United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 07-1112**
	)	**Issued: November 27, 2007**
DEPARTMENT OF THE AIR FORCE, SAN ANTONIO AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated February 28, 2007. The last merit decision of record is the Board's February 2, 2005 decision. As more than one year has elapsed between the last merit decision and the filing of this appeal on March 19, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

This is the fifth appeal in this case. On April 22, 1994 appellant, then a 51-year-old clerk typist, filed an occupational disease claim alleging that he developed chronic anxiety due to

factors of his federal employment. The Board reviewed his claim on March 17, 1998[1] and found that appellant had substantiated a compensable factor of employment, that he was required to work rotating shifts. The Board concluded that the medical evidence was not sufficient to establish appellant's claim. On May 2, 2000[2] the Board again found that appellant had not submitted the necessary rationalized medical opinion evidence to establish a causal relationship between his accepted employment factor of rotating work shifts and his alleged emotional condition. The Board reviewed appellant's claim for a third time on August 11, 2003[3] and found that appellant had not established an additional employment factor of error or abuse on the part of the employing establishment in regard to his resignation. The Board also found that the medical evidence was not sufficient to establish a causal relationship between appellant's accepted factor of employment and his diagnosed emotional condition. The Board reviewed appellant's claim on the merits on February 2, 2005[4] and found that he failed to substantiate additional employment factors regarding his termination by the employing establishment, alleged forced resignation and errors of the Merit Systems Protection Board. The Board found that appellant had not submitted the necessary medical opinion evidence to establish a causal connection between his accepted employment duty of rotating work shifts and his diagnosed emotional condition of anxiety.

In letters dated July 10 and August 10, 2004, appellant stated that he was fired in 1989 because of his disease. He stated that on April 1991 the Merit Systems Protection Board placed him on leave without pay for one year and then instructed him to resign. Appellant stated that he had not resigned and requested severance pay. He submitted a termination of appointment from his position of clerk-typist dated June 28, 1993 and effective July 1, 1993. Appellant also submitted an involuntary termination dated August 3, 1989 and effective July 28, 1989. A notification of personnel action established that appellant resigned effective June 30, 1990. In a letter dated December 17, 2002, the employing establishment stated that it had allowed appellant to resign in lieu of being terminated and that appellant was not entitled to severance pay. In a letter dated June 1, 2004, appellant stated that he was discriminated against as he had 2 years of college and worked for 14 years, but was not classified as a GS-4 as required by the minimum qualification requirements.

In letters dated January 14 and February 9, 2006, appellant requested punitive and compensation damages. He alleged that he had won a case against the government, but had not received any money. Appellant alleged that in 1989 he was forced to resign. He submitted his fully successful performance appraisal covering the period January 7, 1991 through June 30, 1992. In a letter dated April 10, 1985, the employing establishment stated that appellant was restored to his position of data transcriber based on evidence that his past medical problems were resolved and that he could return to work with no restrictions. Appellant's congressman, Frank Tejeda, submitted a letter to the employing establishment on July 6, 1994 and alleged that

[1] Docket No. 95-1495 (issued March 17, 1998).

[2] Docket No. 99-1133 (issued May 2, 2000).

[3] Docket No. 03-1315 (issued August 11, 2003).

[4] Docket No. 04-802 (issued February 2, 2005).

appellant was separated due to his inability to perform his job duties due to employment-related stress and anxiety. He noted that appellant might have a workers' compensation claim. Mr. Tejeda submitted a letter to the Office on August 18, 1994 and stated that appellant believed his emotional condition was caused by stress and anxiety at work. He stated that the Office of Personnel Management approved appellant's disability application and waived the one-year time limitation as appellant had established mental incompetency at the time of separation. On August 29, 1994 Mr. Tejeda stated that the employing establishment was aware of appellant's fragile mental health in 1982. He asked whether stress and anxiety related to appellant's job which led to a decline in his work performance would be considered compensable. Appellant's congressman, Henry B. Gonzales, informed him on February 23, 1989 that the employing establishment would inform him of a final determination regarding his grievance and discrimination complaint in the near future.

Appellant submitted letters dated April 2, 7 and May 4, 16, 22 and June 14, 2006 and requested to appeal actions by the employing establishment. He alleged that he had established that he was not mentally competent in 1994. Appellant asserted that he was denied in grade step increases, that he was discriminated against based on his national origin and disability, that he should have received severance pay from the employing establishment as well as punitive and compensatory damages as he prevailed in a 1985 legal suit against the employing establishment. In a document dated February 10, 1989, the employing establishment noted that appellant had filed a grievance expressing his dissatisfaction with his performance appraisal which was resolved. Appellant then filed an informal discrimination complaint regarding the same issues and rejected the employing establishment settlement offer on this claim, instead proceeding to file a formal discrimination complaint. The employing establishment declined to release appellant's medical records to him on the grounds that it could damage his mental and physical health.

Appellant submitted medical evidence including a September 24, 2006 magnetic resonance imaging report regarding his lumbar spine. A note dated September 11, 2006 which addressed appellant's complaints of chronic testicular pain and radicular pain from hip to ankle on the left side. On December 1, 2006 appellant presented with complaints of left foot discomfort. His diagnoses included L4-5 radiculopathy and plantar fasciitis.

In a letter dated July 21, 2006, appellant requested reconsideration based on letters from his congressman in 1985 and 1994. He asserted that the employing establishment knew of his stress condition and did not help him. Appellant then analyzed the 1994 letter from Mr. Tejeda and alleged that the employing establishment and Office failed to take appropriate action to develop his claim. He requested damages and compensation.

