U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY POE and U.S. POSTAL SERVICE,
POST OFFICE, Alpine, CA

Docket No. 03-1275; Submitted on the Record;
Issued September 23, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

Appellant, a 42-year-old postmaster, filed a notice of occupational disease on August 24, 1998 alleging that he had developed an emotional condition and consequential aggravation of his preexisting condition of asthma due to factors of his federal employment. The Office denied his claim by decision dated April 20, 1999, finding that appellant had not substantiated any compensable employment factors.

In a letter dated April 26, 1999, appellant requested an oral hearing. By decision dated March 6, 2000 and finalized March 7, 2000, the hearing representative affirmed the Office's April 20, 1999 decision and finalized the denial of appellant's requests for subpoenas.

Appellant, through his attorney, requested reconsideration on March 2, 2001 and alleged that the hearing representative erred in denying appellant's requests for subpoenas. Appellant further alleged that he had submitted corroborating evidence of harassment and discrimination. By decision dated March 15, 2001, the Office reviewed appellant's claim on the merits and determined that appellant's arguments were not sufficient to warrant modification of its prior decisions.

On September 7, 2001 appellant, through his attorney, requested reconsideration and submitted new evidence. By decision dated October 17, 2001, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that the evidence submitted was not new and relevant.

Appellant's attorney requested reconsideration of the Office's prior decision on October 16, 2002. In a letter dated November 20, 2002, appellant submitted additional new evidence in support of his claim. By decision dated January 17, 2003, the Office declined to

reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed within one year of the last merit decision and that the evidence submitted did not establish clear evidence of error on the part of the Office.

The Board finds that the Office properly refused to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

Appellant requested reconsideration on October 16, 2002. Since appellant filed his reconsideration request more than one year from the Office's March 15, 2001 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[6] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration 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 be manifest on its face that the Office committed an error.[9] Evidence which does not raise

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[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews,* 44 ECAB 765, 768 (1993).

[3] *Id.* at 768; *see also Jesus D. Sanchez,* 41 ECAB 964, 966 (1990).

[4] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin,* 41 ECAB 186 (1989); *petition for recon. denied,* 41 ECAB 458 (1990).

[5] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 2 at 769; *Jesus D. Sanchez, supra* note 3 at 967.

[6] *Thankamma Mathews, supra* note 2 at 770.

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(c) (May 1996).

[8] *Thankamma Mathews, supra* note 2 at 770.

[9] *Leona N. Travis,* 43 ECAB 227, 241 (1991).

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 *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's decision.[13] The Board must make 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.[14]

The Board notes that the issue in the case is whether appellant has met his burden of proof in establishing that his emotional condition and resulting exacerbation of his asthma were due to compensable factors of his federal employment. In support of his claim, appellant submitted a copy of a settlement agreement with the employing establishment regarding his claims for employment discrimination on the bases of disability and retaliation. The agreement specifically states:

> "Accordingly, while this [a]greement resolves all issues and claims of any kind between the parties, it is not to be construed as an admission by [the employing establishment] of any liability, but instead a compromise of vigorously disputed claims. Moreover, neither this [a]greement nor anything in it shall be construed to be or shall be admissible in any proceeding as evidence of, or an admission by [the employing establishment] of any violation of any statute, ordinance, rule, regulation, policy, or other law, or of any liability alleged in this action or otherwise related to [appellant's] employment…."

As a result of the settlement agreement appellant received compensation from the employing establishment in the amount of $220,000.00. Appellant's attorney argued that the amount of the settlement supported appellant's allegations of overwork. The Board has previously held that the mere fact that a settlement agreement result in monetary payment to an appellant does not establish error by the employing establishment.[15] Furthermore, this agreement specifically stated that the employing establishment made no admission of wrongdoing related to appellant's employment. Therefore, this agreement cannot establish discrimination or error and abuse on the part of the employing establishment in any of the employment events alleged by

[10] *Jesus D. Sanchez, supra* note 3 at 968.

[11] *Leona N. Travis, supra* note 9.

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

[13] *Leon D. Faidley, Jr.,* 41 ECAB 104, 114 (1989).

[14] *Gregory Griffin, supra* note 4.

[15] *Georgia M. McCardle,* 48 ECAB 502, 504 (1997).

appellant.[16] As the settlement does not establish any aspect of appellant's claim for an emotional condition, it cannot establish clear evidence of error on the part of the Office.

