United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 09-1498**
	)	**Issued: May 7, 2010**
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:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 8, 2009 appellant filed a timely appeal of a November 24, 2008 decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board has jurisdiction over the November 24, 2008 decision. The Board does not have jurisdiction over a decision on the merits of the claim.[1]

ISSUE

The issue is whether the Office properly found appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

[1] The last merit decision was a Board decision dated September 25, 2002, affirming a February 24, 2000 Office decision. The Board has jurisdiction over final decisions of the Office. *See* 20 C.F.R. § 501.2(c). For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

The case has been before the Board on four prior appeals. In a decision dated September 25, 2002, the Board affirmed the termination of compensation as of June 1, 1992.[2] 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, 1996 to 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.[3] 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.[4] In a decision dated June 2, 2008, the Board affirmed a September 11, 2007 Office decision finding appellant's application for review was untimely and failed to show clear evidence of error.[5] The history of the case is provided in the Board's prior appeals and is incorporated herein by reference.

On June 13, 2008 the Office received an application for reconsideration dated June 9, 2008. Appellant stated that Dr. Abejuela saw him in 1996, not 1992 and the Office allowed the physician to "backdate" an opinion from 1997. He reiterated his contention that he was subject to harassment, discrimination and retaliation at the employing establishment, and that his sick and annual leave was "stolen" by the employing establishment.

With respect to evidence submitted, an October 9, 2007 medical report from Dr. Arnold Nerenberg, a psychologist, opined that appellant continued to have an employment-related emotional condition after June 1, 1992.[6] Dr. Nerenberg referred to chronic job stressors and a "plethora of violations" on February 12, 1989 and "throughout" October 4, 1991. He stated that appellant was verbally assaulted on October 4, 1991 and six months later would be April 4, 1992, not June 1, 1992 and therefore "the time frame of six months diagnoses are not an acceptable diagnosis from Dr. Abejuela on October 10, 1996."

On September 4, 2008 appellant submitted a statement arguing that clear evidence of error was established by two factors. As to the first factor, he stated that he did not have pay continued for 45 days. Appellant also argued that he was medically fit to return to work, but the employing establishment did not accommodate him. On November 10, 2008 he submitted a November 4, 2008 statement, stating that it was clear evidence of error to refer to a date of injury as November 21, 1991, when an incident with his supervisor occurred on October 4, 2001.

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[2] Docket No. 00-1176 (issued September 25, 2002). The Office had accepted adjustment disorder and temporary aggravation of paranoid personality disorder due to an October 4, 1991 compensable incident.

[3] Docket No. 03-1724 (issued March 14, 2005).

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

[5] Docket No. 07-2386 (issued June 2, 2008), *petition for recon. denied* (issued October 30, 2008).

[6] As the Board noted in its June 2, 2008 decision, Dr. Nerenberg had submitted a June 20, 2006 report opining that appellant continued to have an employment-related emotional condition after June 1, 1992.

By decision dated November 24, 2008, the Office denied appellant's request for reconsideration as it was untimely and failed to establish 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.[7] 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."[8]

Section 8128(a) of the Act[9] does not entitle a claimant to a review of an Office decision as a matter of right.[10] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[11] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.[12] As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[13]

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.[14] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[15] The Board makes an independent determination of whether a

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.605 (1999).

[9] 5 U.S.C. § 8128(a).

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

[11] 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."

[12] 5 U.S.C. §§ 8101-8193.

[13] 20 C.F.R. § 10.607.

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

[15] *D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

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.[16]

ANALYSIS

The last decision on the merits of the claim was the Board's September 25, 2002 decision. The application for reconsideration was dated June 9, 2008. Since the application was filed more than one year after the merit decision, it is untimely.

As an untimely application for reconsideration, the issue is whether it shows clear evidence of error by the Office. In this case, the Office had found that the medical evidence established appellant's employment-related emotional conditions (adjustment disorder and temporary aggravation of paranoid personality disorder) had resolved by June 1, 1992. Appellant's June 9, 2008 application for reconsideration and subsequent letters generally argue that he was subject to harassment, discrimination and retaliation. The Board has considered these arguments in prior appeals and appellant provided no new evidence.

Appellant alleged error by the Office in relying on Dr. Abejuela's opinion because he did not examine appellant until 1996 and benefits were terminated June 1, 1992. A physician is not restricted to providing an opinion as to an individual's current condition. The second opinion physician was provided an accurate factual and medical background and he provided a rationalized opinion sufficient to establish the employment-related condition had resolved by June 1, 1992.

As to other specific arguments of error, appellant did not establish clear evidence of error on the issue presented. He appeared to refer to continuation of pay and actions of the employing establishment regarding his return to work.[17] The Office's adverse decision was a determination that his employment-related condition had resolved as of June 1, 1992. The arguments raised are not relevant to the underlying issue on which that decision was made. Appellant also argues the date of injury was incorrect, without explaining how this establishes clear evidence of error. When the occupational claim was filed appellant indicated that he stopped working as of November 21, 1991, and the Office noted this in its decisions. The adverse decisions regarding the claim for compensation were not based on a specific determination of a date of injury.

With respect to medical evidence, appellant submitted an October 9, 2007 report from Dr. Nerenberg, who again indicated that he believed appellant continued to have an employment-related condition. Dr. Nerenberg generally referred to a number of job stressors, but the only accepted compensable employment factor was an October 24, 1991 incident. He does not provide a rationalized medical opinion based on a complete and accurate background. Moreover, as noted above, even a rationalized medical report which could have created a conflict in the medical evidence does not establish clear evidence of error.

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

[17] Office regulations provide for continuation of pay by an employer for up to 45 days for a traumatic injury. 20 C.F.R. § 10.200. Appellant did not file a traumatic injury claim; he filed an occupational disease or illness claim. *See* 20 C.F.R. § 10.205.

On appeal, appellant repeats his contentions that he was subject to discrimination and his claim was mishandled. The Board has addressed specific claims of error presented to the Office in this case. The posture of the case is "clear evidence of error" which remains a difficult standard to meet. For the reasons discussed above, the Board finds appellant did not establish clear evidence of error and the Office properly denied merit review.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 24, 2008 is affirmed.

Issued: May 7, 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