By decision dated February 28, 2007, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[8] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

The Office's regulations require that an application for reconsideration must be submitted in writing[10] and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."[11] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."[12]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which does not raise a

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[5] 5 U.S.C. § 8128(a).

[6] *Thankamma Mathews,* 44 ECAB 765, 768 (1993).

[7] *Id.* at 768; *see also Jesus D. Sanchez,* 41 ECAB 964, 966 (1990).

[8] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin,* 41 ECAB 186 (1989); *petition for recon. denied,* 41 ECAB 458 (1990).

[9] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 6 at 769; *Jesus D. Sanchez, supra* note 7 at 967.

[10] 20 C.F.R. § 10.606.

[11] 20 C.F.R. § 10.605.

[12] 20 C.F.R. § 10.607(b).

[13] *Thankamma Mathews, supra* note 6 at 770.

[14] *Id.*

[15] *Leona N. Travis,* 43 ECAB 227, 241 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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.[19] The Board must make 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.[20]

ANALYSIS

The one-year time limitation begins to run on the date following the date of the original Office decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.[21] Therefore, appellant had one year from the February 2, 2005 decision of the Board to submit a timely request for reconsideration. Appellant requested reconsideration on July 21, 2006. Because this request was received more than one year after the February 2, 2005 merit decision, the Office found that the request was untimely.

However, the Board notes that the Office also received a letter from appellant dated January 14, 2006 requesting punitive and compensatory damages. While this letter was not received by the Office until March 29, 2006, the envelope bearing the letter was not retained by the Office. Chapter 2.1602.3(b)(1) of the Office procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.[22] As the Office did not retain the envelope for appellant's January 14, 2006 letter, Office procedures state that, when there is no evidence to establish the mailing date,

[16] *Jesus D. Sanchez*, *supra* note 7 at 968.

[17] *Leona N. Travis*, *supra* note 15.

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

[19] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[20] *Gregory Griffin*, *supra* note 8.

[21] *Jack D. Jackson*, 57 ECAB ___ (Docket No. 06-433, issued May 17, 2006).

[22] The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

the date of the letter itself should be used.[23] For this reason, The Board finds that appellant's letter dated January 14, 2006, if a reconsideration request, is considered timely filed.

The Board finds that the January 14, 2006 letter does not constitute a request for reconsideration. The mere fact that the January 14, 2006 letter did not mention the word "reconsideration" does not prevent it from acting as a request for reconsideration from the Office. In *Vincente P. Taimanglo*,[24] *Gladys Mercado*,[25] and *Jack D. Johnson*[26] the Board found that letters written by the employees constituted timely requests for reconsideration even though they did not mention the work reconsideration. In *Taimanglo*, the Board stated that, while no special form is required, the request must be made in writing, identify the decision and the specific issue, for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument note considered previously.[27] In *Taimanglo*, the claimant had identified the Office decision in his letter, indicated that additional medical evidence had been submitted and stated that he was waiting for a response. The Board found that the letter constituted a timely request for reconsideration. In *Mercado*, the claimant asked the Office to help her reopen her case, provided her case number and submitted additional medical evidence. The Board found that the claimants letter constitutes a timely request for reconsideration. In *Johnson*, the claimant, advised that he was enclosing pertinent information related to his claim and submitted additional medical evidence. Again the Board found that this letter constituted a timely request for reconsideration. However, in the January 14, 2006 letter, appellant merely requested that the Office help him obtain punitive and compensatory damages due him through some unnamed legal "case" against the government won in 1985. He did not provide a claim number or any further identification of the case he had won. The only documentation accompanying the January 14, 2006 letter was an April 10, 1985 notification from the employing establishment informing appellant that he would be restored to his position of data transcriber and suggesting that appellant might be entitled to back pay. The January 14, 2006 letter does not constitute a timely request for reconsideration as appellant did not identify any decision of the Office or Board, and as the letter was not accompanied by relevant and pertinent new evidence addressing appellant's emotional condition claim.[28] Appellant first requested an unnamed "appeal" on April 2, 2006 and formally requested reconsideration on July 21, 2006. He did not submit a timely request for reconsideration from the Office within one year of the most recent merit decision, the February 2, 2005 decision of the Board, and consequently he must demonstrate clear evidence of error by the Office in denying his claim for compensation.

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[23] *Id.; see also Jack D. Jackson, supra* note 21.

[24] *Vincent P. Taimanglo*, 45 ECAB 504 (1994).

[25] *Gladys Mercado*, 52 ECAB 255 (2001).

[26] *Jack D. Johnson*, 57 ECAB ___ (Docket No. 06-433, issued May 17, 2006).

[27] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (January 2004); *Vicente P. Taimanglo, supra* note 24.

[28] A request for reconsideration must be in writing and set forth argument and contain evidence showing that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office or contain relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.606.

Appellant attempted to establish additional compensable factors of employment which he felt led to the development of his diagnosed emotional condition of anxiety. These alleged factors were that the employing establishment forced him to resign, that the employing establishment discriminated against him based on his national origin and disability and that the employing establishment failed to aid in the development of his emotional condition claim. Appellant has not submitted any evidence substantiating these alleged factors. The mere allegation of additional factors of employment does not establish error on the part of the Office and is not sufficient to establish clear evidence of error.[29]

In order to establish clear evidence of error, the evidence 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 merits of the Office's decision. The evidence submitted on reconsideration failed to meet this standard and, thus, the Office properly denied merit review.[30]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 28, 2007 is affirmed.

Issued: November 27, 2007
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

[29] *Robert G. Burns*, 57 ECAB ___ (Docket No. 06-380, issued June 26, 2006).

[30] *Id.*