

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD D. HUDAK and FEDERAL DEPOSIT INSURANCE
CORPORATION, San Francisco, CA

*Docket No. 98-764; Submitted on the Record;
Issued February 23, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

On July 30, 1993 appellant, then a 48-year-old attorney, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an emotional condition while in the performance of duty. He explained that he suffered from depression and chronic fatigue due to a stressful and hostile work environment. Appellant identified March 15, 1990 as the date he became aware of his illness and December 10, 1990 as the date he first realized that his illness was caused or aggravated by his employment. Appellant resigned from his position with the employing establishment effective August 3, 1990.

After further development of the record, the Office denied appellant's claim on February 8, 1994 based on his failure to establish that his injury occurred in the performance of duty. Appellant subsequently requested an oral hearing, which was held on October 25, 1994. In a decision dated January 6, 1995, an Office hearing representative denied appellant's claim on the basis that he failed to establish that he sustained an emotional condition in the performance of duty. The hearing representative found that appellant failed to establish a compensable employment factor as a cause for his condition. The hearing representative affirmed the Office's February 8, 1994 decision.

On March 4, 1995 appellant filed a request for reconsideration along with additional factual evidence regarding his prior federal employment. In a merit decision dated April 25, 1995, the Office denied modification of the January 6, 1995 decision.

Appellant filed a second request for reconsideration on April 23, 1996, which the Office denied in a merit decision dated June 6, 1996. In an accompanying memorandum, the Office explained that the factual information failed to demonstrate that an injury occurred in the

performance of duty. The Office further noted that appellant failed to substantiate his assertions of harassment and discrimination.

In a letter dated June 4, 1997, appellant requested an extension of time in which to respond to the Office's June 6, 1996 decision denying compensation. Appellant explained that he had been recalled to active duty in the U.S. Army, and was stationed in Haiti during the period June 2 through September 27, 1996. He contended that during his 118-day period of active duty, he was unable to obtain the necessary additional evidence to submit in support of a request for reconsideration. Appellant submitted a copy of his military orders and requested an extension of 118 days.

On June 21, 1997 the Office requested clarification regarding appellant's June 4, 1997 letter. Specifically, the Office inquired as to whether the June 4, 1997 letter was a request for reconsideration of the Office's June 6, 1996 decision denying compensation. Appellant was also requested to clarify his status after September 27, 1996.

In a response dated September 28, 1997, appellant indicated that his prior letter was, in fact, "a request for reconsideration of the formal decision." Appellant also alleged a pattern of harassment and discrimination by the employing establishment that contributed to his emotional condition.¹ Lastly, appellant advised that following his return from active duty in September 1996, he experienced a "severe crisis as a result of [his] disability." Appellant also submitted a February 12, 1997 report from Dr. Robert B. Hepps, a Board-certified psychiatrist.

By decision dated October 9, 1997, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and that he failed to present clear evidence of error. Appellant subsequently filed an appeal with the Board on January 13, 1998.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed his appeal with the Board on January 13, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated June 6, 1996. Consequently, the only decision properly before the Board is the Office's October 9, 1997 decision denying appellant's request for reconsideration.

The Board finds that the Office properly denied appellant's September 28, 1997 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office

¹ Appellant essentially reiterated the contentions raised in his second request for reconsideration filed on April 23, 1996.

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

with discretionary authority to determine whether it will review an award for or against payment of compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.⁷ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁸

In its October 9, 1997 decision, the Office correctly noted that its most recent merit decision was issued on June 6, 1996, and that appellant had filed his request for reconsideration on September 28, 1997, more than one year after the Office's June 6, 1996 decision denying compensation. The Office noted that appellant submitted a June 4, 1997 letter requesting a 118-day extension of time to respond to the June 6, 1996 decision denying compensation. The Office explained, however, that the "request for extension of time was never granted." Appellant's June 4, 1997 letter requesting an extension of time to submit additional information lacks sufficient detail to constitute a request for reconsideration.⁹ Moreover, this letter was received by the Office on June 9, 1997; more than one year after the issuance of the June 6, 1996 decision denying compensation. Consequently, the Office properly determined that appellant failed to file a timely request for reconsideration.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."¹⁰ Consistent with Board precedent, Office procedures 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹³ Evidence which does

⁵ 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." 5 U.S.C. § 8128(a).

⁶ See 20 C.F.R. § 10.138.

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ See *Leon D. Faidley, Jr.*, *supra* note 4.

⁹ See 20 C.F.R. § 10.138(b)(1).

¹⁰ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹² See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ See *Leona N. Travis*, 43 ECAB 227 (1991).

not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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 *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.¹⁶

In determining whether the claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.¹⁷ The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.¹⁸ In accordance with Board precedent and the Office's own internal guidelines, the Office performed a limited review of the record to determine whether appellant's request for reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

In his September 28, 1997 request for reconsideration, appellant alleged that Deputy General Counsel Thomas A. Rose "used harassment and discrimination to injure and disable [him]." He further alleged that on two occasions Mr. Rose improperly denied him a within grade increase and that Mr. Rose denied his restoration rights as a veteran following his return from service. Mr. Rose was also allegedly guilty of committing "unfair labor practices." Additionally, appellant alleged that by coercing and intimidating other employees, Mr. Rose and the employing establishment interfered with his ability to obtain evidence regarding his claim. Lastly, appellant alleged that Mr. Rose and the employing establishment had conspired to cover up their wrongful activities.

Dr. Hepps' February 12, 1997 report that accompanied appellant's request for reconsideration noted diagnoses of depressive disorder, personality disorder with obsessive features and hypertension by history. Additionally, he identified lack of employment as a psychosocial stressors. Dr. Hepps noted that appellant had previously been "under great stress at his job at FDIC and [he] became significantly depressed." He further noted that "[a]s a result of his stress[, appellant] found it difficult to concentrate and to complete his work assignments." Dr. Hepps explained that this problem persists, and that appellant continues to have symptoms of irritability, severe fatigue, obsessive rumination, depressed mood, impaired concentration, low self-esteem and feelings of hopelessness.

¹⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Thankamma Mathews*, *supra* note 16; *Gregory Griffin*, 41 ECAB 458 (1990).

None of the information submitted following the Office's June 6, 1996 decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. Appellant's general and unsubstantiated allegations of harassment, discrimination, coercion and intimidation do not establish any compensable factors of employment. Additionally, Dr. Hepps' nonspecific history of employment-related "stress" is of no probative value in determining whether appellant has established any compensable factors of employment. As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation.

The October 9, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
February 23, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member