

On appeal, appellant asserts that medical evidence was not considered.³

FACTUAL HISTORY

On November 4, 2008 appellant, then a 52-year-old former electronic technician working modified duty in the mail handler craft, filed a traumatic injury claim alleging that he sustained mental fatigue on October 31, 2008 when he stopped work. He provided an undated statement in which he asserted that on October 31, 2008 he reported to a maintenance pass down meeting and left to report to his duty station as instructed by his supervisor, Robert L. Frommel, Jr., maintenance manager. When appellant tried to retrieve his chair for work, his badge privileges had been revoked. Susanne Meaney, a nurse practitioner, completed a form medical report stating he was totally disabled for work from October 31 to November 3, 2008 due to stress but could return to full duty on November 3, 2008. By report dated November 6, 2008, Dr. William A. Zimmern, Board-certified in family medicine, advised that appellant could return to work.

The employing establishment controverted the claim, stating that the alleged incident between appellant and his supervisor concerned an administrative decision that appellant need not attend meetings of maintenance personnel because he was currently assigned to limited duty in another work area.

In letters dated November 19, 2008, the Office informed appellant of the evidence needed to support his claim. Appellant was given 30 days to respond. The Office also asked that the employing establishment respond to his allegations.

In a December 9, 2008 statement, Peter Greene, an employing establishment manager, advised that on October 31, 2008 he spoke with appellant as he was leaving the building. Appellant explained that he became stressed because his supervisor had removed access to certain areas of the building and he was not allowed in the maintenance break room during pass down. Mr. Green stated that appellant later asked for a CA-1 claim form. He told appellant that he would need medical clearance to return to work. Mr. Green noted that appellant's current limited job duties were to assist with mail processing operations in the torn mail section.

Mark Boardman, supervisor of maintenance operations, provided an undated statement in which he advised that appellant had been on a limited-duty assignment since 2001. On two occasions, he was checking television channels when the pass down meeting was held. At the time, managers were attempting to give instructions between tours and appellant was told his behavior was not appropriate. Mr. Frommel asked appellant to go to his assigned work area. Mr. Boardman stated that appellant kept his work chair in the computer room. He told appellant that he had not worked in maintenance or the computer room since 2001 and had no reason to be there. Mr. Boardman noted that, since appellant used an unauthorized parking spot and entered through an unauthorized entrance, his security access was limited. He stated that appellant left work on October 31, 2008 when he could not gain access to the computer room.

³ Appellant described medical evidence not found in the case record concerning in-patient treatment in 2009 and reports discussing treatment for depression.

Mr. Frommel provided an undated statement. He advised that appellant would flip through television channels while maintenance supervisors and employees were attempting to exchange information concerning mail processing equipment maintenance and operational issues and appellant's behavior was very distracting. Mr. Frommel stated that there was no reason for appellant to be in the maintenance break room since his limited-duty assignment was in mail processing. He told appellant that his behavior was distracting and asked him to report to his assigned work area. Mr. Frommel noted that appellant was essentially clocking in and then taking a break to watch television. He also stated that appellant was parking in an unauthorized area and used an unauthorized entrance and he asked the security administrator to remove appellant's access to the unauthorized entrance. In doing so, appellant's access to several other doors was also removed. Arrangements were made so that he could retrieve his special chair on a daily basis.

By decision dated December 22, 2008, the Office denied the claim finding that appellant did not establish his claim. It noted that he did not respond to the November 19, 2008 letter.⁴

In a statement received on December 23, 2008 appellant described alleged employment factors, including that he was humiliated when he was kicked out of the break room in October 2008 and was improperly denied access to parts of the employing establishment.⁵ In correspondence postmarked January 22, 2009, he requested a hearing.

By decision dated July 24, 2009, the Office denied appellant's hearing request on the grounds that it was untimely filed. It found that he was not, as a matter of right, entitled to a hearing as his request, postmarked January 22, 2009, had not been made within 30 days of its December 22, 2008 decision and stated that it had considered the matter in relation to the issue involved and had denied his request on the basis that the issue could be addressed through a reconsideration application.

On January 12, 2010 appellant requested reconsideration. He advised that he sustained an additional stress episode on December 24, 2008 and discussed his medical condition, stating that he was admitted to an in-treatment facility on February 4, 2009. Appellant asserted that the

⁴ On December 22, 2008 appellant submitted an August 12, 2008 report regarding a back condition that is not relevant to the instant claim.

⁵ Appellant further alleged that he was denied positions and prevented from returning to the electronic technician craft, that the union refused to file grievances and that Mr. Frommel and Mr. Boardman harassed him.

statements by Mr. Boardman and Mr. Frommel were complete fabrications.⁶ He indicated that he was enclosing a Family and Medical Leave Act application signed by Dr. Zimmern and a March 3, 2009 report from the physician.⁷ In an attached narrative report, appellant stated that he went home under stress on October 31, 2008 and was given improper instructions about returning to work.

