United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 07-205**
	)	**Issued: June 4, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Paducah, KY, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 October 30, 2006 appellant filed a timely appeal of an October 17, 2006 decision of the Office of Workers' Compensation Programs, finding that his application for reconsideration was untimely and failed to show clear evidence of error. The last decision on the merits of the claim was dated September 2, 2004. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal. The Board does not have jurisdiction over the merits of the claim on this appeal.

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

On July 8, 2004 appellant, then a 48-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an emotional condition causally related to "pressures and demands from management." In a June 14, 2004 statement, he alleged that

management did not sympathize with employees about important issues, subjected employees to abuse following any disagreement, did not treat employees equally and used vehicles with little insulation. Appellant stated that there were changes in mail count and he had to carry more mail in fewer hours.

By decision dated September 2, 2004, the Office denied the claim for compensation. The Office determined that appellant had not substantiated a compensable work factor with respect to his claim.

In a letter dated July 7, 2006, appellant requested reconsideration of his claim. He submitted a May 15, 2006 "National Arbitration" decision regarding a grievance filed by the National Rural Letter Carrier's Association (NLRCA) with respect to a 2002 national mail count. The NLRCA alleged that the U.S. Postal Service "manipulated or at least attempted to manipulate the results of the 2002 National Mail Count" by presenting a mail count course prior to the 2002 national mail count. The arbitrator found that the Postal Service did violate the National Agreement by instructing and requiring managers to target and correct count totals. In addition to the arbitrator's decision, appellant submitted additional medical evidence.

By decision dated October 17, 2006, the Office determined that appellant's request for reconsideration was untimely filed. The Office also found that the request and the evidence submitted failed to establish clear evidence of error in the denial of the claim and, therefore, appellant was not entitled to merit review of the claim.

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 regulation, 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 review is filed within one year of the date of that decision.[5] The Board has found that the

[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; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.607(a).

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]

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[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 186 (1989), *petition for recon.*, 41 ECAB 458 (1990).

ANALYSIS

The merit decision in this case was dated September 2, 2004. The request for reconsideration was dated July 7, 2006. Since this is more than one year after the merit decision, it is untimely.

The claim for compensation in this case was denied on the grounds that appellant had not established a compensable work factor with respect to his claim. Appellant submitted an arbitrator's decision dated May 15, 2006 and argues that this shows clear evidence of error, citing the case of *Jimmy L. Day*.[16] In *Day* the claimant alleged that his emotional condition was due in part to the employing establishment's accusation that he engaged in improper conduct while on duty. On reconsideration, he submitted an Equal Employment Opportunity Commission decision that specifically found that he was a victim of unlawful retaliation by the employing establishment. The Board found that this evidence was sufficient to show clear evidence of error, as it *prima facie* shifted the weight of the evidence in favor of appellant with respect to a compensable work factor.

The *Day* case is clearly distinguishable from the present case. In the instant case, appellant submitted an arbitrator's decision regarding a national grievance filed against the employing establishment relating to a 2002 mail count. The decision does not make any specific findings with respect to appellant, his specific work situation or the supervisors at his work site. Appellant had alleged having to carry more mail in fewer hours, without discussing a 2002 mail count. Unlike *Day*, the arbitrator's decision in this case does not relate to specific allegations made by appellant and make specific findings of error regarding those allegations. The arbitrator's decision is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the Office's decision and, therefore, it does not establish clear evidence of error. The Board also notes that the medical evidence submitted after September 2, 2004 is of little probative value, as the initial issue is whether appellant has established any compensable work factors.[17] The medical evidence does not establish clear evidence of error.

Since appellant's application for reconsideration was untimely filed, he must show clear evidence of error in the denial of his claim. He did not establish clear evidence of error in this case and the Office properly denied merit review.

CONCLUSION

Appellant's application for reconsideration was untimely and failed to show clear evidence of error by the Office.

[16] 48 ECAB 654 (1997).

[17] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2006 is affirmed.

Issued: June 4, 2007
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