

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

CÉSAR L. RIVERA-MELÉNDEZ, Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Mayaguez, PR, Employer**

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**Docket No. 05-182
Issued: March 28, 2005**

Appearances:
César L. Rivera-Meléndez, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 25, 2004 appellant filed a timely appeal of the July 7, 2004 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 26, 1999 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the Office's July 7, 2004 decision denying appellant's request for reconsideration.¹

¹ The record on appeal includes evidence submitted after the Office issued the July 7, 2004 decision. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his March 11, 2004 request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 12, 1996 appellant, then a 57-year-old former customs inspector, filed an occupational disease claim for major depression. He indicated that he first became aware of his employment-related condition on February 9, 1989. Appellant stated that his duties required that he report criminal and administrative misconduct to the proper authorities and when he accused certain peers and managers of misconduct, the employing establishment retaliated against him to protect the wrongdoers. Appellant also alleged that he was forced to retire on January 3, 1996.

Dr. Jose R. Fumero-Vidal performed a fitness-for-duty psychiatric evaluation on June 19 and July 3, 1995 and diagnosed delusional and mood disorder. Dr. Fumero-Vidal concluded that appellant was not fit to perform his duties as a customs inspector and he should not carry a firearm.

On August 28, 1995 the employing establishment issued a notice of proposed removal for nondisciplinary reasons. The employing establishment relied on Dr. Fumero-Vidal's opinion in finding that appellant was medically unable to perform the duties of a customs inspector. Because appellant's position required him to carry a firearm and there were no other positions available to accommodate his medical restrictions, the employing establishment indicated that the only alternative was to remove him from service. Appellant voluntarily retired effective January 3, 1996.

In a decision dated July 25, 1997, the Office denied appellant's claim because he failed to establish a compensable employment factor as the cause of his claimed emotional condition. The Office did not address appellant's allegations of retaliation for his whistleblower activities because these same allegations were the subject of an earlier claim (A02-637051) that was denied in 1992. The Office limited its focus to appellant's allegation that he was forced to retire under threat of removal and found that the proposed removal was a proper administrative action and therefore not compensable.

Appellant requested a hearing, which was held on November 23, 1998. By decision dated January 26, 1999, the Office hearing representative affirmed the July 25, 1997 decision. Appellant requested reconsideration on October 11, 1999 and the Office denied his request in a decision dated December 6, 1999. He filed another request for reconsideration on January 20, 2000, which the Office also denied by decision dated March 27, 2000.

On March 11, 2004 appellant requested reconsideration. He submitted more than 300 pages of documents along with his request. The Office received an additional 110 pages of documents on June 25, 2004. The majority of the documents had been previously submitted and pertained to alleged retaliation for appellant's whistleblower activities. There were also several documents that were created since the Office's last decision dated March 27, 2000.

Additionally, appellant provided documentation concerning a May 13, 1999 settlement agreement approved by the Merit Systems Protection Board (MSPB) regarding his alleged forced retirement. Appellant claimed that the employing establishment violated the terms of the settlement agreement because it refused to disclose information obtained through investigation of his various whistleblower complaints.

In a decision dated July 7, 2004, the Office denied appellant's March 11, 2004 request for reconsideration because it was untimely filed and appellant failed to demonstrate clear evidence of error on the part of the Office in denying his claim for an employment-related emotional condition.

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.² This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ 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.⁵ In those instances when a request for reconsideration is not timely filed, the Office 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."⁶

ANALYSIS

The one-year time limitation began to toll the day the Office issued its January 26, 1999 decision, as this was the last merit decision in the case.⁷ Appellant's most recent request for reconsideration was dated March 11, 2004; therefore, he is not entitled to review of his claim as

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

³ 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).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ 20 C.F.R. § 10.607(a) (1999).

⁶ 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).

⁷ *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

a matter of right. Because appellant filed his request more than one year after the Office's January 26, 1999 merit decision, he must demonstrate "clear evidence of error" on the part of the Office in denying his claim for compensation.

To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.⁸ The Office informed appellant as early as February 25, 1997 that it would not revisit his allegations of retaliation for his whistleblower activities because those same allegations were the subject of a previously denied claim (A02-637051). The current claim was limited to the specific allegation that appellant was forced to retire on January 3, 1996. The vast majority of the more than 400 pages of documentation submitted by appellant on or after March 11, 2004 pertained to his whistleblower activities. The various reports appellant filed over the years regarding what he perceived to be acts of misconduct by coworkers and the employing establishment's handling of those allegations is not relevant to the issue in the instant case.

Appellant resubmitted a copy of the May 13, 1999 settlement of his MSPB complaint regarding his alleged forced retirement. The terms of the agreement do not include an admission of fault by either appellant or the employing establishment. This document was initially considered by the Office in its December 16, 1999 decision denying reconsideration. Appellant's resubmission of the settlement agreement with the current request for reconsideration does not establish clear evidence of error.

Appellant also submitted copies of recent correspondence with the President, the U.S. Court of Appeals and various representatives from the employing establishment, including former Commissioner of Customs, Raymond W. Kelly. The correspondence pertained to appellant's efforts to enforce what he believed to be the terms of the May 13, 1999 settlement agreement. He wanted to obtain copies of investigative reports and the employing establishment advised that any disclosure of information was subject to the Freedom of Information Act. These recent documents also do not demonstrate clear error.

Appellant's March 11, 2004 request for reconsideration and the accompanying evidence failed to demonstrate clear evidence of error on the part of the Office in denying his claim for compensation. 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 request was untimely and failed to show clear evidence of error.

⁸ See *Dean D. Beets*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member