

ISSUE

The issue is whether the Office properly found appellant's request for reconsideration untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the fourth appeal in this case. In the first appeal the Board, by a September 19, 2002 decision found that the Office erred in finding appellant's request for reconsideration was untimely filed because the Office failed to provide the requisite notice of the one-year time limitation for filing a request for reconsideration for claims adjudicated prior to June 1, 1987.³ The Board thus reversed the Office's December 3, 2001 decision and remanded the case for further consideration of the claim. In the second appeal the Board, on July 24, 2003, affirmed a January 28, 2003 Office decision, which denied appellant's emotional claim on the grounds that he failed to establish any compensable factors of employment.⁴ The Board noted that appellant failed to submit any evidence to prove that a coworker accused him of murder, that other coworkers shunned him and called him a murderer, that management did not respond appropriately to his complaint or that management erred or acted abusively in taking various disciplinary actions against him. In the third appeal the Board, on October 8, 2004, affirmed an April 22, 2004 nonmerit decision of the Office on the grounds that appellant failed to meet any of the requirements for reconsideration pursuant to 5 U.S.C. § 8128 and 20 C.F.R. § 10.606.⁵ The facts of this case as set forth in the Board's prior decisions are hereby incorporated by reference.

On November 29, 2004 the Office received an undated letter from appellant requesting reconsideration. Appellant alleged harassment and reviewed various disciplinary actions which were raised and addressed previously. Additionally, he resubmitted medical evidence and a decision by the Department of Veterans Affairs, and also contended that his treating physicians instructed him not to work.

By decision dated December 9, 2004, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

³ Docket No. 02-634 (issued September 19, 2002). On November 13, 1979 appellant, a 24-year-old mail handler, filed a claim alleging that he sustained an employment-related emotional condition. The Office denied his claim on the grounds that he failed to establish any compensable factors of employment.

⁴ Docket No. 03-861 (issued July 24, 2003).

⁵ Docket No. 04-1391 (issued October 8, 2004).

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 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

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 regulations provide 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) submit 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 *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *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).

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.

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

The most recent merit decision in this case is the Board's July 23, 2003 decision which affirmed the Office's denial of appellant's claim on the grounds that he failed to establish compensable factors of employment and thus failed to establish an emotional condition arising from factors of his federal employment. The Office properly notified appellant that any request for reconsideration must be made within one year of that decision. Appellant's request for reconsideration was dated November 29, 2004, more than one year after July 23, 2003.

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its January 28, 2003 merit decision. Appellant's undated request for reconsideration, which the Office received on November 29, 2004, fails to demonstrate clear evidence of error on the part of the Office in its January 28, 2003 decision or the Board's July 24, 2003 merit decision. The Office denied appellant's claim for compensation because he failed to discharge his burden of proof to prove that a coworker accused him of murder, that other coworkers shunned him and called him a murderer, that management did not respond appropriately to his complaint or that management erred or acted abusively in taking various disciplinary actions against him. The issue, therefore, is strictly a factual one. Appellant, however, submitted no factual evidence to address this issue when he made his November 29, 2004 request for reconsideration. Instead, he resubmitted medical evidence and a disability determination by the Department of Veterans Affairs and alleged that he was instructed not to return to work by his treating physicians. Evidence which is repetitious or duplicative of that already in the record and previously reviewed is an insufficient basis to warrant further consideration.¹⁸ Moreover, none of this evidence is relevant to the reason the Office denied his claim on January 28, 2003. Nothing in appellant's November 29,

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).

¹⁸ See *Eugene F. Butler*, 36 ECAB 393 (1984).

2004 request for reconsideration remotely suggests that the Office's January 28 2003 decision was erroneous in finding that no compensable factor of employment had been established.

Because appellant's November 29, 2004 request for reconsideration does not establish, on its face, that the Office's January 28 2003 decision was erroneous, the Board will affirm the Office's December 9, 2004 decision not to reopen his case for a review on the merits.

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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2004 is affirmed.

Issued: July 13, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member