United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 07-2386**
	)	**Issued: June 2, 2008**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Los Angeles, CA, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2007 appellant filed a timely appeal of a September 11, 2007 decision of the Office of Workers' Compensation Programs, finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued September 25, 2002, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly declined to reopen the case for merit review on the grounds that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The case has previously been before the Board. In a decision dated September 25, 2002, the Board affirmed the termination of compensation as of June 1, 1992.[1] The Board found that the weight of the medical evidence was represented by second opinion psychiatrist, Dr. Reynaldo Abejuela, who submitted reports dated February 1 and November 11, 1996 and March 12, 1997. In a decision dated March 14, 2005, the Board affirmed a June 13, 2003 Office decision denying appellant's request for reconsideration without merit review of the claim. By decision dated August 23, 2006, the Board affirmed a November 21, 2005 Office decision finding appellant's application was untimely and failed to show clear evidence of error.[2] The history of the case is provided in the Board's prior appeals and is incorporated herein by reference.

By letter dated February 12, 2007, appellant requested reconsideration of his claim. He reiterated his argument that he had been subject to sexual harassment and discrimination at the employing establishment. Appellant submitted numerous letters restating his allegations. With respect to medical evidence, he submitted a June 20, 2006 report from Dr. Arnold Nerenberg, an attending clinical psychologist, who stated that the employment-related emotional condition did not resolve before June 1, 1992. Dr. Nerenberg argued that appellant was subject to sexual harassment and discrimination. He also stated that appellant would continue his crusade to correct perceived wrongs and this would cause additional stress.

By decision dated September 11, 2007, the Office determined that the application for reconsideration was untimely. The Office further denied the application on the grounds that it did not show clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[3] The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[4]

Section 8128(a) of the 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

[1] Docket No. 00-1176 (issued September 25, 2002). The Office had accepted that appellant sustained an adjustment disorder and temporary aggravation of a paranoid personality disorder due to his federal employment.

[2] Docket No. 06-375 (issued August 23, 2006), *petition for recon. denied* (issued January 24, 2007).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.605 (1999).

[5] 5 U.S.C. § 8128(a).

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

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 under 5 U.S.C. § 8128(a).[8] 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.[9] The Board has found that 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).[10]

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.[11] 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.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

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[7] 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."

[8] 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 evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[9] 20 C.F.R. § 10.607(a).

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

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

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

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

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

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

[16] *See Leona N. Travis*, *supra* note 14.

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

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.[18] 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.[19]

ANALYSIS

The last merit decision in the case was the Board's September 25, 2002 decision. The February 12, 2007 application for reconsideration was more than one year after the merit decision, and therefore is untimely. Appellant has submitted an application for reconsideration and numerous letters reiterating his allegation that he was subject to discrimination and sexual harassment at the employing establishment. As the Board noted in its prior decisions, discrimination and sexual harassment were not established as compensable work factors in this case. The compensable work factor was an October 4, 1991 incident involving verbal abuse by a supervisor. The Office terminated compensation as of June 1, 1992 on the grounds the weight of the medical evidence, as represented by second opinion psychiatrist, Dr. Reynaldo Abejuela, established the accepted adjustment disorder and temporary aggravation of paranoid personality disorder had resolved.

To reopen the case for merit review, appellant would have to submit evidence of such probative value that it *prima facie* shifts the weight of the evidence and raises a substantial question as to the correctness of the Office decision to terminate compensation as of June 1, 1992. The medical evidence from Dr. Nerenberg is not sufficient to shift the weight of the evidence. He did not provide an accurate factual background, as he discussed factors that were not established as compensable work factors. Dr. Nerenberg stated that an employment-related condition continued after June 1, 1992, without providing medical rationale. The Board notes that even if Dr. Nerenberg were to provide an opinion sufficient to create a conflict with the second opinion physician Dr. Abejuela, this would not establish clear evidence of error.[20]

Accordingly, the Board finds that the application for reconsideration did not show clear evidence of error by the Office. Since appellant did not meet the clear evidence of error standard, the Office properly denied the untimely application for reconsideration without merit review of the claim.

CONCLUSION

The application for reconsideration was untimely and failed to show clear evidence of error.

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

[19] *Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990).

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2007 is affirmed.

Issued: June 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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