

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA K. CELA and DEPARTMENT OF THE ARMY,
U.S. ARMY AUDIT AGENCY, Savannah, GA

*Docket No. 00-1084; Submitted on the Record;
Issued March 7, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's June 7, 1999 request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error in the Office's June 9, 1997 decision.

On March 5, 1996 appellant, then a 48-year-old auditor, filed a claim asserting that her high blood pressure, stress and post-traumatic stress disorder were causally related to retaliation for a sexual harassment claim. In a decision dated June 9, 1997, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to demonstrate that her injury occurred in the performance of duty. The Office found that, although an administrative law judge had issued a recommended decision finding sexual harassment and reprisal by the employing establishment, the employing establishment itself issued a final decision rejecting this recommendation.¹ The employing establishment found that appellant had not demonstrated beyond a preponderance of the evidence that she was subjected to sexual harassment and had failed to produce evidence of pretext with regard to the reprisal issue. Under these circumstances, the Office found that the record was one of contradicted and unsubstantiated allegations. The Office denied appellant's claim because she had submitted insufficient evidence to sustain her account of events and to establish that she sustained an emotional condition while in the performance of duty.

On June 7, 1999 appellant, through her attorney, requested reconsideration of the Office's June 9, 1997 decision. In support thereof, she submitted a judgment entered on June 26, 1998 in the United States District Court for the Southern District of Georgia. The judgment showed that a jury had rendered a verdict in favor of appellant on her claim of a hostile work environment

¹ Notice given in the recommended decision stated as follows: "Pursuant to 29 C.F.R. Section 1614.109 of the commission's regulations, the administrative judge's recommended decision shall become a final decision binding on the agency 60 calendar days after its receipt of the complaint file, the hearing transcript and the recommended decision unless, within that time period, the agency itself issues a final decision adopting, rejecting, or modifying the recommended decision."

against the employing establishment.² Appellant submitted that, as this evidence conclusively established the fact of discrimination as a matter of law, the rationale of the Office's June 9, 1997 decision was no longer valid.

In a decision dated October 7, 1999, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error in the Office's June 9, 1997 decision. The Office noted that appellant submitted only a "rather vague" single-page judgment with no specific evidence proving any of her previous specific claims of sexual harassment and discrimination. Because the evidence submitted neither spoke to any of appellant's specific allegations or provided any proof that the Office erred in its original decision, the Office denied a merit review of appellant's claim.

The Board finds that the Office did not abuse its discretion in denying appellant's June 7, 1999 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act does not grant a claimant the right to a merit review of her case.³ Rather, this section vests the Office with discretionary authority to review prior decisions:

"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 accordance with the facts found on review may --

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

(2) award compensation previously refused or discontinued."⁴

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Section 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office's decision, for which review is sought. This section further provides that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

Because appellant made her June 7, 1999 request for reconsideration more than one year after the Office's June 9, 1997 decision denying the merits of her claim, the Office properly found appellant's request to be untimely. The question for determination, therefore, is whether

² The jury rendered verdicts against appellant in her claims of *quid pro quo* and retaliation and judgment was entered accordingly.

³ *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

appellant's request demonstrates clear evidence of error on the part of the Office in its June 9, 1997 decision.

The June 26, 1998 judgment tends to support that a factual basis exists for appellant's claim that she sustained an emotional condition while in the performance of her duties. The issue of hostile work environment was tried in civil court and a jury rendered its verdict in appellant's favor and against the employing establishment. This evidence, however, is vague. It does not establish with specificity what incidents or circumstances the jury found to be established by the evidence as creating a hostile work environment. Appellant has submitted no jury instructions or other evidence that would permit the Office to find that any particular incident or series of incidents created a hostile work environment. As submitted, the judgment alone does nothing to substantiate any of appellant's allegations. A certain amount of specificity is necessary to establish the factual basis of appellant's claim.

Moreover, the judgment alone, lacking details, provides an inadequate history as to the basis for the conclusion expressed by the court order. It is insufficient as submitted to substantiate any of the allegations made by appellant in her claim. The judgment fails to address with specificity the parties or actions taken against appellant or the time, place and manner of circumstances leading to the determination of a hostile work environment by the jury.⁶

The evidence submitted in support of appellant's untimely request for reconsideration is vague, incomplete and fails to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary result or conclusion. To establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.⁷ The evidence submitted on reconsideration fails to meet this standard.

Appellant has not discharged her burden of proof to establish clear evidence of error in the Office's June 9, 1997 decision denying her claim.

⁶ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁷ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

The October 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 7, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member