United States Department of Labor
Employees' Compensation Appeals Board

JESSE J. RAMOS, Appellant	)	
and	)	**Docket No. 06-286**
	)	**Issued: April 13, 2006**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Los Angeles, CA, Employer	)	

Appearances:
Jesse J. Ramos, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 17, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 7, 2005 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 14, 2003 decision denying his claim that he sustained an employment injury on October 1, 1997. Because more than one year has elapsed between the last merit decision and the filing of this appeal on November 17, 2005, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

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

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On January 19, 1998 appellant, then a 45-year-old special agent and criminal investigator, filed a traumatic injury claim alleging that he sustained injury to his right temple, left knee, left arm and left wrist when he was attacked at work on October 1, 1997.[2] Appellant claimed that his first line supervisor, Ezequiel Garcia, refused to stop taking photographs of him and his work area and indicated that "a physical encounter occurred" when appellant tried to stop Mr. Garcia from taking photographs. He alleged that other agents jumped him and forcibly detained him. In an April 17, 1998 statement, appellant asserted that he did not start the altercation with Mr. Garcia. He claimed that he was within his rights when he tried to prevent Mr. Garcia from taking photographs in his office. Appellant was placed on administrative leave with pay beginning October 1, 1997 pending the investigation of the incident.[3]

In an October 1, 1997 statement, Mr. Garcia indicated that he had been advised on that date that appellant had placed a sign on a wall in his workplace that stated: "Beware recording in progress." Mr. Garcia stated that he photographed the sign and that appellant began to tear the sign off the wall, pointed a finger in his face and backed him against a pillar. Mr. Garcia told appellant about four times to back off, but appellant repeatedly asked: "What are you going to do about it?". He stated that appellant then lunged at him, grabbed his tie, forced him to the ground and began choking him. Mr. Garcia indicated that he yelled for help and indicated that two agents, Stephanie Fierro and Roy Casas, pulled appellant away and held him against a desktop. He stated that appellant was handcuffed and Karl P. Ullrich, who arrived at the scene around this time, escorted him to another area. The record contains statements of Ms. Fierro, Mr. Casas and Mr. Ullrich, which are consistent with Mr. Garcia's statement. Mr. Ullrich indicated that Jorge Guzman, a section chief, placed appellant on administrative leave.[4]

Appellant submitted several medical reports concerning his physical and mental condition.

By decision dated January 15, 1999, the Office denied that appellant sustained an employment injury on October 1, 1997 on the grounds that the claimed injury did not occur in the performance of duty. The Office indicated that appellant's actions on October 1, 1997 constituted willful misconduct.

Appellant submitted statements in which he asserted that he did not start the confrontation on October 1, 1997 or commit willful misconduct on that date. He also asserted that he sustained stress because the employing establishment carried out improper investigatory and disciplinary actions in connection with the October 1, 1997 incident. Prior to October 1,

[2] Appellant also asserted that he sustained stress due to the October 1, 1997 incident.

[3] Appellant was terminated from the employing establishment effective March 31, 2000.

[4] The record also contains witness statements which indicate that a tape recorder was observed on appellant's desk on October 1, 1997 and that appellant was told on numerous prior occasions not to record conversations in the workplace.

1997, it improperly disciplined him for recording conversations in the office.[5] Appellant also generally asserted that Mr. Garcia and other employing establishment officials subjected him to harassment and discrimination.[6]

By decisions dated March 23, October 26, 2001, May 29 and October 14, 2003, the Office affirmed its prior determination that appellant did not establish the occurrence of an employment injury. The Office found that appellant committed willful misconduct on October 1, 1997 and therefore was not within the performance of duty during the alleged injury on that date. It also found that appellant had not established harassment, discrimination or wrongdoing in connection with such administrative matters as investigatory and disciplinary actions.