In a January 15, 2009 statement, Mr. Greene advised that on October 31, 2008 appellant gave him a leave request, stating that he was leaving due to stress caused by the removal of his access to certain parts of the building and because he was not allowed in the maintenance break room during a pass down meeting. Appellant later requested a claim form and was told he would need medical clearance to return to work. Mr. Green discussed appellant's attempts to return to work in November 2008. In a January 28, 2009 statement, Ralph P. Roberts, a coworker, advised that, on or about October 23 and 30, 2008, Mr. Frommel asked appellant to leave the pass down meetings and told him he had no reason to be there. He opined that this was meanness on Mr. Frommel's part, to push appellant out of the meeting. In a February 14, 2009 statement, Terry Hall, a coworker advised that on October 30, 2008 Mr. Frommel was rude to appellant who was reading a newspaper during a pass down meeting with fellow coworkers and supervisors and in an unprofessional, rude and nasty manner, told him to leave the break room. On December 30, 2008 Dr. Zimmern provided a diagnosis of mental fatigue, advised that appellant's condition was stable and that he could return to work on December 31, 2008.

By decision dated January 26, 2010, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and he failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ When an application for review is untimely, the Office undertakes a limited review to

⁶ Appellant also reported that he sustained an employment injury on November 3, 2001 and was thereafter transferred from the maintenance craft to the mail handler craft and asserted that he was improperly denied positions that would return him to the mail handler craft. He related that he had filed numerous grievances, Equal Employment Opportunity Commission claims, a Merit Systems Protection Board (MSPB) claim and a National Labor Relations Board claim against the union. Appellant also submitted a traumatic injury claim form dated January 2, 2009 for a December 24, 2008 injury of mental fatigue on which he stated that this claim was a continuation of his October 31, 2008 claim. On November 3, 2008 Dr. Zimmern advised that appellant was doing well and could return to work. On a form report dated February 2, 2009, he advised that he had been seeing appellant frequently for a chronic medical condition and should be off work for four to six weeks because he required intensive evaluation and treatment for medical problems. In statements prepared for an MSPB claim, on January 9, 2009, Christine Y. Weathers, the plant manager's secretary, discussed appellant's attempts to return to work and described events from November 4 to 7, 2008 regarding paperwork needed for appellant's claim. In a February 4, 2009 statement, appellant's wife D.L. advised that she accompanied her husband to a physician's appointment and discussed telephone calls appellant made to the employing establishment on November 21 and 24, 2008. Appellant also submitted evidence previously of record and an unsigned, unidentified statement.

⁷ These are not found in the case record.

⁸ 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

determine whether the application presents clear evidence that the Office's final merit decision was in error.⁹ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth section 10.607 of Office regulations,¹⁰ if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹²

Office procedures note 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.¹⁴

ANALYSIS

The Board finds that as more than one year had passed from the date of issuance of the December 22, 2008 merit decision to appellant's request for reconsideration of January 12, 2010, it was untimely filed.¹⁵ Consequently, appellant must demonstrate clear evidence of error by the

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹⁰ 20 C.F.R. § 10.607.

¹¹ *Alberta Dukes*, 56 ECAB 247 (2005).

¹² *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *James R. Mirra*, 56 ECAB 738 (2005).

¹⁴ *Nancy Marcano*, 50 ECAB 110 (1998).

¹⁵ *Supra* note 8.

Office in denying his claim for disability compensation.¹⁶ The Board finds that he failed to establish clear evidence that the December 22, 2008 decision of the Office was in error.

In support of his January 12, 2010 reconsideration request, appellant maintained that he went home under stress on October 31, 2008 and submitted statements from Mr. Roberts and Mr. Hall, who opined that Mr. Frommel was rude to appellant when asking him to leave the maintenance pass down meeting on October 31, 2008. As noted, he was no longer assigned to the maintenance craft Mr. Frommel explained that his presence at the meeting was distracting. The fact that Mr. Frommel's statements may have offended appellant does not rise to the level of coverage under the Act. Appellant was performing an administrative function, which was not a compensable factor of employment.¹⁷ A claimant's feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, erroneous or abusive.¹⁸ The statements of Mr. Roberts and Mr. Hall are insufficient to establish error and abuse or to raise a substantial question concerning the correctness of the December 22, 2008 merit decision.¹⁹

Appellant also described additional incidents and factors that he felt caused his emotional condition. The Office adjudicated this case as a traumatic injury for claimed incidents that occurred on October 31, 2008. Office regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents that occur within a single workday or shift.²⁰ Thus, the additional contentions raised by appellant in his January 12, 2010 reconsideration request are not relevant to the underlying issue in this case whether he established a compensable factor in the performance of duty on October 31, 2008.

Appellant asserted on appeal that the Office did not consider relevant medical evidence that might have been misplaced. As noted, the underlying issue on which the Office denied his claim was factual: whether he established a compensable employment factor. The Office need not consider the medical evidence until a compensable factor is established.

The term clear evidence of error is intended to represent a difficult standard. The evidence submitted is not the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.²¹ Appellant's evidence and arguments are of insufficient probative value to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the December 22, 2008 Office decision.²² The Office performed

¹⁶ 20 C.F.R. § 10.607(b).

¹⁷ See *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁸ See *Michael A. Deas*, 53 ECAB 208 (2001).

¹⁹ *Robert G. Burns*, *supra* note 12.

²⁰ 20 C.F.R. § 10.5(ee).

²¹ *Id.*

²² *G.H.*, 58 ECAB 183 (2006).

a limited review of the argument submitted by him with his January 12, 2010 reconsideration request to ascertain whether it demonstrated clear evidence of error in the December 22, 2008 decision. The Board finds that the Office properly denied appellant's untimely request for reconsideration.²³

CONCLUSION

The Board finds that, as appellant's January 12, 2010 reconsideration request was not timely filed and that he failed to establish clear evidence of error, the Office properly denied further merit review of his claim.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2011
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

²³ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).