

disorder due to his employment.¹ Appellant claimed that his medical condition had worsened because of an agency reorganization and in retaliation for filing an Equal Employment Opportunity (EEO) complaint. He alleged that he was discriminated against and subjected to abuse and harassment because he would not participate in a scheme to defraud the government. Appellant noted dissatisfaction with his performance appraisal and claimed that his employer improperly refused to allow him to work at home. He also alleged that his employer required him to undergo three psychiatric evaluations and then attempted to force him into disability retirement. He alleged improprieties on the part of his supervisors, Mary Drouin and Dr. Harold J. VanderMolen. He also claimed that the employing establishment attempted to revoke his security clearance and illegally used his federal income tax records. He also contended that the employing establishment delayed processing his workers' compensation claim.

In a decision dated July 7, 1999, the Office denied appellant's claim, finding that he failed to establish that he sustained an injury in the performance of duty. Appellant requested an oral hearing, which was held on January 27, 2000. By decision dated November 9, 2000, an Office hearing representative affirmed the July 7, 1999 decision. She found that appellant failed to substantiate a compensable factor of employment. As such, the medical evidence of record was not addressed.

Appellant requested reconsideration on November 8, 2001.² He identified several dates between March and May 1998 when he was assigned work that he was unable to perform. Appellant argued that the Office overlooked these employment incidents in the November 9, 2000 decision. He also submitted additional medical evidence regarding his colorectal and emotional conditions. In a decision dated March 14, 2002, the Office reviewed the merits of the claim and denied modification of the November 9, 2000 decision.

On August 7, 2002 appellant requested reconsideration. In a decision dated September 17, 2002, the Office declined to review the merits of the claim because the information received was not probative of the issue on reconsideration.

On January 16, 2003 appellant hand delivered another request for reconsideration, which included a January 10, 2003 cover letter and an eight-page brief prepared by his representative. In a decision dated July 14, 2003, the Office denied appellant's request for reconsideration, finding that the request did not raise any substantive legal questions or include any new and relevant evidence.

On July 31, 2003 appellant requested reconsideration, which the Office denied on August 25, 2003. He filed another request on August 28, 2003, that was similarly denied on October 29, 2003. In both the August 25 and October 29, 2003 decisions the Office denied

¹ Appellant's colorectal condition was believed to have stemmed from a July 13, 1991 motor vehicle accident. He was also diagnosed with adjustment disorder and post-traumatic stress disorder. Appellant retired on medical disability in January 2000.

² Appellant had requested an appeal before the Board, which he withdrew in order to pursue reconsideration before the Office. On November 15, 2001 the Board issued an order dismissing the appeal. Docket No. 02-174.

reconsideration because the request was untimely filed and appellant failed to demonstrate clear evidence of error.³

Appellant filed a request for reconsideration on May 7, 2004. He submitted more than 600 pages of documents along with his request. The information included medical and dental records, several Freedom of Information Act (FOIA) requests, and other correspondence with the Secretary of Labor, various Members of Congress, the Federal Bureau of Investigation, the U.S. Attorney's Office, the Office of the Inspector General and the Office of Workers' Compensation Programs. By decision dated June 30, 2004, the Office denied reconsideration. The Office found that the May 7, 2004 request was untimely and the evidence submitted was irrelevant to the issue addressed in the March 14, 2002 merit decision. Accordingly, the Office found that appellant failed to establish clear evidence of error.

Appellant filed another request for reconsideration on July 16, 2004. He submitted copies of recent correspondence with the Secretary of Labor, the U.S. Attorney's Office and the Department of Labor Office of the Inspector General. In a decision dated July 29, 2004, the Office denied reconsideration because it was untimely filed and he failed to establish clear evidence of error on the part of the Office in denying his claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office 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 the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁷ In those instances when a request for reconsideration is not timely filed, the Office

³ Appellant again filed an appeal with the Board, which he later withdrew in favor of pursuing reconsideration before the Office. By order dated April 30, 2004, the Board dismissed the January 24, 2004 appeal. Docket No. 04-738.

⁴ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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 20 C.F.R. § 10.607 (1999).

