

FACTUAL HISTORY

This case has previously been before the Board. By decision dated March 12, 2007, the Board found appellant did not establish a compensable factor with respect to his allegations of harassment and discrimination. However, the Board found that appellant established a compensable factor with respect to a June 3, 2004 altercation when he was assaulted by a coworker.² As a compensable factor was established the Board remanded the case to the Office for further development of the medical evidence. In an October 8, 2008 decision, the Board affirmed the Office's January 9, 2008 decision which denied appellant's claim for wage-loss disability on and after March 21, 2005 due to insufficient medical evidence. In a November 24, 2009 decision, the Board affirmed a March 2, 2009 nonmerit Office decision.³ The findings of fact as set forth in the prior decision are hereby incorporated by reference.⁴

On February 8, 2010 appellant requested reconsideration contending that both the Office and the Board had ignored medical reports dated June 26 and October 24, 2007. He subsequently submitted an undated request for reconsideration citing to 20 C.F.R. §§ 10.332, 10.503 and 10.606 and 5 U.S.C. § 8128(a). In support of his claim, appellant submitted factual evidence and previously considered medical reports from Dr. Surendra Kelwala, a treating Board-certified psychiatrist.

By decision dated February 23, 2010, the Office denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁵ 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. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁷ The Board has found that the imposition of the one-year limitation

² Docket No. 06-1983 (issued March 12, 2007). The Office incorrectly noted the author date as March 13, 2007 in IFECS.

³ Docket No. 09-1124 (issued November 24, 2009).

⁴ On November 26, 2004 appellant filed an occupational disease claim alleging that on or about June 3, 2004 he first realized his depression was employment related. He stopped work on November 24, 2004, returned on January 9, 2005 and stopped again on February 14, 2005. On March 17, 2005 appellant was terminated from employment based on his "inability to perform essential functions -- working in a stressful environment."

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 20 C.F.R. § 10.605.

⁷ *Id.* at § 10.607(a).

does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁸

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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.⁹ 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.¹⁰ 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 the Office properly determined that appellant failed to file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹² However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues,¹³ including a merit decision of the Board.¹⁴ The most recent merit decision was the October 8, 2008 decision of the Board. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since appellant did not file a request until February 8, 2010, the Board finds that it was filed outside the one year time period.

As appellant’s request was untimely, he must submit evidence or argument that shows clear evidence of error in the Office’s decision denying his claim for wage-loss compensation.

⁸ 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, *supra* note 8.

¹¹ *See W.G.*, 60 ECAB ____ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

¹² 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008); *Alberta Dukes*, *supra* note 11.

¹³ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, *supra* note 9.

¹⁴ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (issued January 2004).

The term clear evidence of error is intended to represent a difficult standard.¹⁵ Appellant's request would have to establish on its face that the Office's denial of his wage-loss claim was erroneous. It cannot be a matter of opinion; it must be a matter of proof.

Appellant's requests for reconsideration do not establish clear evidence or error. The Office found that he failed to provide sufficient medical evidence to support his claim that he was entitled to wage-loss compensation on and after March 21, 2005. Appellant contended that the Office and the Board ignored pertinent medical evidence, specifically the June 26 and October 24, 2007 reports from Dr. Kelwala, in affirming the denial of wage-loss compensation. Contrary to appellant's contention, the October 24, 2007 medical report from Dr. Kelwala was considered by both the Office and the Board in prior merit decisions. His argument that relevant medical evidence was ignored is without merit. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁶ Appellant did not submit such evidence.

On appeal, appellant contends that the Office ignored the law in the denial of his claim. He also contends that the Office failed to follow 20 C.F.R. § 10.332 as it did not request his treating physician to provide additional information and also failed to refer him for a second opinion evaluation if his treating physician's opinion was insufficient. Contrary to appellant's contentions the Office did not ignore the law in the development of his claim. He was released to full duty by Dr. Kewala, his treating physician, as of March 21, 2005. It was appellant's burden to establish his entitlement to wage-loss compensation on and after March 21, 2005.¹⁷ As noted, he has not shown that the Office committed clear evidence of error in the denial or in the handling and development of his claim.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁵ *D.L.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁶ *Robert F. Stone*, *supra* note 9.

¹⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001) (for each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2010 is affirmed.

Issued: November 26, 2010
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