United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 08-453**
	)	**Issued: June 2, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Denver, CO, Employer	)	

Appearances:
Bernard Humbler, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal of the December 5, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied her September 11, 2006 request for reconsideration. