

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

JOSEPH C. HALL, Appellant)	
)	
and)	Docket No. 05-1055
)	Issued: August 5, 2005
DEPARTMENT OF THE AIR FORCE, AIR FORCE RESERVES, Portland, OR, Employer)	
)	

Appearances:
Joseph C. Hall, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 11, 2005 appellant filed a timely appeal of a December 21, 2004 decision of the Office of Workers' Compensation Programs, finding that his claim for reconsideration was untimely and failed to show clear evidence of error. The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal pursuant to 20 C.F.R. § 501.3. The only decision the Board may review on this appeal is the December 21, 2004 decision.

ISSUE

The issue is whether the Office properly determined that appellant's November 9, 2004 request for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

On May 17, 2001 appellant, then a 39-year-old former aircraft mechanic, filed an occupational disease claim (Form CA-2). Appellant alleged that he sustained an emotional condition after a November 1996 airplane crash. He indicated that he saw debris from the crash

and knew family of crew members. According to appellant, he resigned from federal employment in April 1999.¹ Appellant submitted an October 5, 2001 report from Dr. Robin Henderson, a psychiatrist, who stated that a key event that aggravated appellant's symptoms was the aircraft crash in November 1996. Dr. Henderson noted that appellant tested positive for marijuana in November 1998, his commander told appellant that his "career was toast" and he resigned in April 1999.

By decision dated November 17, 2001, the Office denied the claim on the grounds that the medical evidence was insufficient to establish the claim. The Office accepted as compensable work factors that appellant saw debris from the crash and watched family members of the crew examine the crash debris.

Appellant requested a hearing before an Office hearing representative, which was held on July 23, 2002.

In a decision dated October 18, 2002, the hearing representative remanded the case for further development of the medical evidence, finding that the reports of the attending psychiatrist, Dr. Henderson, were sufficient to further develop the record.

The Office referred appellant, medical records and a statement of accepted facts to Dr. Charles Bellville, a Board-certified psychiatrist. Based on reports dated November 22, 2002 and January 9, 2003, the Office accepted the claim for post-traumatic stress syndrome. On August 18, 2003 appellant submitted a claim for compensation (Form CA-7) for the period commencing March 1999. Appellant described the type of wage loss as a "downgrade."

In a decision dated October 6, 2003, the Office found that the medical evidence did not establish disability for the period claimed. The Office indicated that Dr. Henderson did not find appellant to be totally disabled and his resignation was not the result of his accepted medical condition.

By letter dated November 9, 2004, appellant requested reconsideration of his claim. Appellant submitted a statement discussing helicopter incidents on June 19, 1989, October 12, 1991 and May 15, 1992, which he felt contributed to his emotional condition. He included brief witness statements as to the accuracy of his statement. With respect to medical evidence, appellant submitted a September 10, 2004 report from Dr. Henderson, who discussed appellant's treatment for post-traumatic stress disorder. Dr. Henderson stated that the first date appellant "became at least partially disabled would have been sometime shortly after" the November 1996 accident. He further stated, "Ultimately, he became disabled in the sense that he could not function without a drug that medicated his anxiety."

In a decision dated December 21, 2004, the Office found that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the October 6, 2003 decision.

¹ The effective date of the resignation was October 14, 1999.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, the Office has stated that 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.⁶ 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 5 U.S.C. § 8128(a).⁷

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁸ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which 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

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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 Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

⁶ 20 C.F.R. § 10.607.

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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).

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 improperly denied merit review in the face of such evidence.¹⁶

ANALYSIS

The last decision on the merits of the claim was dated October 6, 2003. Appellant's request for reconsideration was dated November 9, 2004. Since this is more than one year after the merit decision, it is untimely.

The Office in this case accepted post-traumatic stress disorder as employment related. The October 6, 2003 decision found that disability for work was not established for the claimed period commencing March 1999. Appellant stated on appeal that he was not claiming total disability but a loss of wage-earning capacity, but he did not provide relevant information with his April 18, 2003 Form CA-7 regarding his claim. To the extent appellant was claiming that he was downgraded due to the employment injury and could not earn the date-of-injury wages, he would have to support the claim with probative evidence. The October 6, 2003 decision found that the evidence did not support an employment-related disability for the period claimed.

On reconsideration, appellant submitted a statement regarding prior helicopter incidents and a September 10, 2004 report from Dr. Henderson. This evidence is of little probative value to the underlying issue of an employment-related disability from the accepted work condition. Dr. Henderson provided only a brief statement regarding disability after November 1996, without providing specific detail regarding appellant's job duties, work history, his employment-related condition, and a reasoned medical opinion on disability for work commencing in March 1999.

The clear evidence of error standard requires evidence of such probative value that it *prima facie* shifts the weight of the evidence in appellant's favor. The evidence submitted in this case is not sufficient to establish clear evidence of error in the October 6, 2003 decision.

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

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

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 458 (1990).

CONCLUSION

The Board finds that appellant's November 9, 2004 request for reconsideration was untimely and failed to show clear evidence of error by the Office in the October 6, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21, 2004 is affirmed.

Issued: August 5, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board