United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
	)	**Docket No. 06-1550**
and	)	**Issued: December 6, 2006**
U.S. POSTAL SERVICE, CITY GATE PARK PLANT PROCESSING & DISTRIBUTION CENTER, Columbus, OH, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decisions dated November 1, 2005 and May 17, 2006, denying his requests for reconsideration. Because more than one year has elapsed between the last merit decision dated February 10, 2005 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUES

The issues are: (1) whether the Office properly denied appellant's October 13, 2005 request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly denied appellant's March 15, 2006 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On October 11, 2002 appellant, then a 60-year-old mail processing clerk, filed an occupational disease claim (Form CA-2). On January 8, 2002 he first realized that his

depression, stress, insomnia and anxiety were caused by his federal employment. Appellant stated that on January 7, 2002 he was verbally and physically harassed in the men's locker room by Venice Conley, a coworker. His claim was accompanied by a narrative statement regarding the alleged January 7, 2002 incident and medical evidence indicating that his conditions were caused by his employment.

After further development of the claim, the Office issued a decision on July 10, 2003. It found that appellant failed to establish that he sustained an emotional condition while in the performance of duty. The evidence of record failed to establish that the January 7, 2002 incident occurred as alleged. Further, appellant did not establish harassment by Ms. Conley from the late 1980s to June 6, 2001.

On August 3, 2003 appellant requested an oral hearing before an Office hearing representative.

On September 4, 2003 appellant filed a claim alleging that he sustained a recurrence of disability on August 13, 2003.

At the January 14, 2004 hearing, appellant submitted a January 28, 2002 letter of warning issued by the employing establishment following an incident between himself and Ms. Conley on January 7, 2002. An affidavit from Loretta Evans, appellant's union representative, noted that she handled appellant's grievance regarding the January 28, 2002 letter of warning, which was later reduced to a discussion. She also noted her involvement in an incident that occurred around March or April 2002. Ms. Evans was asked by Richard Washington, a manager, to remove appellant from the workroom floor because he had cursed at a supervisor who failed to sign a receipt of notification of his CA-2 form. A copy of a February 15, 2002 resolution of appellant's grievance indicated that the letter of warning was reduced to a discussion.

By decision dated April 14, 2004, an Office hearing representative affirmed the July 10, 2003 decision. The hearing representative found the evidence of record sufficient to establish that an altercation arose between appellant and Ms. Conley on January 7, 2002 but insufficient to establish that this incident arose out of appellant's employment.

By letter dated August 18, 2004, appellant requested reconsideration. In an undated notarized statement, he described the January 7, 2002 incident. A February 8, 2004 notarized statement of Theron Long, a coworker, stated that he witnessed Ms. Conley verbally abuse appellant on January 7, 2002 after appellant told her that she should not be in the men's locker room. In a January 28, 2002 progress note, appellant's counselor diagnosed "V62.2," an occupational problem. A September 24, 2003 report of Dr. William W. Friday, a Board-certified psychiatrist, indicated that appellant had a history of physical injuries and surgeries and work-related stress while at the employing establishment. He opined that appellant was in a severely depressed state with high anxiety which was caused by his injury.

On October 28, 2004 the Office denied modification of the April 14, 2004 decision. The evidence submitted by appellant failed to establish that the January 7, 2002 incident constituted a compensable factor of his employment.

By letter dated November 15, 2004, appellant requested reconsideration. In a November 6, 2004 statement, Mr. Long reiterated that he witnessed the verbal altercation between appellant and Ms. Conley on January 7, 2002. Appellant told Ms. Conley that she should not be cleaning the men's locker room because a male employee could say or do something to her. He stated that Ms. Conley slept around and that she was an adulterer. Ms. Conley went berserk and cursed and yelled at appellant. Mr. Long noted that appellant told her not to put her hands on him. He did not actually see Ms. Conley touch appellant as he was in the next aisle when he overheard appellant's comments.

In a February 10, 2005 decision, the Office denied modification of its October 28, 2004 decision. It found that the evidence of record established that the incident occurred as alleged but did not occur within the performance of appellant's work duties.

By letter dated October 13, 2005, appellant requested reconsideration. He contended that there was a pattern of discrimination, harassment and a hostile work environment at the employing establishment. He alleged that on December 6, 2004 an employee hit him with a letter tray and that Jeff Acker, a coworker, wrote on his car on October 9, 2004. Appellant submitted an employing establishment claim for personal property which indicated that on October 4, 2004, the driver's side window and door and rear hood of his car were damaged while parked in the employee parking lot.

By decision dated November 1, 2005, the Office denied appellant's request for reconsideration on the grounds that it did not include new and relevant evidence or argument to warrant a merit review of its prior decision.

