United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
	)	
and	)	**Docket No. 06-375**
	)	**Issued: August 23, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer	)	

Appearances:
S.M., pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument July 11, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 2, 2005 appellant filed a timely appeal of a November 21, 2005 decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued September 25, 2002, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly refused to reopen the case for merit review on the grounds that the application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a decision dated September 25, 2002, the Board affirmed the termination of compensation as of June 1, 1992.[1] The Board found that the weight of the medical evidence was represented by second opinion psychiatrist, Dr. Reynaldo Abejuela, who submitted reports dated February 1 and November 11, 1996 and March 12, 1997. In a decision dated March 14, 2005, The Board affirmed a June 13, 2003 Office decision denying appellant's request for reconsideration without merit review of the claim. The history of the case is provided in the Board's prior appeals and is incorporated herein by reference.

In a May 27, 2005 letter, appellant stated that he was submitting "required evidence for reconsideration." Appellant argued that the medical evidence did not establish that his condition had resolved by June 1, 1992. He reiterated that he was subject to sexual harassment at the employing establishment. Appellant submitted a May 26, 2005 report from Dr. Arnold Nerenberg, a clinical psychologist. The report stated that appellant was "able to resume work-related responsibilities with no restrictions whatsoever." In letters dated August 22 and 24, 2005, appellant indicated that he was requesting reconsideration and reiterated his prior arguments.

By decision dated November 21, 2005, the Office determined that appellant's requests for reconsideration were untimely and failed to show clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] 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

[1] Docket No. 00-1176 (issued September 25, 2002).

[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.

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 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 abused its discretion in denying merit review in the face of such evidence.[16]

ANALYSIS

The Office received a May 27, 2005 letter with respect to reconsideration of appellant's claim. The last decision on the merits of the claim is the Board's September 25, 2002 decision.

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[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).

[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 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990).

Since appellant did not submit the application for reconsideration within one year of a merit decision, it is untimely.

In order to reopen the case for merit review, appellant must show clear evidence of error by the Office in its determination that residuals of the accepted adjustment disorder and temporary aggravation of paranoid personality disorder had resolved by June 1, 1992.[17] Appellant argues that the medical evidence does not establish that the conditions had resolved, but his argument is without merit. He refers to medical evidence such as a July 20, 1992 report from Dr. Lawrence Moss, a psychiatrist, opining that he was totally disabled. To be of probative value, however, a medical report must be based on a complete and accurate background.[18] The compensable employment factor established in this case was an October 4, 1991 incident involving verbal abuse. An opinion on disability must be based on an understanding of the compensable and noncompensable work factors in the case.

As the Board noted in its September 25, 2002 decision, Dr. Abejuela provided a reasoned medical opinion based on complete factual and medical background. His report was found to represent the weight of the medical evidence. Appellant has not provided any evidence or argument that would establish clear evidence of error by the Office. The medical report from Dr. Nerenberg does not address the issue of a continuing employment-related condition as of June 1, 1992. As noted above, even if appellant submitted evidence of such probative value that it would create a conflict in the medical evidence, it would not establish clear evidence of error.

On reconsideration appellant reiterated his argument that he was subject to sexual harassment at the employing establishment. The claim of sexual harassment was not substantiated as a compensable factor of employment in this case. Appellant did not submit any evidence that would establish the allegation as compensable, as well as establish a continuing medical condition causally related to the compensable factor after June 1, 1992.

The Board finds that appellant has not established clear evidence of error in this case. The Office, therefore, properly denied the requests for reconsideration with reopening the case for merit review.

CONCLUSION

The evidence does not establish clear evidence of error in the Office's determination that residuals of the employment injury had resolved by June 1, 1992.

[17] Issues regarding appellant's employment status with the employing establishment are not within the Board's jurisdiction. *See* 20 C.F.R. § 501.2(c).

[18] *See Patricia M. Mitchell,* 48 ECAB 371 (1997); *Cleopatra McDougal-Saddler,* 47 ECAB 480 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 21, 2005 is affirmed.

Issued: August 23, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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