and off until January 1997, and that he required hospitalization briefly in November 1996 for a side effect related to the antidepressant medication that he had been taking.

Due to advice of his psychiatrist, appellant decided "to put aside my research career to avoid some of the conflicts and stresses that precipitated the original depression." He resigned his tenured faculty position and had been reassigned other duties.

Appellant submitted a May 2, 1997 medical report from Dr. Lawrence J. Giustra, a Board-certified psychiatrist, who stated that appellant had been under his care for depression since August 1996, that there appeared to be a strong temporal association between the mounting stress at work without resolution and the eventual emergence of clear signs, and symptoms of depression that required medical treatment and prescribed periods of absence from work.

Dr. Giustra found “a strong link” between appellant’s professional work situation and his psychiatric duties.

By letter dated July 15, 1997, the Office requested further information from appellant. No reply was received. In a decision dated October 15, 1997, the Office denied appellant’s claim, finding that the evidence did not support an injury sustained in the performance of duty. The Office noted that although Dr. Giustra’s report was sufficient to establish a *prima facie* case, appellant had not identified factors of employment that caused appellant’s depression.

On May 4, 1999 appellant filed a second claim for compensation and submitted a more detailed accounting of employment events that led to his depression. He alleged that at the time of his recruitment by the employing establishment in February 1991, he was promised that once he was promoted to associate professor, he would become the new chief of pulmonary medicine. Appellant stated that on January 1, 1995 he was promoted to associate professor with tenure, that one of the professors became upset because he had not been given tenure and appellant had, and that this began a period of tension during which many charges without documentation were made against appellant’s competency. He stated that his superior at the employing establishment confirmed that at the time appellant was hired, he was his first choice for the pulmonary chiefship, but that he would first like appellant to create a new division of molecular medicine, of which he would be chief and get a substantial raise and that at a later date appellant would become chief of pulmonary.

Appellant alleged that when his new position was announced, his colleagues became extremely upset and that this caused many discussions and letters concerning whether the molecular medicine entity should be a division, section or unit and where appellant’s salary should come from. He stated that in view of the controversies and apparent lack of funds, he declined the new position, but that confrontations with his pulmonary colleagues continued and that there was generally a very divisive atmosphere.

Appellant stated that on June 15, 1996 he received a memorandum stating that he must vacate his office since he was no longer a part of pulmonary service, that appellant stated he had tenure and that several angry discussions resulted. He stated that he sought psychiatric help in July 1996, that his depression continued to deepen, that on the advice of his psychiatrist he was on and off work for a period of time, and was hospitalized in December. Appellant decided that in March 1997 he could no longer do laboratory research, and that as soon as he made that decision, he experienced rapid improvement. He then proceeded to describe the events that he alleged led to his loss of tenure. Specifically, appellant noted that he was forced to sign a letter of resignation. He also submitted a summary of his employment history, which included details of his employment with the employing establishment.

In further support of his claim, appellant submitted copies of letters between himself and Dr. Manuel Martinez-Maldonado, dated from February 28 to July 15, 1996. These letters deal with an ongoing dispute over the nature of appellant’s appointment with the employing establishment. These letters acknowledge “conflicts” in the office.

Appellant also submitted a March 24, 1999 medical report from Dr. Robert J. Alpern, a Board-certified psychiatrist and neurologist, who stated “with reasonable medical certainty that

[appellant's] depression has been the direct result of conditions of stress in his employment.” Dr. Alpern attributed appellant's psychiatric condition to significant emotional assaults from various superiors and colleagues, broken promises regarding promotions at work, apparently unjustified criticisms of his professional efforts and a plot to force his resignation. He found no other factors that would have precipitated the onset of appellant's depression.

In a letter dated March 25, 1999, the Office stated that the new CA-2 was clearly a duplicate of the former CA-2. The Office advised appellant that if he wished to dispute the decision of October 15, 1997, he should follow his appeal rights.

By letter dated August 23, 1999, appellant requested reconsideration. His attorney stated that “a smoking gun” had been found in the case, and that it was “now clear that [appellant's] firing from the [employing establishment] was illegal.” In support thereof, affidavits of appellant and his attorney were submitted.

By decision dated September 13, 1999, the Office denied appellant's request for reconsideration, finding that appellant did not present clear evidence of error that the prior decision was erroneous.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”¹

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. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.² To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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.³

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(b).

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁵ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the office.⁶ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.⁷

In support of his petition for reconsideration, appellant submitted a personal affidavit and an affidavit by his attorney alleging that appellant's termination was illegal. Other evidence submitted to the Office since the time of the October 15, 1997 decision included statements by appellant detailing the specifics of the situation at the employing establishment with regard to his position, letters between appellant and Dr. Martinez-Maldonado regarding the ongoing dispute and medical evidence.

This evidence submitted by appellant in support of his untimely request for reconsideration is insufficient to establish clear evidence of error in the Office's original determination that appellant failed to establish that he sustained an injury in the performance of duty. For example, appellant provided further information regarding whether his emotional condition was due to not getting the promotion to chief of the pulmonary division as he alleged was promised to him when he was hired. However, that appellant was not given a promotion he desired is not a compensable factor of employment under the Act.⁸ Nor is his inability to work in his chosen field of pulmonary medicine, because a claimant's frustration from not being permitted to work in a particular environment is not compensable.⁹

Although appellant attempted to cure some of the deficiencies in his earlier presentation of the evidence by submitting more detailed arguments and letters between himself and Dr. Martinez-Maldonado, the evidence submitted by appellant is of insufficient probative value to establish clear evidence of error by *prima facie* shifting the weight of the evidence in favor of appellant's claim. The clear evidence of error standard is intended to be difficult to meet.¹⁰ Because appellant did not submit evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.

⁴ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁵ *Id.*

⁶ *Id.*

⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁸ *Ernest St. Pierre*, 51 ECAB _____ (Docket No. 99-467, issued August 14, 2000).

⁹ *Ray E. Shotwell, Jr.*, 51 ECAB _____ (Docket No. 99-2032, issued September 12, 2000).

¹⁰ *Mamie L. Morgan*, 47 ECAB 281, 284 (1996).

The decision of the Office of Workers' Compensation Programs dated September 13, 1999 is affirmed.

Dated, Washington, DC
September 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member