United States Department of Labor
Employees' Compensation Appeals Board

ROBERT G. BURNS, Appellant	)	
and	)	**Docket No. 06-380**
	)	**Issued: June 26, 2006**
DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Rouses Point, NY, Employer	)	

Appearances:
Ronald H. Tonkin, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument May 23, 2006

DECISION AND ORDER

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

JURISDICTION

On December 6, 2005 appellant, through his attorney, filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated September 14, 2005 denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the September 14, 2005 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for review of the merits of his claim under 5 U.S.C. § 8128 on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

[1] *See* 5 U.S.C. § 501.3(d)(2).

FACTUAL HISTORY

This case is before the Board for the second time. In the prior appeal, the Board affirmed a May 2, 2003 Office decision denying appellant's claim that he sustained an emotional and diabetic condition due to factors of his federal employment.[2] The Board found that he had established as compensable employment factors the fact that his supervisor referred to him as an "axe man" and limited his contact outside the employing establishment. The Board further found, however, that he failed to submit sufficient medical evidence to establish an emotional condition resulting from these compensable employment factors. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

In a letter dated May 15, 2005, appellant related that he wanted to "reinstate [his] claim for injuries sustained on the job" and noted that he had retired from the employing establishment.

In a letter dated June 17, 2005, appellant, through his attorney, requested that the Office reopen his case. He submitted an unsworn declaration dated July 28, 2004 from a former special agent with the employing establishment, Michael A. Banas, which he maintained established a hostile work environment.

In his July 28, 2004 statement, Mr. Banas related that in 1994 he investigated complaints of hostile working conditions in appellant's work location caused by managers Daniel Letourneau and Mark Garrand. He related that Mr. Letourneau had a reputation for an "autocratic management style" and that Mr. Garrand was an "ambitious agent who wanted to advance his own career." Mr. Banas indicated that he was part of a team that interviewed the employees in Mr. Letourneau's office as a result of the allegations. He stated: "Each employee our team interviewed provided a sworn statement concerning the problems and hostile working conditions. The fact that they did so exemplified how bad working conditions had become." Mr. Banas noted that those he interviewed related that Mr. Letourneau used a government vehicle for private purposes and periodically walked away from employees who tried to talk with him. Appellant, during his interview, reported Mr. Letourneau's misuse of a government vehicle and this information was provided to management in a report. Mr. Banas noted that his supervisor, Mr. Tevens, told him that appellant was bad news and that later he learned that his supervisor was a friend and confidant of Mr. Letourneau. He described appellant as distraught when he spoke with him about the work situation in 1994 and 1996, particularly after Mr. Tevens told him that those investigating the situation worked for management. Mr. Banas concluded that the employees in appellant's office "were working in a hostile working environment caused by the management styles and personalities of [Mr.] Letourneau and [Mr.] Garrand."

By letter dated July 11, 2005, the Office notified appellant's attorney that he should exercise his appeal rights if he wanted the case reopened. On July 15, 2005 appellant, through counsel, requested reconsideration of his claim.

By decision dated September 14, 2005, the Office denied appellant's claim on the grounds that it was untimely filed and failed to present clear evidence of error.

[2] *Robert G. Burns*, Docket No. 03-1648 (issued January 28, 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.[3] 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.[4] 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.[5] 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.[6] 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.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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.[9] 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.[10]

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[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

[6] *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 decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[8] *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Dorletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003).

[9] *Id*.

[10] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[11] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[12] In this case, appellant's July 15, 2005 letter requesting reconsideration was submitted more than one year after the last merit decision of record and, thus, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.[13] While appellant argued on appeal that he initially requested reconsideration on May 15, 2005 rather than July 15, 2005, as May 15, 2005 is more than one year from the last merit decision issued January 28, 2004, his request would still be untimely.

The Board previously affirmed the denial of appellant's claim on the grounds that the medical evidence was insufficient to demonstrate that he sustained an emotional condition due to the established compensable employment factors. In support of his request for reconsideration, he submitted no additional medical evidence. Instead, appellant submitted a statement dated July 28, 2004 from Mr. Banas, an investigator with the employing establishment who interviewed employees in connection with complaints of hostility in the workplace caused by Mr. Letourneau and Mr. Garrand. He related that every employee interviewed described a hostile work environment. Mr. Banas indicated that the employees asserted that Mr. Letourneau used a government vehicle for his own private purposes and walked away from employees who tried to speak with him. He further related that appellant described Mr. Letourneau's misuse of the government vehicle and that this disclosure may have been revealed to Mr. Letourneau by his supervisor, Mr. Tevens. Mr. Banas noted that appellant seemed very upset about the work situation and expressed his belief that the management of Mr. Letourneau and Mr. Garrand caused a hostile work environment. His July 28, 2004 statement, however, does not raise a substantial question as to the correctness of the Office's decision. While Mr. Banas generally noted that subordinates in appellant's office reported a feeling of hostility arising from Mr. Letourneau's management style, he did not refer to any specific actions or statements by Mr. Letoureau directed towards appellant. Thus, his statement is insufficient to establish that appellant was harassed or discriminated against by management at the employing establishment.[14] Further, Mr. Banas' description of allegations by subordinates that Mr. Letoureau used a government vehicle for private purposes is unsubstantiated and thus insufficient to establish error or abuse in a management function.[15]

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[11] 20 C.F.R. § 10.607(a).

[12] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

[13] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ___ (Docket No. 03-2223, issued January 9, 2004).

[14] For harassment or discrimination to give rise to a compensable disability, there must be evidence that the harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable. *Jamel A. White*, 54 ECAB 224 (2002).

[15] An administrative or personnel matter will be considered an employment factor only where the evidence discloses error or abuse on the part of the employing establishment. *Hasty P. Foreman*, 54 ECAB 427 (2003).

On appeal, appellant, through counsel, argued that the hearing representative erred in denying his request for subpoenas. He maintained that the evidence obtained through subpoenas would establish a hostile work environment. The Board, however, previously affirmed the hearing representative's denial of the subpoena request.[16] Absent further review of this issue by the Office, pursuant to section 8128, it is *res judicata*.[17]

Appellant, through counsel, additionally argued that Mr. Banas' July 28, 2004 statement established that Michael Bridgeman, a supervisor, fraudulently controverted his claim. He contended that Rule 60 of the Federal Rules of Civil Procedure provided that courts have the power to grant relief if a judgment is achieved using fraud. Counsel cited to a circuit court case, *Hesling v. CSX Transport, Inc.*,[18] for the proposition that a party did not have to show that the outcome of the case would be changed absent the fraud in order to apply Rule 60. In this case, however, appellant has not shown that Mr. Banas' July 28, 2004 statement demonstrated that Mr. Bridgeman committed fraud by challenging his claim of a hostile work environment. Additionally, procedures before the Board are not governed by the Federal Rules of Civil Procedure.[19]

In order to establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the merits of the Office's decision.[20] The evidence submitted on reconsideration failed to meet this standard and, thus, the Office properly denied merit review.[21]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for review of the merits of his claim on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

[16] *See Robert G. Burns*, *supra* note 2.

[17] *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

[18] 396 F. 3d 632 (5th Cir. 2005).

[19] *See generally Bertha Keeble*, 45 ECAB 355 (1994). Federal workers' compensation claims are governed by the Act. *See* 5 U.S.C. §§ 8101-8193.

[20] *Pasquale C. D'Arco*, 54 ECAB 560 (2003).

[21] Appellant submitted new evidence with his appeal. The Board, however, has no jurisdiction to review evidence that was not before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2005 is affirmed.

Issued: June 26, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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