United States Department of Labor
Employees' Compensation Appeals Board

JIMMY P. PIKE, Appellant	)	
and	)	**Docket No. 05-1027**
	)	**Issued: August 3, 2005**
DEPARTMENT OF THE NAVY, NAVAL AIR DEPOT, NORTH ISLAND, San Diego, CA, Employer	)	

Appearances:
Jimmy P. Pike, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 1, 2005 appellant filed a timely appeal from the January 28, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which denied his untimely request for reconsideration and found that he failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 15, 2003 and the filing of the appeal on April 1, 2005 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), but has jurisdiction over the nonmerits.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On February 28, 2001 appellant, then a 52-year-old planner and estimator, filed an occupational disease claim alleging that on February 6, 2001 he first realized that his aggravated

arthritis and elevated blood pressure were resulting from an "extreme stress disorder" due to work and travel requirements.[1] Following the development of appellant's claim, the Office issued a decision on August 13, 2001 which found that he failed to establish that he sustained an emotional condition while in the performance of duty. The Office found that appellant failed to provide sufficient evidence establishing the alleged events and circumstances as factual. Appellant disagreed with the Office's decision and in a letter dated August 18, 2001 he requested an oral hearing before an Office hearing representative. The Office subsequently denied appellant's request to postpone the hearing and advised him that instead a review of the written record would be conducted.

By decision dated June 18, 2002, an Office hearing representative found that appellant's travel requirements constituted a compensable factor of his employment. The hearing representative further found that the medical evidence of record attributed appellant's emotional condition to his travel requirements but necessitated further development regarding causal relation. Accordingly, the hearing representative set aside the Office's August 13, 2001 decision and remanded the case for further action.

On remand, the Office issued a decision dated October 22, 2002, which found that appellant did not sustain an emotional condition while in the performance of duty. The Office found that appellant's allegations regarding his work-related travel pertained to his fear and anxiety about future injury if he were required to travel following his January 19, 2001 back injury. The Office found that such fear and anxiety were not compensable under the Federal Employees' Compensation Act.

In a November 19, 2002 letter, appellant requested an oral hearing.[2] By decision dated December 15, 2003, a hearing representative found the evidence of record insufficient to establish that appellant sustained an emotional condition and/or aggravation of his hypertension while in the performance of duty. The hearing representative found that appellant's travel requirements, losing or having his airline ticket stolen, having a heavy workload and sustaining a back injury on January 19, 2001 constituted compensable factors of his employment. The hearing representative also found that the employing establishment's handling of certain leave matters constituted a compensable employment factor. The hearing representative, however, found the medical evidence of record insufficient to establish that appellant's emotional condition was caused by the accepted employment factors. The hearing representative concluded that appellant did not sustain an emotional condition while in the performance of duty. Accordingly, the Office's June 18, 2002 decision was affirmed as modified.

On December 20, 2004 the Office received a December 10, 2004 letter from appellant requesting reconsideration. He contended that his request was timely made. Appellant addressed being demoted by the employing establishment because he was physically unable to travel and forced to travel despite his physical limitations. He noted his discussions with the

[1] On April 21, 2001 appellant filed a traumatic injury claim alleging that he hurt his back on January 19, 2001 while inspecting five aircrafts.

[2] At the August 27, 2003 hearing, appellant testified that he resigned from the employing establishment on March 22, 2002 after being demoted by the employing establishment because he was physically unable to travel.

employing establishment regarding the submission of medical documentation and difficulty in performing the requirements of the demoted sheet metal worker position. He argued that his back injury and emotional condition claims were untimely processed by the employing establishment, which resulted in disorganization and the denial of the claims.

By decision dated January 28, 2005, the Office stated that appellant's letter requesting reconsideration was received in the Office on December 20, 2004 and, therefore, found it was filed more than a year after the Office's December 15, 2003 decision and was untimely. The Office also found that appellant did not submit any evidence establishing clear evidence of error in the Office's prior decisions.[3] Consequently, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[6] Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date."[7] Otherwise, the date of the letter itself should be used."[8]

Section 10.607(a) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[10] The evidence must be positive, precise and explicit

[3] The Board notes that on appeal appellant has submitted new evidence. The Board may not consider evidence for the first time on appeal, which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; and 20 C.F.R. § 10.606.

[4] 5 U.S.C. § 8128(a).

[5] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] 20 C.F.R. § 10.607(a).

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (January 2004).

[9] 20 C.F.R. § 10.607(b).

[10] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

and must be manifest on its face that the Office committed an error.[11] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14]

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.[15] 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.[16]

ANALYSIS

The last merit decision in this case was issued by an Office hearing representative on December 15, 2003, which found that appellant established compensable factors of his employment but failed to establish that his emotional condition and aggravated hypertension were caused by the accepted employment factors. The postmarked envelope in which appellant mailed his letter requesting reconsideration is not in the record. The Office stated that it received appellant's December 10, 2004 reconsideration request on December 20, 2004. As appellant's letter was dated December 10, 2004, which was within a year of the Office's December 15, 2003 decision, the Board finds that his reconsideration request is timely.[17] The burden is on the Office to show that a reconsideration request was untimely and the Office has failed to meet this burden.[18]

Since appellant's December 10, 2004 reconsideration request was timely filed, the case will be remanded for the Office to adjudicate appellant's reconsideration request in accordance with the criteria set forth in 20 C.F.R. § 10.607(a). After any further development as it deems necessary, the Office shall issue an appropriate decision.

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[11] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[12] *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

[13] *Leona N. Travis, supra* note 11.

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

[15] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[16] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[17] *See Algimantas Bumelis*, 48 ECAB 679, 680 (1997); *see also* Chapter 2.1602.3b(1) *supra* note 8.

[18] *Id.*

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration on the grounds that it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: August 3, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board