

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HELEN KING and DEPARTMENT OF EDUCATION,  
DEBT COLLECTION SERVICE, San Francisco, CA

*Docket No. 00-1604; Submitted on the Record;  
Issued April 5, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's November 3, 1999 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On May 7, 1998 appellant, then a 58-year-old loan analyst, filed a notice of occupational disease, claiming that her stress, headaches, sleep loss and muscle spasms resulted from harassment and a hostile work environment. By decision dated September 1, 1998, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained an emotional condition arising out of her employment.

By letter dated August 4, 1999, appellant, through her representative, requested reconsideration and submitted a narrative report dated July 27, 1999 from her psychologist, Dr. Katherine L. Bowman, who opined that appellant's post-traumatic stress syndrome was related to her job situation and stated:

"I believe that [appellant] clearly qualifies for a diagnosis of post[-]traumatic stress disorder chronic related to the workplace bullying and verbal abuse she describes as occurring in her work situation and interactions with her boss at the [employing establishment]. She will require ongoing psychotherapy to help her recover to former levels of functioning."

Dr. Bowman added: "I believe that the post[-]traumatic stress syndrome experienced by [appellant] is clearly due to the work situation at the [employing establishment]."

By decision dated September 2, 1999, the Office denied appellant's request for review on the grounds that the evidence submitted was immaterial and did not address whether the

employing establishment committed any error in its administrative actions or whether there were any factual elements of work which would be compensable.

By letter dated November 3, 1999, appellant requested reconsideration. Appellant submitted a copy of an October 1, 1999 letter, from appellant's employer, finding misconduct on the part of her former supervisor. By decision dated January 6, 2000, appellant's request for reconsideration was denied as untimely filed and lacking clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>1</sup>

In support of her August 4, 1999 request for reconsideration, appellant submitted a narrative report from her psychologist, Dr. Bowman, who concluded that appellant suffered from post-traumatic stress syndrome, which resulted from her work situation.

Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.<sup>2</sup> There are distinctions regarding the type of work situation giving rise to an emotional condition which will be covered under the Act.

The actions of an employee's supervisor which the employee characterizes as harassment may constitute a compensable factor and if the record demonstrates that the employing establishment erred or acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.<sup>3</sup> However, a claimant must support her allegations of harassment or erroneous actions with probative and reliable evidence; personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>4</sup> If appellant's allegations are not supported by probative and reliable evidence, it is unnecessary to address the medical evidence.<sup>5</sup>

Because Dr. Bowman was not a witness to the incidents at the employing establishment, which appellant alleges caused her conditions, the physician's narrative report is irrelevant to establish any compensable work factors. Therefore, the Office properly found this evidence insufficient to warrant merit review.

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<sup>1</sup> 20 C.F.R. § 10.606(b)(2).

<sup>2</sup> *Lillian Cutler*, 28 ECAB 125, 129 (1976).

<sup>3</sup> *Margrethe Lublin*, 44 ECAB 945, 956 (1993).

<sup>4</sup> *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

<sup>5</sup> *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

Since appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office, she did not establish that the Office abused its discretion in denying her request for reconsideration.

The Board also finds that the Office properly determined that appellant's November 3, 1999 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act<sup>6</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>7</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.<sup>8</sup> 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).<sup>9</sup>

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that 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.<sup>10</sup> Office procedures state 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, if the claimant's application for review shows “clear evidence of error” on the part of the Office.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2).

<sup>9</sup> *Jesus D. Sanchez*, *supra* note 7; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

In implementing the one-year time limitation, the Office's procedures provide that the one-year period for requesting reconsideration begins on the date of the original Office decision. Appellant's request for reconsideration was dated November 3, 1999, which is more than one year after the Office's most recent merit decision dated September 1, 1998. Appellant's request was, therefore, untimely.

In support of this untimely request for reconsideration appellant submitted a letter dated October 1, 1999 from Gary L. Hopkins, Acting Director of the Debt Collection Service. In this letter, Mr. Hopkins informed appellant that the U.S. Investigations Services, Inc. had conducted an investigation from August to October 1998 regarding Gary Rozier's statements made at a January 7, 1998 staff meeting. Mr. Hopkins noted that all employees present at the meeting had been interviewed. Mr. Hopkins stated that he had concluded that Mr. Rozier's comments were inappropriate, even though the investigation was inconclusive as to whether a threat of violence had been made.

At the time the Office denied appellant's claim, appellant had not submitted any evidence to substantiate her allegations regarding this January 1998 meeting. The 1999 letter is not sufficient to establish clear error in the Office's denial of the claim because it consists of

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<sup>12</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *Jesus D. Sanchez*, *supra* note 7.

<sup>15</sup> *Leona N. Travis*, *supra* note 13.

<sup>16</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, *supra* note 9.

<sup>18</sup> *Gregory Griffin*, *supra* note 10.

Mr. Hopkins' conclusions, which are based upon evidence not of record. Appellant has still not submitted supporting evidence from witnesses to substantiate that the allegations occurred as alleged.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant's request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 6, 2000 and September 2, 1999 are hereby affirmed.

Dated, Washington, DC  
April 5, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member