

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL M. BARROS and U.S. POSTAL SERVICE,
POST OFFICE, Brockton, MA

*Docket No. 02-321; Submitted on the Record;
Issued August 2, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On April 1, 1998 appellant, then a 42-year-old mailhandler, filed an occupational disease claim (Form CA-2), alleging that he sustained an emotional condition due to constant abuse.¹ Appellant stopped work on April 2, 1998 and has not returned.

By letter dated July 24, 1998, the Office informed appellant that evidence was insufficient to support his claim and advised him as to the type of medical and factual information required to support his claim.

In a decision dated September 28, 1998, the Office denied appellant's claim on the basis that he failed to identify specific employment factors alleged to be responsible for his condition.

Appellant requested reconsideration by letter dated January 19, 1999 and submitted evidence in support of his request.

By merit decision dated April 27, 1999, the Office denied appellant's claim on the basis that he failed to establish that he sustained an injury in the performance of duty as no factors of employment were alleged.

Appellant again requested reconsideration through his Senator by letter dated March 10, 2000.

¹ Appellant did not specify the type of abuse he was subjected to beyond noting that the abuse on April 1, 1998 was "the straw that broke the camels back."

By decision dated June 22, 2000, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient to warrant a merit review.

By letter dated June 14, 2001, appellant requested reconsideration through his congressional representative and Senator.

In support of his request for reconsideration, appellant submitted: (1) a narrative report identifying incidents for the period March 8, 1980 through April 1, 1998; (2) signed statements of Robert Bradshaw, Frank Daley and Stephen Cunningham; (3) a December 11, 1999 report by Dr. Benjamin Presskreisher, a staff psychologist; and (4) a December 8, 1998 statement by appellant.

By decision dated September 21, 2001, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and did not demonstrate clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office's decision dated September 21, 2001. Since more than one year elapsed from the date of issuance of the Office's April 27, 1999 merit decision to the date of the filing of appellant's appeal, December 18, 2001, the Board lacks jurisdiction to review the merit decision.²

The Board finds that the Office properly determined that appellant's request for reconsideration dated June 14, 2000 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act³ 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 own 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."⁴

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)

² See 20 C.F.R. § 501.3(d).

³ 5 U.S.C. § 8101; § 8128(a).

⁴ 5 U.S.C. § 8128(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.⁵

In its September 21, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Office issued its last merit decision on April 27, 1999 and appellant's request for reconsideration was dated June 14, 2001, which was more than one year after April 27, 1999. Accordingly, his petition for reconsideration was not timely filed.

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. 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 manifest on its face that the Office committed an error.⁶

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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.⁷

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰

The critical issue in appellant's case at the time of the April 27, 1999 merit denial of modification was whether he had established that his claimed medical condition and disability for work on and after April 2, 1998 were due to compensable factors of his federal employment. Thus, any evidence or argument regarding the March 10, 2001 request for reconsideration, must be evaluated as to whether it addresses the deficiencies in the evidence such as to *prima facie* shift the weight of the evidence in appellant's favor. At minimum, this would entail establishing a compensable factor of employment.

⁵ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

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

⁷ *Annie L. Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB ____ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

The Board finds that appellant's request for reconsideration has failed to show clear evidence of error.

In support of his request for reconsideration, appellant submitted: (1) a narrative report identifying incidents for the period March 8, 1980 through April 1, 1998; (2) signed statements of Mr. Bradshaw, Mr. Daley and Mr. Cunningham; (3) a December 11, 1999 report by Dr. Presskreisher; and (4) a December 8, 1998 statement by appellant. Both items (3) and (4) above were previously of record and are not a basis for reopening a claim. The Board has held that material that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.¹¹ Thus, these duplicate documents are of no value in establishing clear evidence of error. Item No. (1) is a narrative of appellant's own allegations in support of his request for reconsideration. This statement reiterates arguments appellant had previously presented to the Office and Board and do not constitute the evidence necessary to establish clear evidence of error.

Appellant submitted statements by Mr. Bradshaw, Mr. Daley and Mr. Cunningham, which he believed verified his statements. However, none of their statements provided any information as to who the individual were, whether they witnessed the alleged incidents nor did they provide any particular details of the alleged incidents. These statements are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim.¹²

For these reasons, the Board finds that evidence submitted do not raise a substantial question as to the correctness of the Office's decision and are insufficient to demonstrate clear evidence of error. The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

¹¹ *James A. England*, 47 ECAB 115 (1995).

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

The September 21, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 2, 2002

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member