

**United States Department of Labor
Employees' Compensation Appeals Board**

A.C., Appellant)

and)

U.S. POSTAL SERVICE, PHILADELPHIA)
LOGISTICS CENTER, Swedesboro, NJ,)
Employer)

Docket No. 07-2236
Issued: February 26, 2008

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant, through counsel, filed a timely appeal from a June 25, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated September 3, 2004 and the filing of this appeal, 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 is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a September 3, 2004 decision, the Board affirmed an Office hearing representative's December 10, 2003 decision

which found that appellant did not sustain an emotional condition in the performance of duty as he did not establish any compensable factors of his federal employment.¹ The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.² The facts as relevant to the present appeal are set forth.

By letter dated May 29, 2007, appellant, through counsel, requested reconsideration before the Office. Counsel contended that the accompanying medical reports of Dr. Walter E. Afield, a Board-certified psychiatrist, were sufficiently rationalized to establish that appellant sustained an emotional condition causally related to compensable factors of his employment. In a January 4, 2007 report, Dr. Afield noted that appellant was fearful in social situations and only trusted his healthcare providers. Appellant believed that he was going to be harassed by anyone else he met and had withdrawn socially. He was haunted by restless sleep and flashbacks. Appellant became tearful during the examination while describing his situation. He was also stretched to the maximum financially which caused him to stop taking his medication for a while. Dr. Afield opined that appellant continued to experience major depression and post-traumatic stress disorder. He opined that appellant's prognosis was poor and that he was in need of regular psychotherapy. Dr. Afield concluded that appellant was permanently disabled from performing any work-related duties. In an April 16, 2007 report, Dr. Afield reiterated that appellant was totally disabled due to traumatic workplace incidents. He stated that he had been mooned, humiliated and tricked into eating candy in the shape of a penis by coworkers. Dr. Afield stated that the pattern of emotional harassment had pushed appellant over the edge and continued to disrupt him totally throughout his work. He noted suicidal ideation and anxiety.

By decision dated June 25, 2007, the Office found that appellant's letter requesting reconsideration was dated May 29, 2007, more than one year after the Board's September 3, 2004 decision and was untimely. It found that appellant did not submit evidence to establish clear evidence of error in the prior decision finding that he did not sustain an emotional condition in the performance of duty.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for

¹ Docket No. 04-1229 (issued September 3, 2004).

² On July 23, 2002 appellant, then a 55-year-old clerk, filed an occupational disease claim alleging that on January 14, 2002 he first became aware of his emotional condition and that on June 29, 2002 he first realized that his condition was caused by factors of his federal employment. He stated: "I have been, abused, harassed and sexually harassed by other employees also on [sic] the front of the supervisors." Appellant stopped work on June 29, 2002 and did not return.

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The last merit decision in this case was issued by the Board on September 3, 2004. The Board found that the Office properly determined that appellant did not sustain an emotional condition in the performance of duty as he failed to establish any compensable employment factors. As appellant's May 29, 2007 letter requesting reconsideration was made more than one year after the Board's September 3, 2004 merit decision, the Board finds that it was not timely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's finding that he did not establish a compensable factor of employment. Appellant has not established clear evidence of error by the Office in this regard. He did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

In support of his request for reconsideration, appellant submitted Dr. Afield's January 4 and April 16, 2007 reports which found that he suffered from major depression, post-traumatic stress disorder, suicidal ideation and anxiety. He further opined that appellant was permanently disabled for work. In the April 16, 2007 report, Dr. Afield opined that appellant's total disability for work was due to traumatic workplace incidents which included being mooned and humiliated and tricked into eating candy in the shape of a penis by coworkers. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. Dr. Afield's January 4, 2007 report did not identify any compensable factors of appellant's employment as the cause of his emotional conditions. Although he opined in his April 16, 2007 report, that appellant's emotional conditions and total disability were caused by the mooning and candy eating incidents, the Office found and on prior appeal the Board affirmed, that appellant failed to establish that these incidents constituted compensable factors of his employment and, therefore, his emotional conditions did not arise in the performance of his federal duties. The Office is not required to consider medical evidence in an emotional condition case where no work factors have been established.¹⁵ For these reasons, the Board finds that Dr. Afield's January 4 and April 16, 2007 reports do not raise a substantial question concerning the correctness of the Office's decision and therefore do not establish clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹⁴ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁵ *See Richard Yadron*, 57 ECAB ____ (Docket No. 05-1738, issued November 8, 2005).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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