

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

LEON J. MODROWSKI, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
Chicago, IL, Employer**

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**Docket No. 03-1702
Issued: January 2, 2004**

Appearances:
Leon J. Modrowski, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 30, 2003 appellant filed a timely appeal of a May 16, 2003 decision of the Office of Workers' Compensation Programs which denied appellant's request for reconsideration. The Office previously denied his claim on the merits in a decision dated December 31, 1998. Because more than one year has elapsed between the last merit decision dated December 31, 1998 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The only decision properly before the Board is the Office's May 16, 2003 decision denying appellant's request for reconsideration of the merits of his claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 6, 1997 appellant, then a 51-year-old senior realty specialist, filed a claim asserting that his work environment on or about July 9, 1997 caused his depression, anxiety and fear and exacerbated neurological impairments which resulted from a motor vehicle accident sustained on December 13, 1990. He first became aware of his condition in April 28, 1993 when he suffered a number of personal tragedies. Appellant alleged that, since January 1996, his employer harassed and pressured him to retire, threatened him with discipline on July 9, 1997 and with removal on July 28, 1997. He stopped working August 11, 1997.

In a decision dated February 12, 1998, the Office denied appellant's claim on the grounds that he had not established any compensable factors of employment. The Office found that the alleged incidents were not substantiated by the evidence of record, were of a personal nature or of an administrative nature and unsupported by evidence of error or abuse.

In a March 9, 1998 letter, appellant requested both reconsideration and a hearing. He listed disagreements with the Office's findings and made new allegations. A hearing took place on September 23, 1998, during which appellant testified and submitted multiple exhibits. In a decision dated December 31, 1998, an Office hearing representative affirmed the Office's February 12, 1998 decision denying appellant's emotional and neurological claim. The Office hearing representative modified the decision to find that appellant had established a compensable factor of employment, that he was called an ass by a supervisor at work. The hearing representative found that appellant failed to submit sufficient medical evidence to support a finding that this factor contributed to his neurological condition or to the development of any emotional condition.

By letter dated November 10, 2002, appellant requested reconsideration of the Office's December 31, 1998 decision on the grounds that he was wrongly terminated on October 6, 1997. He stated that he entered into a written settlement agreement with the employing establishment on July 1, 2002, wherein all charges by the employing establishment were withdrawn and he retired effective December 28, 1999. Appellant requested workers' compensation benefits from the date of his termination on October 6, 1997 through December 28, 1999, the date of his disability retirement. Submitted were decisions and hearing testimony from other adjudicatory tribunals.

A June 13, 2001 decision of the United States Court of Appeals for the Federal Circuit affirmed in part, reversed in part, vacated in part and remanded for further proceedings a June 24, 1999 decision of the Merit Systems Protection Board (MSPB). The Court of Appeals affirmed that appellant had violated conflict of interest rules by participating in the sale of agency-owned property to his son-in-law and that he knowingly concealed such information from the agency in violation of agency rules of conduct for employees. The Court vacated the MSPB's finding that appellant refused to cooperate in the agency's investigation. Accordingly, the Court of Appeals remanded the case for a redetermination of an appropriate penalty. A subsequent decision of the MSPB dated July 1, 2002 dismissed the appeal on the grounds that the parties had reached a settlement pertaining to appellant's removal by the employing establishment and no further matter remained before the MSPB for adjudication. Copies of pages from the MSPB hearing record was also submitted.

In a decision dated May 16, 2003, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.¹ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.² The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁵ 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

ANALYSIS

Appellant's November 10, 2002 letter requesting reconsideration was submitted more than one year after the December 31, 1998 merit decision and, was therefore, untimely. As appellant's request was filed more than one year after the Office's December 31, 1998 decision, appellant must demonstrate "clear evidence of error" on the part of the Office in issuing its December 31, 1998 decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁷ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so

¹ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² Section 8128 of the Act provides: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607 (1999).

⁴ 20 C.F.R. § 10.607(a) (1999).

⁵ 20 C.F.R. § 10.607(b) (1999).

⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

as to produce a contrary conclusion.¹⁰ 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 decision.¹¹ In the instant case, appellant failed to demonstrate clear evidence of error.

Appellant submitted decisions and testimony from other adjudicatory tribunals. The June 13, 2001 decision of the United States Court of Appeals for the Federal Circuit vacated a previous MSPB decision on the grounds that the charge of refusal to cooperate was dropped. The Court, however, affirmed two other charges finding that appellant violated conflict of interest rules and concealed information from the agency. The matter was returned to the MSPB to redetermine the appropriate penalty to be imposed. This evidence does not raise a substantial question as to the correctness of the Office's decision finding no administrative error or abuse. The fact that the MSPB was asked to redetermine appellant's penalty does nothing to refute the charges upon which disciplinary action was taken. The July 1, 2002 MSPB decision dismissed the appeal since the parties reached a settlement pertaining to appellant's removal from the employing establishment and no matter remained before the MSPB for adjudication. Copies of a portion of the MSPB hearing record were also submitted. These materials do not establish that the charges upon which discipline was based were disapproved. Rather, the parties entered a settlement agreement and no further matter remained for the MSPB to adjudicate. The Board finds that this evidence fails to establish error or abuse on the part of the employing establishment and, is not sufficient to *prima facie* shift the weight of the evidence in favor of the appellant's claim or raise a substantial question that the Office erred in denying appellant's claim.¹² Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member