United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 07-291**
	)	**Issued: July 2, 2007**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Seagoville, TX, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 13, 2006 appellant filed a timely appeal of an August 29, 2006 decision of the Office of Workers' Compensation Programs, denying merit review of his claim. Since more than one year has elapsed between the most recent merit decision on February 5, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

Appellant, a correctional officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained employment-related stress as a result of a May 23, 2000 incident. According to appellant, he was assaulted by an inmate, which triggered a flashback to an April 2000 assault.

An October 12, 2002 memorandum from the employing establishment indicated that a coworker recalled that on May 23, 2000 an inmate threw a liquid substance on appellant, who was allowed to go home due to a wet uniform. By decision dated February 5, 2003, the Office denied the claim. The Office found that appellant had not established a factual basis for the claim.

In a letter dated March 23, 2006, appellant requested reconsideration of his claim. He stated that he could not remember seeing a notice of decision. Appellant alleged that he worked as a correctional officer and on May 23, 2000 he was spit on by an inmate. He also stated that the inmate threw fecal matter on him. Appellant stated this brought back memories of an April 14, 2000 altercation involving several inmates.

On reconsideration, appellant submitted a number of medical reports regarding psychiatric treatment. In a treatment note dated May 24, 2000, Dr. John Black, a psychologist, stated that appellant reported an incident at work yesterday. He indicated that appellant was having nightmares and flashbacks. In a treatment note dated March 22, 2005, Dr. Gloria Emmett, Ph.D., a clinical psychologist, noted that appellant reported a prison incident in which he was held captive in a mess hall by inmates for a period of time. Appellant also submitted treatment notes from Dr. Steven Eilers, a psychiatrist, regarding treatment in 2005 and 2006. Dr. Eilers noted "Former PTSD [post-traumatic stress disorder] sx's [symptoms] related to prisoner uprising incident on April 14, 2000."

By decision dated August 29, 2006, the Office determined that appellant's application for reconsideration was untimely. The Office further determined that the evidence did not show clear evidence of error in the February 5, 2003 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[5] The Board has found that

[1] 5 U.S.C. § 8128(a).

[2] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] 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 his own motion or on application."

[4] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.607(a).

the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[6]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[7] In accordance with this holding, the Office has stated in its procedure manual that it 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.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] 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.[15]

ANALYSIS

The merit decision denying appellant's claim for compensation was dated February 5, 2003. Although he stated that he could not remember seeing a decision, the record

[6] *See Leon D. Faidley, Jr.*, *supra* note 2.

[7] *Leonard E. Redway*, 28 ECAB 242 (1977).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[9] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

[12] *See Leona N. Travis*, *supra* note 10.

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

[14] *Leon D. Faidley, Jr.*, *supra* note 2.

[15] *Gregory Griffin*, 41 ECAB 458 (1990).

establishes that the February 5, 2003 decision was sent to appellant's address of record. Appellant filed an application for reconsideration dated March 23, 2006. This is more than one year after the February 5, 2003 decision and, therefore, the application for reconsideration is untimely.

Since the application for reconsideration is untimely, appellant must show clear evidence of error by the Office to be entitled to a merit review of his claim. His claim was that a May 23, 2000 incident resulted in an emotional condition. A claim for an emotional condition requires both factual evidence establishing a compensable work factor, as well as rationalized medical evidence establishing a diagnosed condition causally related to the compensable work factor.[16] To show clear evidence of error, therefore, appellant would have to submit evidence of such probative value that it established a compensable work factor and a resulting diagnosed medical condition, such that the Office clearly erred in denying the claim.

The evidence from the employing establishment indicated that there was an incident involving an inmate that resulted in appellant having a wet uniform and being sent home. Appellant did not submit any additional probative evidence regarding the May 23, 2000 incident. Moreover, he did not submit probative medical evidence on causal relationship between a May 23, 2000 incident and a diagnosed condition. Dr. Black noted that appellant reported an employment incident on May 23, 2000 and he was having nightmares and flashbacks. He did not provide a complete history or a rationalized medical opinion on causal relationship between a diagnosed condition and a May 23, 2000 employment incident.

The Board finds that appellant did not establish clear evidence of error in this case. He did not submit evidence that *prima facie* shifted the weight of the evidence in favor of the claimant and raised a substantial question as to the correctness of the Office decision. Under these circumstances the Office properly denied merit review of the claim.

CONCLUSION

The March 23, 2006 application for reconsideration was untimely and failed to show clear evidence of error.

[16] *Beverly R. Jones*, 55 ECAB 411 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 29, 2006 is affirmed.

Issued: July 2, 2007
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