United States Department of Labor
Employees' Compensation Appeals Board

O.C., Appellant	)	
and	)	**Docket No. 10-1675**
	)	**Issued: April 6, 2011**
U.S. POSTAL SERVICE, FOREST HILLS POST OFFICE, Tampa, FL, Employer	)	

Appearances:
William Hackney, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 9, 2010 appellant filed a timely appeal from a March 10, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration. The final merit decision in the case was issued January 8, 2009. There is no merit decision of record issued within 180 days of June 9, 2010, the date appellant filed his appeal with the Board. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case. The Board has jurisdiction over the nonmerit denial of reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for a merit review, as being untimely and lacking of evidence showing clear evidence of error.

On appeal, appellant's representative contends that appellant was within the performance of duty when injured on May 26, 2008. He asserted that trimming trees was within appellant's duty description, that the employing establishment knew he had trimmed trees in the past and that he was expected to initiate and prioritize tasks without supervisory direction.

FACTUAL HISTORY

On May 27, 2008 appellant, then a 55-year-old custodian, filed a traumatic injury claim (Form CA-1) claiming that, on May 26, 2008, he sustained left humeral, right calcaneus and L1 vertebral fractures when he was knocked from a ladder by a falling tree branch while he trimmed the tree with a chainsaw.[1] A May 26, 2008 authorization for medical treatment (Form CA-16) was signed by a customer service supervisor. Appellant's position description noted that custodial duties included tending to "lawns, shrubbery and premises of the [employing establishment]."

In a May 26, 2008 letter, appellant's supervisor, stated that "[t]rimming and cutting trees [were] not part of [appellant's] duties/activities. Specifically, the date of the injury, [appellant] was scheduled to work his nonscheduled day to wax floor in the station." The supervisor stated that she was unaware whether management advised [him] to trim trees or whether [he] had done so in the past. [She] stated that using power tools was outside the scope of appellant's duties.

In a June 6, 2008 letter, the Office advised appellant of the evidence needed to establish his claim, including factual information substantiating that trimming trees was within the performance of duty. Appellant was afforded 30 days to submit such evidence. In a second June 6, 2008 letter, the Office requested that the employing establishment explain if he was assigned or expected to trim trees on May 26, 2008.

In a June 30, 2008 letter, appellant related that on May 26, 2008 his supervisor asked him to come in on overtime to clean and wax the floors. As he knew of a "dangerously low branch hanging in the station's parking area, [he] brought [his own] tree trimming tools to work to cut and remove the branch" while waiting for the floors to dry. There were no supervisors on duty. Appellant contended that his supervisors were aware that he regularly "cleared, trimmed and cut trees and brush." Station managers gave him permission to bring in his chain saw from home to remove branches in 2000 and early 2007. The ladder from which appellant fell was provided by the employing establishment.

Appellant submitted June 26 and July 20 and 27, 2005 private-sector tree trimming estimates obtained by employing establishment management officials.

By decision dated July 16, 2008, the Office denied the claim on the grounds that appellant was not in the performance of duty when he fell from the ladder on May 26, 2008. It found that trimming trees on May 26, 2008 was a deviation from his assigned task of waxing the station floors.

In a July 28, 2008 letter, appellant requested a telephonic hearing, held November 6, 2008. During the hearing, appellant's representative asserted that the employing establishment denied that trimming trees was within his duty description to protect new safety program statistics. He noted that three stations in the same management district as the

[1] Appellant submitted hospital records. On May 26, 20008 he underwent open reduction and fixation of a three-part proximal left humeral fracture. On June 11, 2008 appellant underwent open fixation of a right calcaneal fracture.

employing establishment routinely purchased or rented chainsaws for premises maintenance. Appellant's representative noted that appellant's supervisor originally said that appellant was in the performance of duty.

After the hearing, appellant's representative submitted undated interviews with employing establishment station managers stating that they did not recall whether they instructed appellant to bring in his chainsaw to remove a dead tree in 2001, late 2006 or early 2007.

