United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 09-1200**
	)	**Issued: January 13, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Bastrop, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2009 appellant filed a timely appeal of a March 27, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 20, 2001 and the filing of the 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.

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

On June 5, 2000 appellant, then a 35-year-old accounting technician, filed an occupational disease claim for an emotional condition caused or aggravated by the stress of working in a prison environment. He alleged that his underlying post-traumatic stress disorder

was aggravated by incidents that occurred at work which he characterized as harassment and racial discrimination. By decision dated August 22, 2000, the Office denied the claim on the grounds that no compensable work factor had been established.

Appellant disagreed with the decision and requested a review of the written record by the Office's Branch of Hearings and Review. By decision dated May 21, 2001, an Office hearing representative affirmed the August 22, 2000 decision.

In a June 22, 2001 letter, appellant requested reconsideration of the Office's decision and submitted additional evidence. By decision dated August 15, 2001, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was duplicative of that already considered or irrelevant to support reopening of his claim for merit review.

In a September 18, 2001 letter, appellant disagreed with the Office's decision and requested reconsideration. He also submitted additional evidence. By decision dated December 20, 2001, the Office denied modification of its prior decisions.

In a March 17, 2009 letter, appellant requested reconsideration. He contended that because of his preexisting post-traumatic stress disorder, time limits regarding his claim should be excused as his current mental condition rendered him less functional than the average person and that dealing with time limits was stressful. Appellant further argued that he should be granted retroactive benefits based upon a loss of wage-earning capacity due to his work-related emotional condition. In support of his request, he submitted duplicative copies of evidence previously of record and reviewed by the Office, including a June 11, 2001 letter from the Office of Personnel Management, approving his application for disability retirement and a May 24, 2001 letter from Dr. Michael Jaworski, a Board-certified psychiatrist, advising that appellant's post-traumatic stress disorder, depression and anxiety disabled him from employment. Appellant advised he was also submitting a permanent and total disability rating from the Department of Veterans Affairs and a disability report from Lorraine L. Papa, Ph.D., but no such evidence was received by the Office.[1]

In a June 15, 2000 letter, Carol Cofer, a social worker, noted treating appellant in an Employee Assistance Program since December 1999. She diagnosed appellant with post-traumatic stress disorder and consequent dysthymia and anxiety disorders. Ms. Cofer opined that work stressors caused or aggravated his post-traumatic stress disorder. She opined that appellant's current symptoms rendered him unable to continue in his current job.

By decision dated March 27, 2009, the Office determined that the request for reconsideration was untimely and failed to show clear evidence of error.

[1] The record reflects medical evidence was received from Dr. Papa and reviewed by the Office in its previous decisions.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[2] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[3]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[4] Office regulations and procedure provide that the Office 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.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

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[2] 20 C.F.R. § 10.607(a).

[3] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[4] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[5] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedures provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

[6] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[7] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[8] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[9] *See Leona N. Travis, supra* note 7.

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

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.[11]

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the December 20, 2001 merit decision. In implementing the one-year time limitation, the Office's procedures provide that the period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[12]

In the December 20, 2001 decision, the Office denied modification of its prior decisions finding that appellant did not sustain an emotional condition in the performance of duty as he failed to establish any compensable employment factors. The appeal rights attached to the decision notified appellant of his right to request reconsideration and submit additional evidence to the Office within one year of that decision. Appellant did not request reconsideration until March 17, 2009. He asserted that his emotional condition prevented him from timely filing his reconsideration request. However, this argument is without merit as appellant did not submit any probative medical evidence establishing that he was not competent to communicate or that his testimony was necessary to obtain modification of the Office's decision.[13] As appellant's March 17, 2009 letter requesting reconsideration was made more than one year after the Office's December 20, 2001 merit decision, the Board finds that it was not timely filed.

The Board finds that appellant has not submitted evidence establishing clear evidence of error by the Office in finding that he did not establish any compensable employment factors that caused or contributed to his emotional condition. Appellant did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error. He argued that the time limitations should not apply in his case as he was functioning less than the average person because of his current and preexisting mental conditions and the time limitations were stressful. Appellant also argued that he should be entitled to retroactive compensation for loss of earning capacity due to his work-related emotional condition. However, no work-related emotional condition has been established. As noted, appellant's claim was denied because he failed to establish any compensable employment factors as having caused his current emotional condition. Thus, appellant's assertions in support of his reconsideration request do not establish that the Office committed an error that raises a substantial question as to the correctness of the Office decision.

The reports submitted with appellant's request are not of sufficient probative value to raise a substantial question as to the correctness of the Office's decision. Appellant submitted a June 15, 2000 report of Ms. Cofer, a social worker. To the extent that Ms. Cofer's report is

[11] *Pete F. Dorso*, 52 ECAB 424 (2001).

[12] *Larry L. Litton*, 44 ECAB 243 (1992).

[13] *See* 20 C.F.R. § 10.607(c).

offered as medical evidence, her report is of no probative medical value as a social worker is not a physician as defined under the Act.[14] Moreover, appellant's underlying claim was denied because he did not establish the existence of any compensable employment factors. Therefore, it would be premature to consider medical evidence.[15] The Board finds that Ms. Cofer's report does not raise a substantial question as to the correctness of the Office's decision and does not establish clear evidence of error. The other evidence appellant submitted was previously of record and reviewed by the Office. Appellant has not explained how this evidence raises a substantial question concerning the correctness of the Office's decision. The Board finds that this material does not establish clear evidence of error in the Office's decision. For these reasons, the Office properly denied appellant's request for reconsideration.

On appeal, appellant primarily argues that the medical evidence supports he has a compensable emotional condition. This argument goes to the merits of appellant's claim which are not before the Board. The remainder or appellant's arguments do not establish clear evidence of error on the part of the Office.

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] 5 U.S.C. § 8101(2). This subsection defines the term physician to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician); *Sedi L. Graham*, 57 ECAB 494 (2006) (the reports of a social worker do not constitute competent medical evidence, as a social worker is not a physician as defined by section 8101(2)).

[15] Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *C.S.*, 58 ECAB 137 (2006).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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