

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

J.B., Appellant)

and)

**DEPARTMENT OF DEFENSE, NAVAL AIR
STATION, Fallon, AZ, Employer**)

**Docket No. 10-539
Issued: September 14, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 22, 2009 appellant, through his attorney, filed a timely appeal from a November 10, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as it was untimely and did not establish clear evidence of error. As the last merit decision is dated September 13, 2007, more than one year prior to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely and did not demonstrate clear evidence of error.

¹ For final Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. 20 C.F.R. § 501.3(d)(2). For final Office decisions issued on and after November 19, 2008, a claimant has 180 days to appeal to the Board. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case is before the Board for the third time. In a decision dated September 13, 2007, the Board affirmed a December 8, 2006 decision denying appellant's emotional condition claim.² The Board found that he had not established a factual basis for his allegations that he was harassed or that razor blades were placed on the windshield, that someone called him "crazy," or that his supervisor wanted a coworker for his position. The Board further determined that appellant had not established error or abuse by the employing establishment in failing to reassign him to another location. By decision dated November 10, 2008, the Board affirmed a February 28, 2008 nonmerit decision denying his request for reconsideration under 5 U.S.C. § 8128.³ The Board found that appellant had submitted medical evidence with his request for reconsideration but that this was not relevant in determining whether he sustained a compensable work factor.

In a decision dated September 8, 1998, received by the Office on September 30, 2008, the Merit Systems Protection Board (MSPB) found that the employing establishment properly removed appellant as he was physically unable to perform the duties of his position. It further determined that appellant had not proven discrimination based on a handicap.

On October 28, 2009 appellant, through his attorney, requested reconsideration. In support of his request, he submitted an August 13, 2009 report from Dr. James G. Reid, a family practitioner, who discussed his treatment of appellant since July 1988 for bilateral carpal tunnel syndrome and upper extremity pain and weakness. Dr. Reid also noted that he had a psychiatric illness beginning in 1994. He diagnosed status post bilateral carpal tunnel repairs, diabetes mellitus, hypothyroidism and essential hypertension and opined that appellant was disabled for employment.

By decision dated November 10, 2009, the Office denied appellant's request for reconsideration after finding that it was not timely and did not show clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.⁴ As once, such limitations, 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 on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

² Docket No. 07-664 (issued September 13, 2007). On June 10, 1999 appellant, then a 40-year-old meat cutter, filed an emotional condition claim alleging that he was harassed, his life was threatened and his car was vandalized.

³ Docket No. 08-1405 (issued November 10, 2008).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.607.

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.⁶ 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.⁷

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ The most recent merit decision of record is the Board’s September 13, 2007 decision. As the October 28, 2009 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁰

The Office, in its most recent merit decision of December 8, 2006, denied appellant’s emotional condition claim because he did not establish a compensable factor of employment. In a September 8, 1998 decision, the MSPB determined that the employing establishment properly removed appellant from employment because he could not perform his required work duties. It also did not find discrimination by the employing establishment due to a handicap. The September 8, 1998 MSPB decision does not support a finding of harassment or discrimination by the employing establishment or that it committed error or abuse in an administrative matter. Consequently, it does not support a finding of clear evidence of error.

On August 13, 2009 Dr. Reid discussed appellant’s upper extremity condition and noted that he had a history of psychiatric illness. He diagnosed status post bilateral carpal tunnel repairs, diabetes mellitus, hypothyroidism, and essential hypertension and found that appellant was disabled for employment. The Office, however, need not consider medical evidence in an emotional condition case if the claimant has not established compensable work factors.¹¹

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

⁷ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Robert F. Stone*, *supra* note 7.

¹⁰ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹¹ *See Richard Yadron*, 57 ECAB 207 (2005).

Dr. Reid's report is not relevant to the pertinent issue of whether appellant has established a compensable work factor.¹² Therefore, his report does not show clear evidence of error.

As the evidence submitted by appellant is insufficient to manifest on its face that the Office erred in its last merit decision, he has not established clear evidence of error.¹³

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² See *Nancy Marcano*, 50 ECAB 110 (1998) (to establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by the Office).

¹³ See *Jack D. Johnson*, 57 ECAB 593 (2006); *Andrew Fullman*, 57 ECAB 574 (2006).