

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

H.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Minneapolis, MN, Employer**

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**Docket No. 09-286
Issued: August 7, 2009**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 10, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decisions dated December 27, 2007 and October 31, 2008, which denied his requests for reconsideration on the grounds that he initially failed to submit relevant new evidence and that his second request was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated January 4, 2007 to the filing of this appeal on November 10, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) on December 27, 2007; and (2) 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 on October 31, 2008.

FACTUAL HISTORY

On November 13, 2006 appellant, then a 50-year-old mail handler, filed a traumatic injury claim alleging that he was threatened and assaulted by a fellow postal worker while performing his duties on October 31, 2006. He stated that he was choked and shoved resulting in emotional stress and aggravation of his preexisting post-traumatic stress disorder as well as neck and head conditions. In a letter dated November 27, 2006, the Office requested additional factual and medical evidence and allowed 30 days for a response.

The employing establishment submitted a letter dated December 4, 2006 which disputed appellant's claim on the grounds that he was engaged in horseplay with a coworker and that there was no evidence that this incident resulted in emotional stress.

Appellant submitted two notes and a form report signed by a nurse on November 1 and 16, 2006 describing his employment incident and offering a diagnosis.

In a memorandum dated November 7, 2006, Oilveen Akins, supervisor, stated that on October 31, 2006 she witnessed Gene Stillpass, appellant's coworker, with his hand on appellant's neck. She "yelled" to let appellant go, and asked if appellant was okay, but appellant continued laughing and talking with Mr. Stillpass. Ms. Akins then instructed the two men to "stop goofing off" and to return to work.

By decision dated January 4, 2007, the Office denied appellant's claim on the grounds that he failed to submit medical evidence diagnosing a condition and that he also failed to establish that the incident occurred as alleged.

Dr. Zaheer Aslam, a Board-certified psychiatrist, completed a note on February 9, 2007 and diagnosed post-traumatic stress disorder and depression. He stated, "[Appellant's] symptoms apparently exacerbated after a work-related incident in October 2006."

Appellant requested reconsideration on July 2, 2007 and completed narrative statements dated November 2, 2006 and March 18, 2007. He reported that he was threatened and physically assaulted on October 31, 2006 by a coworker. Appellant stated that Mr. Stillpass, a coworker, threatened to run over him with a container. After several attempts to hit appellant with the container, Mr. Stillpass then grabbed appellant by the throat and started choking and shaking him. Appellant stated that there were two witnesses to the assault and that this was a traumatic experience for him. He noted that he had no previous disagreements with Mr. Stillpass and that he believed himself to be the victim of a random act of violence with the specific purpose of creating intimidation and doing bodily harm to the writer.

In a report dated October 24, 2001, Dr. Philip Sarff, a licensed psychologist, found that appellant minimized his psychological problems and diagnosed adjustment disorder with depressed mood. Dr. Aslam released appellant to return to part-time work on May 6, 2007. Dr. Joseph Westermeyer, a Board-certified psychiatrist, completed a form report on June 27, 2007 and diagnosed preexisting post-traumatic stress disorder, depression and alcohol abuse. He provided a history with a date of injury of October 31, 2006 and stated that a coworker made threats and then choked appellant. Dr. Westermeyer indicated with a checkmark "yes" that

appellant's diagnosed conditions were caused or aggravated by his employment, stating, "I believe that PTSD [post-traumatic stress disorder] and depression were made to recur and alcohol abuse worsened."

By decision dated December 27, 2007, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration did not contain relevant new evidence or legal argument.

In a letter received by the Office on April 11, 2008 including this claim number, appellant requested that the Office "reopen" his claim as he had additional medical evidence which supported his claim. In a letter dated May 13, 2008, he requested reconsideration by the Board. On May 20, 2008 appellant resubmitted the form report from Dr. Westermeyer. He again requested reconsideration from the Office on August 17, 2008.

By decision dated October 31, 2008, 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 contain clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.² When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.³

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirements pertaining to the submission of evidence in support of reconsideration only specify that the evidence be relevant and pertinent and not previously considered by the Office.⁴

ANALYSIS -- ISSUE 1

Appellant filed a claim for a traumatic emotional injury occurring on October 31, 2006. The Office denied his claim on January 4, 2007 finding that he failed to submit any medical

¹ 5 U.S.C. §§ 8101-8193, § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ *Id.* at § 10.608(b).

⁴ *Donald T. Pippin*, 54 ECAB 631 (2003).

evidence establishing that an injury occurred and that he failed to submit factual evidence substantiating the alleged employment incident.

Appellant timely requested reconsideration on July 2, 2007 and submitted additional evidence including a June 27, 2007 medical report from Dr. Westermeyer, a Board-certified psychiatrist, diagnosing preexisting post-traumatic stress disorder, depression and alcohol abuse. Dr. Westermeyer provided a history including a date of injury on October 31, 2006 and stated that a coworker made threats and then choked appellant. He further indicated with a checkmark “yes” that appellant’s diagnosed conditions were caused or aggravated by his employment. Dr. Westermeyer stated, “I believe that PTSD and depression were made to recur and alcohol abuse worsened.”

Appellant submitted two notes and a form report signed by a nurse on November 1 and 16, 2006 describing his employment incident and offering a diagnosis.

It is well established that, to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician. *Vickey C. Randall*, 51 ECAB 357, 360 (2000); *Arnold A. Alley*, 44 ECAB 912, 921 (1993); *Merton J. Sills*, 39 ECAB 572, 575 (1988). Section 8101(2) of the Act provides as follows: “(2) ‘physician’ includes surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.” Registered nurses, licensed practical nurses and physician’s assistants are not “physicians” as defined under the Act. Their opinions are of no probative value. *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

The Board finds that this June 27, 2007 report from Dr. Westermeyer constituted relevant new evidence and that the Office was required to perform a merit review of appellant’s claim based on this report. As noted above, the requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirements pertaining to the submission of evidence in support of reconsideration only specify that the evidence be relevant and pertinent and not previously considered by the Office.⁵ Dr. Westermeyer’s report was not previously considered by the Office and was relevant to the issue of whether appellant sustained an emotional injury on October 31, 2006 as alleged. On remand, the Office should consider the merits of the additional evidence submitted by appellant in support of his request for reconsideration and issue an appropriate decision.⁶

CONCLUSION

The Board finds that the Office improperly denied merit review of appellant’s July 2, 2007 request for reconsideration. On remand, the Office should consider the merits of the evidence submitted and issue an appropriate decision.

⁵ *Id.*

⁶ Due to the disposition of this issue, the issue of whether appellant established clear evidence of error through his additional requests for reconsideration is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2008 and December 27, 2007 decisions of the Office of Workers' Compensation Programs are set aside and remanded for additional development consistent with this decision of the Board.

Issued: August 7, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board