

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 10-1653
Issued: November 15, 2010**

Appearances:
Richwell Ison, Esq., for the appellant
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 June 8, 2010 appellant filed a timely appeal from the April 12, 2010 nonmerit decision of the Office of Workers' Compensation Programs refusing to reopen his case for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record is the Board's February 20, 2001 decision denying appellant's claim for a work-related emotional condition. Because more than one year has elapsed between the last merit decision and the filing of this appeal on June 8, 2010, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

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

¹ See 20 C.F.R. §§ 501.2(c) and 501.3. Docket No. 00-683 (issued February 20, 2001). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a).

FACTUAL HISTORY

In April 1998 appellant, then a 38-year-old distribution clerk, alleged that he sustained emotional and stress-related conditions as a result of incidents and conditions at work. In December 29, 1998 and August 11, 1999 decisions, the Office denied his claim on the grounds that he did not establish any compensable employment factors.² In a February 20, 2001 decision, the Board affirmed the Office's December 29, 1998 and August 11, 1999 decisions.³

In a March 24, 2010 letter received by the Office on March 31, 2010, appellant's attorney requested reconsideration on behalf of appellant. He asserted that, when a package exploded in appellant's hands, management did not determine whether the substance was harmful or not. Counsel argued that management's refusal to take appellant to the hospital aggravated his post-traumatic stress syndrome. There were no expert witnesses available at the work site and therefore appellant should have been given the benefit of the doubt and received medical attention. Counsel stated, "There are clear and unmistakable errors, in the findings against an individual who has had serious mental problems, after a stressful event. We would like to reopen this matter, to argue that there were clear and unmistakable errors, by not allowing first-hand witnesses to testify, and a failure to test the exploding substance."

In an April 12, 2010 decision, the Office denied appellant's request for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

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.⁴ 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 Act.⁵

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

² Appellant alleged that he was subjected to harassment and discrimination by his supervisors on February 15, 1998 when they failed to show proper concern and refused to allow him to go to the hospital after a liquid substance leaked from a package onto his hands. The Board found that appellant was not subjected to harassment and discrimination, noting that he was shown the commercially labeled bottle from which shampoo leaked and was advised that he was free to take leave in order to go to the hospital if he so wished.

³ Docket No. 00-683 (issued February 20, 2001).

⁴ 20 C.F.R. § 10.607(a). According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

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

establishes “clear evidence of error.”⁶ 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹³

ANALYSIS

In December 29, 1998 and August 11, 1999 decisions, the Office denied appellant’s claim for emotional and stress-related conditions on the grounds that he did not establish any compensable employment factors. In a February 20, 2001 decision, the Board affirmed the denial of the claim. In an April 12, 2010 decision, the Office denied appellant’s request 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.

In its April 12, 2010 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was filed on March 31, 2010, more than one year after the last merit decision of record, the Board’s February 20, 2001

⁶ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, “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).” *Id.* at Chapter 2.1602.3c.

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 5.

decision. Therefore, he must demonstrate clear evidence of error on the part of the Office in the denial of his claim for an emotional condition.¹⁴

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its December 29, 1998 and August 11, 1999 decisions. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error in denying his claim for an emotional condition.

In connection with his untimely reconsideration, appellant argued that he had established an employment factor in connection with management's handling of the situation when a package leaked liquid onto his hands.¹⁵ He claimed that management's refusal to take appellant for medical evaluation, particularly since no medical personnel were present at the work site to evaluate the liquid, constituted clear error. Appellant made such argument before the Office and the Board. The facts in evidence identified the substance as commercial shampoo and he was advised he could take leave if he wished medical evaluation.¹⁶ Appellant's argument does not establish clear error that the employing establishment acted unreasonably in handling the matter of the leaking liquid. His contention was previously considered and does not shift the weight of evidence in favor of the claim.

For these reasons, the argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior merit decisions. The Office properly determined that appellant did not show clear evidence of error in those decisions.

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 establish clear evidence of error.

¹⁴ See *supra* note 4.

¹⁵ The Board has found that an administrative or personnel matter, such as managing a safety-related matter, will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁶ Appellant also asserted that management wrongly posted a picture depicting him as a wanted person and improperly placed him on leave without pay status. He did not explain how these claimed facts would show clear evidence of error in the Office's prior decisions.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2010
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