United States Department of Labor
Employees' Compensation Appeals Board

E.F., Appellant	)	
	)	**Docket No. 06-470**
and	)	**Issued: October 24, 2006**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated July 15, 2005 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent Office merit decision, dated January 27, 2003, and the filing of this appeal on December 27, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On September 10, 2001 appellant, then a 37-year-old mail handler, filed a traumatic injury claim alleging that he experienced stress on September 10, 2001 after his supervisor

initiated disciplinary action against him because he refused to work outside his limited-duty restrictions. He stopped work on September 10, 2001 and did not return.[1]

Appellant submitted a narrative statement dated September 10, 2001 and alleged that on September 10, 2001 his supervisor, Harlan Singleton, forced him to work outside his restrictions and when appellant resisted Mr. Singleton yelled at him and disciplined him.

By letter dated September 28, 2001, the Office asked appellant to submit additional factual and medical information, including a detailed description of the employment factors or incidents that he believed contributed to his claimed illness. In a letter of the same date, the Office requested the employing establishment address the allegations of appellant.

Appellant submitted reports from Dr. Frank J. Coufal, a Board-certified neurosurgeon, dated February 2 and March 21, 2001, who indicated that appellant reached maximum medical improvement on January 23, 2001 with regard to his low back injury.

The employing establishment submitted a statement from Mr. Singleton, appellant's supervisor, dated September 10, 2001, who noted that on this date he paged appellant several times between the hours of 1600 and 1645 to provide work instructions; however, he was unable to locate him. Mr. Singleton indicated that appellant reported at 1675 and he questioned appellant about leaving the unit without permission and appellant indicated that he left to retrieve his "stuff." He indicated that a letter of warning was issued for being absent from his work assignment without permission. Mr. Singleton advised that appellant was never instructed to work outside of his restrictions. Also submitted was an email to the claims examiner from Scott Pement, a representative of the employing establishment, dated December 14, 2001, which noted that appellant was issued a letter of warning for his absence from his work assignment without notifying management and indicated that appellant was not required to perform any duty that was in violation of his assigned work restrictions.

In a decision dated December 19, 2001, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.

In a letter dated January 14, 2002, appellant requested reconsideration. Appellant submitted a diary of events from January 23 to August 3, 2001 and from August 3 to October 23, 2001 which documented his limited-duty position and the events surrounding the alleged incident of September 10, 2001. Also submitted was a proposed disciplinary action dated September 10, 2001, in which appellant was cited for failure to follow instructions. Appellant submitted a report from Dr. Steven Simon, Board-certified in physical medicine and rehabilitation, dated September 20, 2001, who noted that appellant was being treated for chronic pain. A letter of warning dated September 24, 2001 indicated that on September 10, 2001 appellant was absent from his work assignment from 1600 to 1675 and was not authorized to be absent from the work unit. Appellant submitted an undated statement from Christopher W.

[1] Appellant filed a separate claim for an injury sustained on March 23, 1998 which the Office accepted for lumbar strain and permanent aggravation of lumbar degenerative joint disease in File No. 11-0163214. File No. 11-0163214 is also on appeal to the Board in Docket No. 06-471.

Sullivan, a union representative, who noted that on September 10, 2001, appellant's supervisor, Mr. Singleton proposed to issue appellant a letter of warning if he would not perform his duties and questioned appellant with regard to taking frequent breaks.

By letter dated March 1, 2002, the Office asked appellant to submit additional factual and medical information, including a detailed description of nonwork stressors and prior emotional conditions, particularly requesting that appellant submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

By decision dated April 1, 2002, the Office denied modification of the prior decision.

In a letter dated July 24, 2002, appellant requested reconsideration and submitted additional evidence. He advised that he did not have any stressors outside of work and that the only stress he experienced was from his back injury. Appellant submitted a report from Dr. E. Michael Young, a Board-certified psychiatrist, dated July 18, 2002, who noted that appellant was being treated for major depression, recurrent and anxiety disorder and indicated that appellant's chronic back pain from his work injury compounded his depressive state.

In a decision dated September 17, 2002, the Office modified the prior decision of the Office dated April 1, 2002, finding that appellant established a compensable factor of employment. The Office specifically indicated that appellant established that on September 10, 2001 he had a disagreement with his supervisor, Mr. Singleton, regarding whether he was being required to work outside his medical restrictions. However, the Office denied appellant's claim on the grounds that the medical evidence did not establish that the current emotional condition was caused by the disagreement of September 10, 2001.

In a letter dated October 21, 2002, appellant requested reconsideration and submitted additional evidence. Appellant submitted an email to the Office from an unknown source indicating that appellant was offered a position based on restrictions set forth by Dr. Coufal who determined that appellant reached maximum medical improvement.

By decision dated January 27, 2003, the Office denied modification of the prior decision.

