United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
	)	
and	)	**Docket No. 08-445**
	)	**Issued: August 4, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

On December 3, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 5, 2007 nonmerit decision denying his request for merit review of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The Office's last merit decision of record was its December 31, 2003 decision denying appellant's emotional condition claim. Because more than one year has elapsed between the Office's last merit decision and the filing of this appeal on December 3, 2007, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

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

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal, the Board issued a decision on July 6, 2004 finding that the Office properly denied appellant's emotional condition claim on the grounds that he had not submitted sufficient evidence to establish any compensable employment factors.[2] In an April 3, 2003 decision, the Office initially denied appellant's emotional condition claim and, in a December 31, 2003 decision, an Office hearing representative affirmed the Office's April 3, 2003 decision.[3] In the second appeal, the Board issued a decision on July 5, 2007 finding that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[4] The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

In an August 8, 2007 letter, appellant requested reconsideration of the Office's denial of his emotional condition claim. He argued that several witness statements of coworkers and other documents he previously submitted to the Office showed that he was harassed by Mr. Gant. Appellant repeated a number of his previous claims that certain incidents involving Mr. Gant and Ms. Manies constituted harassment. He also asserted that medical evidence of record showed that he sustained an employment-related emotional condition. In an August 27, 2007 statement, appellant argued that a statement of Ms. Manies in the record was not accurate.

In an October 5, 2007 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[5]

[2] Docket No. 04-796 (issued July 6, 2004).

[3] On June 13, 2002 appellant, then a 50-year-old mail handler, filed a claim alleging that he sustained depression and anxiety due to various incidents and conditions at work. He indicated that on July 5, 2001 Mary Ann Manies, a supervisor, called him into a room filled with other supervisors and accused him of lying in his injury report and threatened to report him to the postal inspector for investigation. Appellant stated that, prior to July 5, 2001, he was harassed by his supervisor, Benny Gant, and that two postal managers he complained to did not do anything about the situation. He claimed that on July 6, 2001 Mr. Gant gave him an investigative interview and told him that it could lead to a disciplinary action. Appellant asserted that he received unfair disciplinary letters, including a July 19, 2001 letter of warning regarding the July 5, 2001 incident, a September 5, 2001 letter of warning for unsatisfactory attendance, and a May 8, 2002 letter of warning for arriving late to work. He alleged that Phil Perry, a supervisor, harassed him by saying that Ms. Manies had indicated that she did not want to talk to him after he had asked to speak to her. Appellant claimed that he sustained stress when Gary Banlowe, a supervisor, gave him an investigative interview on March 21, 2002. He asserted that he was wrongly prohibited from flossing his teeth in the restroom and from going to the health clinic and that Mr. Gant discriminated against him by not taking his seniority into consideration when assigning duties and by talking to coworkers about his health and work habits. Appellant also asserted that Mr. Gant harassed him by following him into the restroom and questioning him about his breaks.

[4] Docket No. 05-1529 (issued July 5, 2006).

[5] 20 C.F.R. § 10.607(a).

According to Office procedure, the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[7]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office regulations and procedure provide that the Office 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 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 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]

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

[7] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[9] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

[10] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[12] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

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

[15] *Leon D. Faidley, Jr.*, *supra* note 7.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[16] A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[17] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[18] When a given matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[19]

To the extent that disputes and incidents alleged as constituting harassment by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[20] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[21] A claimant must substantiate allegations of harassment with probative and reliable evidence, such as witness statements or the outcomes of grievances.[22]

ANALYSIS

In its October 5, 2007 decision, the Office properly determined that appellant filed an untimely request for reconsideration of the Office's denial of his emotional condition claim.[23] Appellant's reconsideration request was filed on August 8, 2007, more than one year after the

[16] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[17] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[18] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[19] *Id.* If a claimant has not established any compensable employment factors, the Office need not consider the medical evidence of record. *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[20] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[21] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[22] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

[23] Appellant's claim was denied on the grounds that he did not establish any compensable employment factors.

Board's July 6, 2004 decision on the merits, and therefore he must demonstrate clear evidence of error on the part of the Office in issuing its prior decisions.[24]

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its prior decisions concerning his emotional condition claim. He did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

In his August 2007 letters, appellant argued that several witness statements and other documents he previously submitted to the Office showed that he was harassed by Mr. Gant. He took issue with the accuracy of a statement from Ms. Manies. Appellant repeated a number of his previous claims that certain incidents involving Mr. Gant and Ms. Manies constituted harassment.

These arguments, however, are not relevant to the main issue of the present case, *i.e.*, whether appellant established any compensable employment factors in his emotional condition claim. Appellant has restated the nature of some of his alleged employed factors and has generally asserted that some evidence of record (such as the statements of coworkers) supported his claim and that other evidence of record (such as the statement of Ms. Manies) did not support the Office's findings. These mere assertions would not tend to establish his alleged employment factors, including harassment by Mr. Gant and Ms. Manies.[25] Appellant also asserted that medical evidence of record showed that he sustained an employment-related emotional condition, but this argument is not relevant as appellant has not established any compensable employment factors and there is no need for the Office to evaluate the medical evidence of record in such a case.[26]

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior decisions and the Office properly determined that appellant did not show clear evidence of error in those decisions.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

[24] *See supra* notes 5 and 6 and accompanying text.

[25] Appellant did not submit any additional evidence in support of his reconsideration request, such as a new witness statement or the outcome of a grievance. As noted above, a claimant must substantiate allegations of harassment with probative and reliable evidence. *See supra* note 22 and accompanying text.

[26] *See supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 5, 2007 decision is affirmed.

Issued: August 4, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board