United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
	)	**Docket No. 09-294**
and	)	**Issued: October 2, 2009**
	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Washington, DC, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 10, 2008 appellant filed a timely appeal from the September 23, 2008 decision of the Office of Workers' Compensation Programs, which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 15, 2006 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 on appeal is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This is the second appeal in the present case. In an April 21, 2006 decision, the Board set aside the August 10, 2005 decision of the Office and remanded the case. The Board found that

appellant filed a timely request for reconsideration. The Board remanded the case for the Office to apply the standard for a timely reconsideration request. The facts and the circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.[1]

In a decision dated November 15, 2006, the Office denied modification of the March 11, 2004 decision.

Appellant sought congressional assistance and submitted a March 8, 2007 letter to his congressman requesting assistance in having his leave status changed from absent without leave (AWOL) to leave without pay (LWOP). On June 8, 2007 the congressman asked the Office to address his concerns. In a June 13, 2007 letter to the congressman, it summarized appellant's case history and noted that on November 15, 2006, the Office denied modification of a decision denying his claim for an emotional condition. It noted that appellant had not pursued his appeal rights with regard to this decision. On February 27, 2008 the congressman requested that the Office address his concerns regarding the failure of the agency to provide protective clothing and in improperly determining his work status. On March 14, 2008 the Office informed the congressman that appellant was provided with appeal rights after the November 15, 2006 decision; however, he did not exercise any appeal rights and his claim was closed.

Appellant submitted letters to his senator dated July 10 and 24, 2008 requesting further assistance with his claim. In a letter dated July 29, 2008, the senator requested that the Office address his concerns. On July 30, 2008 the Office responded and summarized appellant's case history noting that he did not pursue his appeal rights after the November 15, 2006 decision and his appeal rights had since lapsed. On August 19, 2008 appellant wrote to senator Mikulski and asserted that his reconsideration request was timely filed.

Appellant, through his senator, submitted an appeal request form dated November 29, 2006, seeking reconsideration. It was received by the Office on September 12, 2008. Accompanying appellant's request were two affidavit's from coworkers, an attending physician's report, an agency directive on electrical distribution systems dated November 30, 2006, a May 16, 2007 fax cover sheet from his congressman to the Office and confirmation sheets dated June 8 and 11, 2007, a June 28, 2007 letter from the congressman and a February 27, 2008 letter from the congressman to the Office. Appellant submitted a September 2, 2008 letter from his senator inquiring as to the status of his claim and including his November 29, 2006 request for reconsideration. On September 12, 2008 the Office acknowledged receipt of the November 29, 2006 request for reconsideration and advised that the claim was assigned to a claims examiner.

In an August 28, 2003 attending physicians report, Dr. Daniel J. O'Connell, noted that appellant experienced harassment in the workplace and was totally disabled. He also submitted a report from Dr. Frank J. Genova, a psychiatrist, dated March 21, 2007, who treated appellant for depression. Other documents submitted included copies of Office decisions and the Board's April 21, 2006 decision. Appellant submitted affidavits from coworkers, Bahaa El Ayoubi, dated January 30, 2007, and Silas Tucker, dated June 20, 2007, who noted that appellant was not provided with protective clothing.

[1] Docket No. 06-224 (issued April 21, 2006).

By decision dated September 23, 2008, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that he did not present clear evidence of error by it.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[3]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[4]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.[5]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[4] *Id*. at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[5] *Annie L. Billingsley*, *supra* note 3.

[6] *Jimmy L. Day*, 48 ECAB 652 (1997).

[7] *Id.*

limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[9]

ANALYSIS

The Office denied modification of a decision denying appellant's claim for an emotional condition in a November 15, 2006 decision.

On September 12, 2008 the Office received a reconsideration request dated November 29, 2006. Appellant asserted that he submitted his reconsideration request in a timely manner and attached correspondence from his congressman and senator. The Board notes that the correspondence of June 8, 2007, February 27 and July 29, 2008 were inquiries as to the status of his claim and did not purported to be requests for reconsideration. The Office responded to the congressional inquiries, noting the status of appellant's claim and that the November 15, 2006 decision had provided him with notice of his appeal rights. It noted that appellant failed to exercise those rights. On September 12, 2008 the Office received correspondence dated September 2, 2008, forwarding a November 29, 2006 reconsideration request. The Board has reviewed the case record and notes that no reconsideration request can be found other than that dated November 29, 2006 and received on September 12, 2008.

Pursuant to the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[10] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[11] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[12] This Board has held that this rule applies equally to claimants and the Office alike, provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing.[13]

Appellant submitted no evidence to establish that the November 29, 2006 appeal form was duly mailed. There is no certified mail receipt or copy of the envelope to show whether he mailed this letter to the proper address or whether the envelope bore proper postage. Unlike the Office, law firms or other businesses, appellant is an individual and may not establish proper

[8] *Id.*

[9] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[10] *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

[11] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[12] *See Larry L. Hill*, 42 ECAB 596 (April 17, 1991).

[13] *Id.*

mailing by business use or custom. With no evidence of proper mailing, no presumption of receipt arises from the mailbox rule. Accordingly, the Board finds that appellant's request for reconsideration received on September 12, 2008 is untimely as it was more than one year following the November 15, 2006 merit decision.[14]

The Board also finds that appellant has not established clear evidence of error on the part of the Office. The Board notes that appellant did not submit any evidence with his reconsideration request that would shift the weight of the evidence in his favor.

Appellant submitted a report from the employer regarding the building electrical distribution systems and a memorandum noting that an electrical incident occurred at the workplace. Also submitted were copies of Office decisions and the Board's prior decision. These documents do not establish clear evidence of error in the underlying Office decision which determined that he did not establish that he developed an emotional condition in the performance of duty.

The documents from employing establishment personnel, affidavits from coworkers Mr. Ayoubi and Mr. Tucker, who noted appellant was not provided with protective clothing and congressional correspondence does not establish clear evidence of error or raise a substantial question as to the correctness of the Office's merit decision. It does not purport to establish a causal relationship between appellant's diagnosed conditions to his employment. Therefore, the Office properly found that this evidence did not establish clear evidence of error.

Appellant submitted an August 28, 2003 attending physicians report from Dr. O'Connell, who noted that he experienced continued harassment in the workplace and was totally disabled. Another report from Dr. Genova, dated March 21, 2007, noted his treatment for depression. However, this evidence is insufficient to establish that the Office erred in its denial of appellant's claim. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed; well-rationalized medical report which, if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.[15] Drs. O'Connell and Genova's reports do not raise a substantial question as to the correctness of the Office's November 15, 2006 merit decision or demonstrate clear evidence of error. The Office properly found that appellant's reconsideration does not establish clear evidence of error.

On appeal, appellant's asserts that he submitted his reconsideration request in a timely manner and attached copies of the congressional correspondence. As noted, inquiries were made as to the status of his claim. They did not request reconsideration of the November 15, 2006 decision. The Office advised the congressional staffs that, appellant was provided with appeal rights but did not timely exercise those rights. There is no evidence of a timely reconsideration request received by the Office within one year of November 15, 2006.

[14] *See Joseph G. Cutrufello,* Docket No 97-2546 (issued June 21, 1999).

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(c) (January 2004).

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2009
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