In a letter dated February 20, 2005, appellant requested reconsideration and submitted additional evidence. He submitted a form report prepared by Dr. Simon dated July 23, 2003 who noted that appellant was totally disabled due to his chronic low back pain and advised that appellant's anxiety disorder exacerbated his pain and caused increased dysfunction and an inability to work. Dr. Simon diagnosed chronic low back pain, degenerative disc disease and anxiety stress disorder. In a report dated February 3, 2005, he noted a history of appellant's work injury of March 1998 and subsequent treatment for chronic back pain and indicated that appellant's depression, anxiety and chronic pain were all related. Also submitted was a report from Dr. Donald A. Rosenfield, a psychotherapist licensed as a clinical social worker, dated May 19, 2004, who noted treating appellant since October 23, 2001 for extreme stress and anxiety reportedly caused by interactions with supervisory personnel at his workplace. Appellant submitted a report from Dr. Young dated February 1, 2005 who noted treating appellant since October 2001 for major depressive disorder and pain disorder. He opined that there was a correlation between appellant's back injury in 1998 and his emotional state. Also

submitted were reports from Dr. Susan Laningham, a Board-certified family practitioner, dated March 1 and April 18, 2005, who noted that appellant presented postsyncopal episode in which he fell asleep while driving secondary to over sedation and was diagnosed with severe sleep apnea. Appellant submitted a medical form from Dr. William O. Reed, Jr., a Board-certified orthopedist, dated March 7, 2005, who indicated that appellant would be off work starting March 7, 2005. Also submitted was a sleep study conducted by Dr. Joseph E. Henry, a Board-certified pulmonologist, dated March 29, 2005, which indicated a sleep disorder.

By decision dated July 15, 2005, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[3]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[4]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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.[5]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[9]

ANALYSIS

In its July 15, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on January 27, 2003 and appellant's request for reconsideration was dated February 20, 2005 which was more than one year after January 27, 2003. Accordingly, appellant's request for reconsideration was not timely filed.

The Board has also reviewed the evidence submitted with appellant's untimely reconsideration request and concludes that a merit review is also not warranted as appellant has not established clear evidence of error on the part of the Office in its most recent merit decision.

Appellant submitted reports from Dr. Simon dated July 23, 2003 and February 3, 2005 who indicated that appellant sustained a work-related back injury in March 1998 and opined that appellant's depression, anxiety and chronic pain were all related and caused increased dysfunction and an inability to work. However, this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision as Dr. Simon did not specifically address whether appellant's diagnosed emotional condition is causally related to the accepted employment factor -- the incident of September 10, 2001 in which appellant had a disagreement with his supervisor, Mr. Singleton, regarding whether he was required to work outside of his medical restrictions. Dr. Simon did not provide a rationalized opinion supporting causal relationship of the diagnosed conditions of depression and anxiety to the work incident of September 10, 2001. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[10]

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[5] *Annie L. Billingsley*, *supra* note 3

[6] *Jimmy L. Day*, 48 ECAB 652 (1997).

[7] *Id.*

[8] *Id.*

[9] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[10] *See Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Appellant also submitted a report from Dr. Rosenfield, a psychotherapist licensed as a clinical social worker, dated May 19, 2004, who noted treating appellant since October 23, 2001 for an emotional condition. However, Dr. Rosenfield's report cannot be considered medical evidence as the evidence does not show that he is a clinical psychologist or otherwise qualifies as a physician under the Act.[11]

Also submitted was a report from Dr. Young dated February 1, 2005 who treated appellant since October 2001 for major depressive disorder and pain disorder and opined that there was a correlation between appellant's back injury in 1998 and his emotional state. However, this evidence is also insufficient to raise a substantial question as to the correctness of the Office's decision as these reports do not sufficiently address the underlying deficiency in the claim -- the causal relationship of appellant's diagnosed emotional condition to the incident of September 10, 2001 in which appellant had a disagreement with his supervisor, Mr. Singleton, regarding whether he was required to work outside of his medical restrictions. As noted above, the physicians did not provide a rationalized opinion supporting causal relationship of the diagnosed conditions of depression and anxiety to the work incident of September 10, 2001.[12] Thus, it cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.

Other reports from Drs. Laningham, Reed and Henry addressed appellant's treatment for a sleeping disorder. The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision as the physicians fail to specifically address whether appellant's diagnosed emotional condition is causally related to the accepted employment factor -- the incident of September 10, 2001 in which appellant had a disagreement with his supervisor, Mr. Singleton, regarding whether he was required to work outside of his medical restrictions. Thus, it cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.

The Board, therefore, finds these records insufficient to raise a substantial question as to the correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.

[11] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician); *Sedi L. Graham*, 57 ECAB ___ (Docket No. 06-135, issued March 15, 2006) (the reports of a social worker do not constitute competent medical evidence, as a social worker is not a "physician" as defined by section 8101(2)).

[12] *Id.*

CONCLUSION

The Office properly determined that appellant's request for reconsideration dated February 20, 2005 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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