United States Department of Labor
Employees' Compensation Appeals Board

STEVEN M. VIVOLO, Appellant	)	
and	)	**Docket No. 04-674**
	)	**Issued: May 11, 2004**
U.S. POSTAL SERVICE, TERMINAL ANNEX, Seattle, WA, Employer	)	

Appearances:
Steven M. Vivolo, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 16, 2004 appellant filed a timely appeal from the December 1, 2003 decision of the Office of Workers' Compensation Programs, which denied a reopening of his case for a review on the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's December 1, 2003 nonmerit decision.

ISSUE

The issue is whether the Office properly denied a reopening of appellant's case for a review on the merits on the grounds that his September 11, 2003 request for reconsideration was untimely and did not present clear evidence of error.

FACTUAL HISTORY

On September 16, 1984 appellant, then a 41-year-old former laborer/custodian,[1] filed a claim alleging that his job stress, problems with interpersonal relationships, insomnia and chest

[1] Appellant was terminated from employment effective August 27, 1984 for failure to follow instructions and four days of absence without leave. Disability retirement was disapproved on April 14, 1986.

pains were a result of his federal employment.[2] In a decision dated July 10, 1987, the Office denied appellant's claim for compensation.[3] The Office found that the weight of the medical evidence, as represented by the well-rationalized opinions of the impartial medical specialists,[4] established that appellant's emotional condition was not causally related to his employment.

In a decision dated October 17, 1988, the Office again denied appellant's claim for compensation. The Office found that the weight of the medical evidence rested with the opinion of the impartial medical specialist selected to resolve a subsequent conflict. The Office found that this well-rationalized medical opinion established that appellant sustained no stress-related condition causally related to factors of employment. In a statement of appeal rights, the Office notified appellant that any request for reconsideration must be made within one year of the date of that decision.

On March 21, 1995 the Office denied a reopening of appellant's case for a review on the merits, finding that his January 6, 1995 request for reconsideration was untimely and failed to present clear evidence of error. On May 19, 1995 the Office again denied a reopening of appellant's case for a review on the merits. Noting that his previous request for reconsideration was untimely, the Office found that appellant's April 11, 1995 request for reconsideration failed to present clear evidence of error. On December 24, 2002 the Board issued an order dismissing appellant's appeal for lack of jurisdiction. The record contained no final decision of the Office issued within one year of the filing of the April 18, 2002 appeal.[5]

On September 11, 2003 appellant requested reconsideration, stating as follows:

> "Date and time when injuries and disabilities occurred. Filed by employee's managers for timeliness purposes, due to employee's workplace environment. No resolution, to date, employee is still without compensation. Personal threats have been made of physical harm towards employee with firearms. In the statement of accepted facts, all written for timeliness to the U.S. Department of Labor Headquarters for the past 20 years as a protected handicapped federal employee. By regulations he has been entitled to coverage under the act (attached), government's request for employee to stop his appeals and letter writing through the Honorable Senator Maria Cantwell's Offices located in Seattle, Washington. The awful fact remains, employee's injuries are permanent. Employee's

[2] Asa L. Strine, supervisor of building services, reported on September 27, 1984 that he was unaware of any problems related to job stress until September 25, 1984, when appellant filed his claim for compensation.

[3] OWCP Case No. 14-0197580.

[4] Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[5] Docket No. 02-1276 (issued December 24, 2002).

physicians requests that rehabilitation services be provided by the U.S. Department of Labor has not been received due to the long period [of] disability and unemployability and lack of understanding by the U.S. Department of Labor."[6]

In a decision dated December 1, 2003, the Office denied a reopening of appellant's case for a review on the merits. The Office found that appellant's September 11, 2003 request for reconsideration was untimely and failed to present clear evidence of error in the denial of his claim.

LEGAL PRECEDENT

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[7]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 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 of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[8] Where the request is untimely and fails to present any clear evidence of error, the Office will deny the request for application for reconsideration without reopening the case for a review on the merits.[9]

ANALYSIS

The most recent merit decision in this case is the Office's October 17, 1988 decision denying appellant's claim on the grounds that the weight of the medical evidence, as represented by the well-rationalized opinion of the impartial medical specialist, established that appellant

[6] In OWCP Case No. 14-358413, a separate case that is not currently before this Board, the Office issued a decision on March 11, 2002 denying appellant's March 14, 2001 claim for compensation on the grounds that it was untimely filed. The Board issued a decision and order affirming the Office's denial of that claim. Docket No. 02-1275 (issued September 19, 2002), *petition for recon. denied*, Docket No. 02-1275 (issued April 11, 2003).

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.607 (1999).

[9] *Id*. at § 10.608(b).

sustained no stress-related condition causally related to factors of employment. The Office properly notified appellant that any request for reconsideration must be made within one year of that decision. Appellant's September 11, 2003 request for reconsideration is therefore untimely by almost 14 years.

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its October 17, 1988 decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[10] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[11] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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 decision.[15] The Board makes 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 a merit review in the face of such evidence.[16]

Appellant's September 11, 2003 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office in its October 17, 1988 decision. The Office denied appellant's claim for compensation on account of job stress because he failed to discharge his burden of proof to establish that his emotional condition was causally related to his federal employment. An impartial medical specialist selected to resolve a conflict in medical opinion concluded that there was no causal relationship. Because this opinion represented the weight of the medical evidence, appellant failed to establish an essential element of his claim. The issue, therefore, is strictly a medical one. Appellant, however, submitted no medical evidence to address this issue when he made his September 11, 2003 request for reconsideration. Instead, he alluded to timeliness, his status as a protected handicapped federal employee and requests for rehabilitation services. None of these matters is relevant to the reason the Office denied his claim on October 17, 1988. Nothing in appellant's September 11, 2003 request for

[10] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227 (1991).

[12] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[13] *See Leona N. Travis, supra* note 11.

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

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

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

reconsideration remotely suggests that the Office's October 17, 1988 decision was erroneous in finding that causal relationship was not established.

Because appellant's September 11, 2003 request for reconsideration does not establish, on its face, that the Office's October 17, 1988 decision was erroneous, the Board will affirm the Office's December 1, 2003 decision not to reopen his case for a review on the merits. Appellant's untimely request does not warrant such action under the law.

CONCLUSION

The Board finds that the Office properly denied appellant's September 11, 2003 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 203 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member