U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONSERRATE CABAN and U.S. POSTAL SERVICE,
POST OFFICE, Aquadilla, PR

Docket No. 00-551; Submitted on the Record;
Issued February 2, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On December 17, 1992 appellant, a 40-year-old mail clerk, filed a claim for benefits based on an emotional condition.

By decision dated March 29, 1993, the Office denied the claim, finding that appellant failed to establish that she sustained an emotional condition in the performance of duty.

By letter dated April 8, 1993, appellant requested an oral hearing, which was held on March 8, 1994.

By decision dated February 13, 1998, an Office hearing representative vacated the previous decision and remanded the case for further development of the evidence. The hearing representative instructed the district Office to refer appellant to a Board-certified psychiatrist to determine whether appellant's claimed emotional condition was causally related to her federal employment.

In a report dated June 25, 1997, Dr. Mary Anne Pagan, Board-certified in psychiatry and neurology, stated:

> "[Appellant] did not suffer psychiatric condition related to factors of her federal employment. She is totally disabled because she had no remission of her depressive symptoms. Her family problems continue. The case 'harassment' she exposed does not have a supportive data."

By decision dated June 25, 1997, the Office denied the claim, finding that appellant failed to establish she sustained an emotional condition in the performance of duty.

By letter dated December 31, 1997, appellant's congressional representative requested reconsideration of the June 25, 1997 decision.

By decision dated April 3, 1998, the Office found that the evidence submitted was not sufficient to warrant modification of the June 25, 1997 decision.

By letter dated April 23, 1999, appellant's congressional representative requested reconsideration. In support of his request, appellant submitted a July 23, 1998 report from Dr. Francisco J. Zamora Alvarez, a psychiatrist, and an April 9, 1999 report from Dr. Jose J. Zamora Alvarez, a psychiatrist. Dr. Francisco Alvarez stated that appellant had an emotional condition which produced excessive anxiety and worries, depressed mood, irritability, markedly diminished interest in all activities, insomnia, restlessness, diminished ability to concentrate, crying episodes, feeling of hopelessness, poor memory and muscle tension. He noted that appellant had a chronic and severe degree of impairment at the emotional level of functioning, and advised that she was unable to engage in any type of substantial, gainful employment. Dr. Francisco Alvarez further stated that appellant was totally and permanently disabled from the social, emotional and industrial standpoints. In addition, he opined that the stressful situation at work was the precipitating factor that caused her condition, and added that the constant harassment from her supervisor accelerated the course of the condition. Dr. Jose Alvarez noted treating appellant since August 22, 1991 for an emotional condition which was aggravated by her federal employment. He noted that the death of appellant's mother and her daugher's condition were not precipitating causes.

By decision dated October 15, 1999, the Office denied reconsideration without a merit, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

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

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle an employee to a review of an Office decision as a matter of right.[2] 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 his own motion or on application. The Secretary, in

[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

accordance with the facts found on review may--

(1) end, 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).[3] 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[5]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on April 2, 1998. Appellant requested reconsideration on April 23, 1999; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

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.[6] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the appellant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue, which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be

[3] 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 point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[4] 20 C.F.R. § 10.607(b).

[5] *See* cases cited *supra* note 7.

[6] *Rex L. Weaver*, 44 ECAB 535 (1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[8] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

[10] *See Jesus D. Sanchez*, *supra* note 2.

construed so as to produce a contrary conclusion.[11] 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.[12] 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's decision.[13] The Board makes an independent determination of whether an appellant 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.[14]

The Board finds that appellant's April 23, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it failed to establish clear evidence of error. The reports from Drs. Jose Alvarez and Francisco Alvarez indicate that appellant is totally and permanently disabled from employment due to an emotional condition caused by a stress from work and harassment. While these reports are relevant to the issue of whether appellant sustained an emotional condition in the performance of duty, they are not insufficient to *prima facie* shift the weight of the evidence in favor of appellant. While medical opinions may be construed as being of equal weight such as to create a conflict in medical opinion, this is not sufficient to show clear evidence of error. A conflict in medical opinion does not establish that the Office's decision was erroneous and does shift the weight of evidence in appellant's favor.[15] In addition, appellant did not present any evidence of error on the part of the Office in her request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

[11] *See Leona N. Travis, supra* note 9.

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

[13] *Leon D. Faidley supra* note 2.

[14] *Gregory Griffin,* 41 ECAB 458 (1990).

[15] *See Fidel E. Perez,* 48 ECAB 663 (1997).

The October 15, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 2, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member