Appellant requested reconsideration by letter dated March 15, 2006. He contended that the Office failed to investigate the December 6, 2004 incident. Appellant reported his allegations that Mr. Acker wrote on his car on October 9, 2004 and tried to force him to shake his hand on October 1, 2005. He alleged harassment in November 1997 by a white male who was six feet and eight inches tall who followed him from the employees' parking lot to the workroom floor. Appellant stated that, as a black male Vietnam veteran, he was discriminated against and was exposed to traumatic experiences on a daily basis at the employing establishment. In a December 10, 2005 statement, he described a November 26, 2005 incident involving Richard Bailey, a coworker. Appellant alleged that Mr. Bailey repeatedly yelled at him while teasing him about retiring first. He submitted a partial copy of his CA-2a form.

In a May 17, 2006 decision, the Office found that appellant's letter requesting reconsideration was dated March 15, 2006, more than one year after the Office's February 10, 2005 decision and was untimely. The Office found that appellant did not submit any evidence establishing clear evidence of error in the prior decision rejecting his claim for an emotional condition.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[1] 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) constitute relevant and pertinent new evidence not previously considered by the Office.[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.[3] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 1

In an October 13, 2005 letter, appellant requested reconsideration of the Office's February 10, 2005 decision, which found that he did not sustain an emotional condition while in the performance of duty. The relevant underlying issue is whether appellant has established compensable factors arising from his federal employment.

Appellant contended that he was verbally harassed by Ms. Conley on January 7, 2002, that in October 2004 Mr. Acker wrote on his car, that the driver's side window and door and rear hood of his car were damaged while it was parked in the employees' parking lot, and that a coworker hit him with a letter tray on December 6, 2004.

Appellant's allegations essentially repeat his contention of harassment previously considered by the Office. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[4]

To the extent that his allegation of harassment may be considered a legal argument not previously considered by the Office, the Board has held that, while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.[5] Although appellant had not previously made an allegation of being physically

[1] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b)(1)-(2).

[3] *Id*. at § 10.607(a).

[4] *James W. Scott*, 55 ECAB 606 (2004).

[5] *Vincent Holmes*, 53 ECAB 468 (2002).

attacked by a coworker, the Board notes that he did not submit any relevant evidence supporting his contention.[6]

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his October 13, 2005 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] 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.[9] 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. Otherwise, the date of the letter itself should be used.[10]

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.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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[6] *See generally Daniel O Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of the application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

[7] 5 U.S.C. § 8128(a).

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

[9] 20 C.F.R. § 10.607(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

[11] 20 C.F.R. § 10.607(b).

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

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

establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16]

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's decision.[17] 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.[18]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[19]

The most recent merit decision in this case was issued by the Office on February 10, 2005. It found that the January 7, 2002 incident occurred but not within the performance of appellant's work duties. As appellant's March 15, 2006 request for reconsideration was made more than one year following this merit decision, the Board finds that it was untimely filed.

As previously noted, the underlying issue is whether appellant established that he sustained an emotional condition causally related to compensable factors of his federal employment. He contended that on December 6, 2004 a coworker hit him with a letter tray, that in October 2004 Mr. Acker wrote on his car and on October 1, 2005 he tried to force him to shake his hand, that in November 1997 a tall white male coworker harassed him from the employees' parking lot to the workroom floor and that on November 26, 2005 Mr. Bailey yelled at him while teasing him about retiring first.

Appellant's allegations are unsupported by any evidence that raises a substantial question as to the correctness of the Office decision. This evidence is insufficient to shift the weight of

[14] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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

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

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

[19] *Larry L. Litton*, 44 ECAB 243 (1992).

the evidence in favor of appellant's claim. The Office previously considered appellant's contentions and found that they were not established by the record. On reconsideration, appellant did not explain how the Office's previous determinations about his allegations were clearly erroneous nor did he submit any evidence sufficient to shift the weight of the evidence in his favor. For example, appellant did not submit any sufficient evidence to shift the weight of the evidence with regard to appellant's contentions that on October 1, 2005 Mr. Acker tried to force him to shake his hand, that he was harassed by an employee in November 1997 from the employees' parking lot to the workroom floor and that on November 26, 2005 Mr. Bailey yelled at him and teased him. Appellant also submitted a partial copy of his CA-2a form which was already of record but he did not explain how this article of evidence was sufficient to shift the weight of the evidence in favor of his claim. The claim form does not establish that he sustained an emotional condition while in the performance of duty. As such, the Board finds that his unsupported allegations do not establish clear evidence of error.

For these reasons, appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's October 13, 2005 request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The Board further finds that the Office properly determined that appellant's March 15, 2006 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2006 and November 1, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board