United States Department of Labor
Employees' Compensation Appeals Board

LARRY R. CUMMINGS, Appellant	)	
and	)	**Docket No. 04-1235**
	)	**Issued: October 12, 2004**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Greensboro, NC, Employer	)	

Appearances:
Larry R. Cummings, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 8, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated March 17, 2004 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated July 11, 2001 to the filing of this appeal on April 8, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

This case is on appeal before the Board for the fourth time. On July 11, 2001 the Board affirmed an Office hearing representative's March 8, 2000 decision which found appellant had

failed to establish any compensable factors and, therefore, failed to establish that he sustained an emotional condition causally related to his employment.[1] The Board also affirmed the Office's April 11, 2000 decision denying appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a). On June 17, 2002 the Board affirmed the Office's denial of appellant's request for reconsideration on the merits of his claim pursuant to 5 U.S.C. § 8128(a).[2] On June 5, 2003 the Board affirmed the Office's September 9, 2002 denial of appellant's request for reconsideration on the basis that it was untimely filed and failed to demonstrate clear evidence of error.[3] The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

Subsequent to the Board's June 5, 2003 decision filed, appellant filed a request for reconsideration in letters dated February 27 and March 7, 2004. He submitted Freedom of Information Act requests and the response from the agencies; copies of his statements regarding an alleged bomb threat left on his answering machine; a March 9, 2004 letter to the Office of the Inspector General for the employing establishment; a February 20, 2004 letter from Dave Van Norsrand, Special Agent in Charge, informing him that an investigation would not be opened on his allegations of harassment and retaliation for his filing a fraud complaint regarding a postal contract to New Breed Leasing Corporation; a March 4, 2004 letter from the Board informing him that the Board's jurisdiction over his case ended June 5, 2003; a copy of his September 14, 1998 occupational disease claim; an investigative summary log by Inspector Griswold for the period February 22 through November 17, 1995; a copy of a January 9, 2004 letter from T.R. Denneny, Inspector In Charge, U.S. Postal Service Inspection Service; a March 7, 2004 letter from appellant appealing the denial of his request for the entire investigative summary log; a copy of the Freedom of Information Act appeal procedure; an October 2, 1996 letter from Robert E. Taylor, Clerk of the Board for the Merit Systems Protection Board; a January 19, 1995 letter protesting the award of a contract by the employing establishment to New Breed Leasing Corporation; a March 5, 2004 letter from appellant regarding a medical article on hypertension; copies of his W2 forms for 1994 and 1998; a copy of his retirement amount for 2003; a statement by appellant regarding his lost wages and benefits; a copy of his request to withdraw his petition for review to the Merit Systems Protection Board and copies of evidence previously submitted; a copy of a May 2, 2003 article on the postal inspector general; a copy of a criminal record check on appellant; a copy of the first page of biography of the Board of Governors for the employing establishment; and various news articles.

[1] Docket No. 00-1955 (issued July 11, 2001). On September 13, 1998 appellant, a 57-year-old distribution operations supervisor, filed a claim alleging that his stress was due to harassment he was subjected to on September 10, 1998. In a letter dated October 8, 1998, he alleged that he had been harassed by his supervisor, Gene Puckett since December 8, 1995, when he filed a complaint regarding the retirement program. Appellant stated that the retaliation took the form of cutting his overtime, doubling up his job assignments and disapproving his leave. The Office denied his claim on March 1, 1999 on the grounds that he failed to establish fact of injury as no medical evidence had been submitted. In a decision dated March 8, 2000, an Office hearing representative affirmed the denial of appellant's emotional condition claim on the grounds that he failed to establish any compensable factors of employment.

[2] Docket No. 02-222 (issued June 17, 2002).

[3] Docket No. 02-2388 (issued June 5, 2003).

In a March 17, 2004 decision,[4] the Office denied reconsideration finding that appellant's claim was untimely and did not establish clear evidence of error.[5]

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[6] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[7] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[8] 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. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9] 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.[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

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[4] The Office only noted appellant's March 7, 2004 request for reconsideration in its decision. However, since the February 27, 2004 reconsideration request is also untimely, the Office's failure to note this request is harmless error. *See Mohamed Yunis*, 46 ECAB 827 (1995).

[5] On appeal appellant attempted to submit additional evidence. The Board's review is limited to the evidence that was before the Office at the time of its final decision. The Board therefore cannot consider evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[6] 5 U.S.C. §§ 8101-8193. To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] the Office's regulation provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision. *See* 20 C.F.R. § 10.607(a). When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act. *See Joseph A. Brown, Jr.*, 55 ECAB ___ (Docket No. 04-376, issued May 11, 2004). 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. *See Adell Allen (Melvin L. Allen*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

[7] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[8] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[9] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

[10] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[11] *See Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

manifested 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 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] 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 decision.[16] 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.[17]

ANALYSIS

In its March 17, 2004 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision was rendered on July 11, 2001. Appellant requested reconsideration in letters dated February 27 and March 7, 2004. Since appellant's requests for reconsideration are more than one year after the July 11, 2001 decision, they are untimely.

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The critical issue is whether appellant has established compensable factors of employment with regard to the incidents which occurred on September 10, 1998, which he alleged constituted harassment and the cause of his stress. With

[12] *See Pasquale C. D'Arco*, 54 ECAB ___ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[13] *See Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez, supra* note 8.

[14] *See Leona N. Travis, supra* note 12.

[15] *See Nelson T. Thompson, supra* note 10.

[16] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[17] *See George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

his February 27 and March 7, 2004 requests for reconsideration, appellant submitted evidence he contended warranted reconsideration. The evidence submitted by appellant fails to address the incidents he alleged constituted harassment. Most of the evidence submitted is recent and not contemporaneous with his claim or the incidents alleged. None of this evidence addresses the relevant issue of whether appellant sustained an emotional condition causally related to accepted factors of his employment.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review because his request for reconsideration was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2004 is affirmed

Issued: October 12, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member