United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH R. SANTOS, Appellant	)	
and	)	**Docket No. 06-452**
	)	**Issued May 3, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Grass Valley, CA, Employer	)	

Appearances:
James A. Birt, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 23, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 15, 2005 nonmerit decision denying his request for merit review of his claim. 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 the Office was an April 3, 2003 decision denying appellant's emotional condition claim. As more than one year has lapsed from the April 3, 2003 decision to the filing of this appeal, the Board does not have jurisdiction over the merits of this case.[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

This is the second appeal in this case. The Board issued a decision on October 18, 2004 in which it affirmed the Office's denial of further merit review of appellant's claim.[2] On September 17, 2001 appellant, then a 52-year-old mail carrier, filed a claim alleging that he sustained depression and anxiety due to various incidents and conditions at work.[3] By decisions dated March 22, 2002 and April 3, 2003, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. By decision dated April 30, 2004, the Office denied his request for merit review of his claim. The Board found that the evidence and argument submitted by appellant in support of his emotional condition claim was either irrelevant or had already been considered by the Office. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

By letter dated January 18, 2005, appellant, through his attorney, requested reconsideration of his claim. Appellant discussed the standards for evaluating claimed employment factors in emotional condition claims. He contended that the employing establishment committed error and abuse in connection with several disciplinary actions, including an April 1998 letter of warning for discussing a sexual harassment suit, a July 1998 proposed letter of warning for inappropriate touching of coworkers, a December 1998 proposed letter of warning for "coercing" a coworker to scan a piece of mail, a December 1999 disciplinary letter for allowing his wife to use his government credit card, and a February 2001 notice of proposed termination for unauthorized use of a government vehicle. He claimed that his actions relating to the matters discussed in these disciplinary actions were justified. Appellant detailed the standards found in Merit Systems Protection Board cases for evaluating the reasonableness of disciplinary actions and posited that the employing establishment's disciplinary actions were not reasonable. He argued that it was inappropriate for the employing establishment to terminate him because performance evaluations issued in 1996 and 1997 showed that he "met all the objectives and expectations" and he received a $250.00 cash award and letters of appreciation in 1998 and 1999.

Appellant submitted May 1996 and December 1997 performance evaluations showing that he received a rating of "met objectives/expectations" and April 17, 1998 and March 31, 1999 letters in which employing establishment officials expressed their appreciation for his handling of mail route inspections. He also submitted a July 29, 1999 PS Form 8168 showing that he received a $250.00 cash award from the employing establishment.

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[2] Docket No. 04-1501 (issued October 18, 2004).

[3] Appellant claimed that beginning in January 1998 he developed stress due to working for 17 weeks away from his home and asserted that the employing establishment failed in its responsibility to refer him to the Employee Assistance Program. He alleged that he received several improper disciplinary actions, including an April 1998 letter of warning for discussing a sexual harassment suit, a 1999 letter of warning for allowing his wife to use his government credit card and a February 2001 letter of proposed removal for unauthorized use of a government vehicle. He further alleged that, in his former capacity as a supervisor, his work required deadlines that were difficult to meet and that there was a great deal of pressure to meet mail count standards.

By decision dated February 15, 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.[4] 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.[5]

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."[6] 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.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record

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[4] 20 C.F.R. § 10.607(a).

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

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

[7] 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." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3c (January 2004).

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

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

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

[11] *See Leona N. Travis*, *supra* note 9.

and whether the new evidence demonstrates clear error on the part of the Office.[12] 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.[13]

ANALYSIS

In its February 15, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on October 18, 2004, more than one year after the Office's merit decision of April 3, 2003. Therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.[14]

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its April 3, 2003 decision. 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 argued that the employing establishment committed error and abuse when it issued several disciplinary actions between 1998 and 2001, including a notice of proposed termination for unauthorized use of a government vehicle. However, this argument would not be relevant as appellant merely made an assertion that the employing establishment acted improperly with respect to these disciplinary actions and did not submit any evidence to support his assertions. Appellant detailed the standards found in Merit Systems Protection Board cases for evaluating the reasonableness of disciplinary actions and posited that the employing establishment's disciplinary actions were not reasonable. This argument also would not be relevant as the Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under the Act.[15] Appellant suggested that it was inappropriate for the employing establishment to terminate him because performance evaluations issued in 1996 and 1997 showed that he "met all the objectives and expectations" and he received a $250.00 cash award and letters of appreciation in 1998 and 1999. This argument would not be relevant as appellant did not provide any explanation of how evaluations, awards and letters of appreciation given for

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

[13] *Leon D. Faidley, Jr.*, *supra* note 5.

[14] According to Office procedure, the one-year period for requesting reconsideration begins on the date of original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002). The record contains an April 30, 2004 Board decision, but this decision addresses a nonmerit issue rather than a merit issue.

[15] *See Donald Johnson*, 44 ECAB 540, 551 (1993).

past performance would be relevant to the employing establishment's decision to terminate him after he was charged with unauthorized use of a government vehicle and other offenses.[16]

The arguments submitted by appellant are not the type of probative evidence which would show that he established a compensable employment factor, let alone show that he sustained an emotional condition due to a compensable employment factor.[17] For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's April 3, 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' February 15, 2005 decision is affirmed.

Issued: May 3, 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

[16] Appellant submitted copies of the aforementioned evaluations, award and letters of appreciation, but they do not show that the Office acted improperly in issuing disciplinary actions or terminating his employment.

[17] If a claimant does establish a compensable employment factor, he must also submit medical evidence showing that he sustained an emotional condition due to an employment factor. *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).