In a December 3, 2008 letter, appellant's representative stated that a central maintenance supervisor in Tampa supervised all custodians at the Carroll, Forest Hills, Hilldale, New Tampa, Produce and Sulphur Springs postal stations. He asserted that all these stations owned or rented chainsaws for tree trimming. Therefore, it was appellant's representative's contention that appellant's supervisors were not being truthful when they denied that trimming trees was not a custodial duty. He submitted August and September 2008 letters and photographs from custodians at the Brandon, Produce, Riverview, Sulphur Springs and Zephyr Hills postal stations stating that these facilities owned or rented chainsaws to trim trees on their premises.[2]

By decision dated January 8, 2009, an Office hearing representative affirmed the Office's July 16, 2008 decision, finding that appellant was not in the performance of duty when injured on May 26, 2008. The hearing representative found that, on May 26, 2008, appellant was assigned to wax floors. Appellant was not directed to perform any tasks involving climbing ladders or using a chainsaw to trim trees.

In an undated letter received by the Office of February 24, 2010 appellant, through his elected representative, requested reconsideration. Appellant's representative asserted that supervisors gave inconsistent statements, that the Office should review the custodial job description, reconsider whether custodians used power tools in their daily tasks and that custodians regularly worked without supervision. Appellant provided duplicate copies of job descriptions, tree trimming estimates and letters and photographs regarding tree trimming at postal stations. He newly submitted a Naples, Florida postal grievance opinion and award finding that tree trimming was a custodial task, grievance documents regarding postal custodial classification in Oklahoma and a fragment of an unsigned statement repeating prior arguments.

By nonmerit decision dated March 10, 2010, the Office denied reconsideration on the grounds that appellant did not submit new, relevant argument or evidence establishing legal error by the Office. It found that the additional arguments and evidence did not establish clear evidence of error as they did not show that he was performing a regular or assigned duty when injured on May 26, 2008.

[2] Appellant's representative also submitted a grievance determination regarding postal custodian classification in Oklahoma and a Tampa headquarters custodian position description noting use of power lawnmowers.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] 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 compensation.[5] The Office, through regulations, has imposed limitation on the exercise of its discretionary authority. One such limitation is that the Office 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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[8] Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration 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 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

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[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765 (1993).

[5] *Id*.; *see also Jesus D. Sanchez*, 41 ECAB 964 (1990).

[6] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

[7] 5 U.S.C. § 10.607(b); *supra* note 5.

[8] *Thankamma Mathews, supra* note 4.

[9] 20 C.F.R. § 10.607(b).

[10] *Thankamma Mathews, supra* note 4.

[11] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[12] *Jesus D. Sanchez, supra* note 5.

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

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

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[15] The Board must make 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 merit review in the face of such evidence.[16]

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on January 8, 2009. Appellant's February 24, 2010 request for reconsideration was untimely filed as it was submitted more than one year after the last merit decision.[17] It must now be determined whether his February 24, 2010 request for reconsideration demonstrated clear evidence of error in the Office's January 8, 2009 decision.

In the February 24, 2010 letter, appellant's representative asserted that supervisors provided inconsistent statements that custodians used power tools without supervision and that the Office should review appellant's job description. Appellant also submitted a fragment of an unsigned statement reiterating arguments presented at the November 6, 2008 hearing. He also provided duplicate copies of job descriptions and documents regarding tree trimming at other postal stations. The Board has held that evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[18] These documents do not establish on their face that the Office erred in denying appellant's traumatic injury claim and are insufficient to establish clear evidence of error.

Appellant also submitted a Naples, Florida postal grievance opinion finding that tree trimming was a custodial task and documents regarding custodial classification at postal stations in Oklahoma. These documents are not relevant to the claim as they do not address whether he was assigned or permitted to trim trees at the employing establishment on May 26, 2008. The Board has held that irrelevant evidence is insufficient to establish clear evidence of error.[19]

Appellant has not established that the Office improperly denied his request for further review of the merits of his claim. The arguments and evidence submitted by him in support of his February 24, 2010 request for reconsideration do not shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's January 8, 2009

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[16] *Gregory Griffin*, *supra* note 6.

[17] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[18] *Denis M. Dupor*, 51 ECAB 482 (2000).

[19] *Thankamma Matthews*, *supra* note 4.

decision. The Board therefore finds that they are insufficient to demonstrate clear evidence of error.

On appeal, appellant's representative contends that appellant was within the performance of duty when injured on May 26, 2008. He asserted that trimming trees was within appellant's duty description, that the employing establishment knew appellant had trimmed trees in the past and that he was expected to work without direct supervision. These arguments go to the merits of appellant's claim, which are not before the Board on the present appeal. These arguments do not establish clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's February 24, 2010 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2010 is affirmed.

Issued: April 6, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board