In support of his claim, appellant submitted a report dated February 15, 2002 from Janice Wexler, a vocational evaluation specialist. Ms. Wexler stated that her objective was to determine appellant's employment potential. She listed appellant's duties and responsibilities as a postmaster and prepared a chart indicating that appellant's work hours increased from 9 hours a day to 13 hours a day after September 12, 1996, due to change in the duties of appellant's subordinate supervisor resulting in additional clerk work for the supervisor and appellant's absorption of the supervisor's daily duties. Ms. Wexler further indicated that appellant's work hours increased again, after November 13, 1996, to 15 hours a day as appellant's superior reduced the budget for window clerk workload, which was absorbed by appellant.

This report tends to support that a factual basis exists for appellant's claim that he sustained an emotional condition while in the performance of his duties.[17] The report addresses and supports appellant's allegation that he was overworked. However, the Board finds that the report is not sufficient to establish clear evidence of error on the part of the Office. Ms. Wexler concludes that appellant was required to assume 4 hours a day of his subordinate supervisor's activities beginning on September 12, 1996 resulting in a 13-hour workday and that after November 13, 1996 appellant's supervisor decreased the budget for the window clerk workload and appellant had to assume 2 additional hours of clerk duties per day resulting in a 15-hour workday. However, Ms. Wexler's report did not include the evidence she relied upon in reaching her conclusions such as copies of the orders from appellant's superiors that resulted in these allegedly increased work hours. Furthermore, she did not submit evidence corroborating that appellant actually worked the additional hours calculated in order to assume the duties. Ms. Wexler's findings are not substantiated by the evidence before the Board and cannot establish overwork on the part of appellant. The Board also notes that Ms. Wexler was hired by appellant as an expert in his pursuit of legal action against the employing establishment. Without copies of the evidence that Ms. Wexler relied on in reaching her conclusion, her status as appellant's expert suggests that perhaps she based her report on appellant's assertions rather than the substantiating and corroborating evidence necessary to meet appellant's burden of proof to establish a compensable employment factor as required by the Board. Therefore, the Board must conclude that this report is not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the Office's decision denying his claim.

Appellant submitted a report dated December 28, 2001 from Richard J. Henegar, Ph.D., a licensed marriage and family therapist. Section 8101(2) of the Act[18] provides that the term "physician" includes clinical psychologists. There is no evidence in the record establishing that Mr. Henegar is a clinical psychologist. A mental health therapist is not considered a physician

[16] *Mary L. Brooks*, 46 ECAB 266, 274 (1994).

[17] *Linda K. Cela*, 52 ECAB 288, 290 (2001); *Jimmy L. Day*, 48 ECAB 654, 658 (1997).

[18] 5 U.S.C. §§ 8101-8193, 8101(2).

for the purposes of the Act.[19] As Mr. Henegar is not a physician his reports do not constitute medical evidence and are not sufficient to establish the medical aspect of appellant' s emotional condition claim.[20] 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 *prima facie* shift the weight of the evidence in favor of the claimant. Mr. Henegar's report cannot shift the weight of the evidence in favor of appellant as it lacks probative value.

In support of his request for reconsideration, appellant submitted a report dated December 28, 2001 from Dr. Bruce M. Prenner, a physician Board-certified in allergies and immunology, who diagnosed persistent asthma, moderately severe; allergic rhinitis and allergic conjunctivitis. He stated that at the time he initially examined appellant, appellant was under tremendous stress as a result of his employment. Dr. Prenner indicated that after leaving the employing establishment appellant's condition had stabilized. He stated that appellant felt that reduction in stress had aided his asthma condition. Dr. Prenner concluded that it was difficult to establish the exact etiology of responsibility for appellant's condition as his asthma had been life long noting that appellant's asthma was multifactorial. The Board finds that this report is not sufficient to establish clear evidence of error on the part of the Office. Dr. Prenner did not provide a clear opinion that appellant's asthma was aggravated by his employment and did not discuss any compensable factors of employment. The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as the correctness of the Office's most recent merit decision and is insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant has not submitted sufficient evidence to establish clear evidence of error on the part of the Office and the Office, therefore, properly declined to reopen his claim for consideration of the merits.

[19] *Bradford L. Sutherland*, 33 ECAB 1568 (1982).

[20] *Arnold A. Alley*, 44 ECAB 912, 921 (1993).

The January 17, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 23, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member