⁷ 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁸

ANALYSIS

Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁹ The one-year time limitation begins to run the day following issuance of the March 14, 2002 decision, as this was the last merit decision in the case. Appellant’s two most recent requests for reconsideration were dated May 7 and July 16, 2004; therefore, he is not entitled to review of his claim as a matter of right. Because appellant filed his requests more than one year after the Office’s March 14, 2002 merit decision, he must demonstrate “clear evidence of error” on the part of the Office in denying his claim.¹⁰

Appellant’s primary contention on appeal was that he was entitled to a merit review in response to his January 16, 2003 request for reconsideration. This request was accompanied by a January 10, 2003 brief prepared by his representative. Appellant argued that he should have received a merit review based on the January 16, 2003 submission, but the Office neglected to consider Dr. Soeken’s brief.¹¹ As previously noted, the Office reviewed appellant’s claim on July 14, 2003 and denied reconsideration. The decision does not specifically identify the date of appellant’s request for reconsideration, but the timing strongly suggests that it was issued in response to appellant’s January 16, 2003 submission.¹² While the July 14, 2003 decision did not specifically mention Dr. Soeken’s January 10, 2003 brief, the absence of a specific reference

⁸ 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁹ 20 C.F.R. § 10.607(a) (1999).

¹⁰ 20 C.F.R. § 10.607(b) (1999).

¹¹ Dr. Soeken’s brief was date stamped as having been received by the Office on January 17, 2005. The principal argument advanced by Dr. Soeken in the January 10, 2003 brief was that in 1994 the employing establishment forced appellant to undergo psychiatric evaluation by Dr. Rodney V. Burbach, a Board-certified psychiatrist, and then used this confidential medical information to pressure appellant to retire from federal service. He argued that this was a prohibited employment practice, and therefore, it represented a compensable employment factor. Appellant’s prior counsel, Michael M. Sebold, presented this same argument when the case was pending before the Branch of Hearings and Review in 2000. Dr. Soeken also alleged that appellant was improperly assigned “extra duties” and that an unidentified coworker placed a defamatory sign in the men’s room concerning appellant’s use of the bathroom.

¹² Appellant did not claim to have filed any other requests for reconsideration during the period between the Office’s September 17, 2002 and July 14, 2003 decisions.

does not, by itself, establish that the Office failed to consider the information. In denying reconsideration, the Office found that while appellant's request was timely, he failed to submit sufficient evidence or argument to warrant further merit review.¹³ Appellant has not established that the Office failed to consider his January 16, 2003 request for reconsideration.

To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.¹⁴ The pertinent issue is not appellant's current medical status, but whether he established a compensable employment factor as the cause of his claimed conditions. Appellant must submit evidence or argument that establishes clear error on the part of the Office in concluding that appellant had not established any compensable employment factors.

Appellant did not submit any evidence or argument relevant to the issue of whether he established a compensable employment factor as a cause of his claimed conditions. His arguments on reconsideration pertained to alleged improprieties by the Office in handling his workers' compensation claim. He alleged that an Office supervisory claims examiner had removed more than 300 pages of documents from his file. Appellant noted having submitted numerous FOIA requests in an effort to insure that his case file was complete. The same supervisory claims examiner who allegedly removed documents from the case file was in part responsible for appellant being investigated for allegedly leaving a threatening voicemail message. Appellant discussed the difficulties he encountered in attempting to clear his name following what he characterized as false allegations. However, these arguments and the evidence submitted in support thereof are not pertinent to the underlying issue on reconsideration. Evidence regarding appellant's current medical condition is similarly irrelevant to the issue on reconsideration. As such, the May 7 and July 16, 2004 requests for reconsideration and the accompanying evidence fail to demonstrate clear evidence of error on the part of the Office in denying appellant's claim. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his May 7 and July 16, 2004 requests were untimely filed and failed to demonstrate clear evidence of error.

¹³ Whether Dr. Soeken's January 10, 2003 brief presented sufficient argument to warrant merit review is not an issue currently before the Board because the appeal rights have long since elapsed with respect to the July 14, 2003 decision.

¹⁴ See *Dean D. Beets*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the July 29 and June 30, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 30, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board