In a lengthy, undated letter received by the Office on June 6, 2005, appellant requested reconsideration of his claim. Appellant described the October 1, 1997 incident and asserted that employing establishment officials gave inconsistent accounts of what occurred on that date. He suggested that Mr. Garcia committed fraud in a civil case by alleging that he had been injured on October 1, 1997. Appellant claimed that employing establishment officials acted improperly when they served him with a restraining order after the October 1, 1997 incident. Appellant contended that he was improperly convicted of being part of a gang that committed real estate fraud. He asserted that Mr. Garcia and Mr. Guzman were corrupt and suggested that they and other employing establishment officials tried to kill him. Appellant alleged that Mr. Guzman approved tactics at work which violated citizens' civil rights and that he targeted Hispanics and Mexican-Americans for disciplinary action and termination from the employing establishment. He asserted that Caucasian agents were not disciplined as harshly as Hispanics or Mexican-American agents. Appellant claimed that Mr. Guzman and other employing establishment officials were harboring illegal aliens.

By decision dated September 7, 2005, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[7] 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 Federal Employees' Compensation Act.[8]

[5] Appellant claimed that a surveillance tape of Mr. Garcia taken while he delivered him a restraining order after the October 1, 1997 incident showed that Mr. Garcia had not been injured on October 1, 1997 as he had alleged.

[6] Appellant also continued to submit additional medical evidence.

[7] 20 C.F.R. § 10.607(a).

[8] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office regulations and procedure provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[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 manifest 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]

ANALYSIS

Appellant alleged that he sustained physical and emotional injury due to a confrontation with a supervisor on October 1, 1997 and due to the fact that the employing establishment committed harassment and discrimination and engaged in wrongdoing with respect to investigatory and disciplinary actions. The Office denied appellant's claim, finding that he

[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 8.

committed willful misconduct on October 1, 1997 and determining that he did not prove his other claims regarding the actions at the employing establishment.[17]

In its September 7, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on June 1, 2005, more than one year after the Office's last merit decision of October 14, 2003. Therefore, he must demonstrate clear evidence of error on the part of the Office.

Appellant has not demonstrated clear evidence of error on the part of the Office. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In connection with his untimely reconsideration request, appellant submitted a letter in which he described the October 1, 1997 incident and asserted that employing establishment officials gave inconsistent accounts of what occurred on that date. He suggested that Mr. Garcia committed fraud in a civil case by alleging that he had been injured on October 1, 1997 and claimed that he was improperly served a restraining order after the October 1, 1997 incident. However, these statements have limited relevance because they are similar to earlier statements made by appellant and were not supported by any additional probative evidence.[18] Appellant's mere assertions in this regard are not the type of convincing, probative evidence that would show clear evidence of error in the Office's determination that he had not sustained an employment injury.

In his letter, appellant discussed a number of other matters, but it is unclear how they are relevant to appellant's claim that he sustained an employment injury. For example, appellant argued that he was improperly convicted of being part of a gang that committed real estate fraud. Appellant made a number of vague assertions regarding the actions of employing establishment officials, but they would not be relevant as appellant did not articulate how they related to him or caused him to sustain an employment injury. For example, he generally asserted that Mr. Garcia and Mr. Guzman were corrupt and claimed that Mr. Guzman approved tactics at work which violated citizens' civil rights, that he harbored illegal aliens and that he discriminated against Hispanic and Mexican-American agents.[19]

---

[17] The Board has defined willful misconduct as deliberate conduct involving premeditation, obstinacy or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct which is in wanton or reckless disregard of probably injurious consequences. *Karen Cepec*, 52 ECAB 156, 159 (2000). For harassment or discrimination to give rise to a compensable disability, there must be evidence that harassment or discrimination did in fact occur. *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). An administrative matter such as an investigatory or disciplinary action will only give rise to a compensable disability if the employing establishment committed error or abuse in carrying out the action. *Richard J. Dube*, 42 ECAB 916, 920 (1991).

[18] For example, he did not present evidence or argument which showed that he did not commit willful misconduct on October 1, 1997. Nor did he submit evidence, such as the findings of grievances, which showed that the employing establishment subjected him to harassment and discrimination or committed wrongdoing in connection with such administrative matters as investigatory and disciplinary actions.

[19] Appellant did not provide any evidence which would provide support for these charges or explain how they related to his own situation. Appellant also suggested that Mr. Garcia and Mr. Guzman and other employing establishment officials tried to kill him. However, he did not provide any support for this assertion.

For these reasons, the argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's October 14, 2003 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 7, 2005 decision is affirmed.

Issued: April 13, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board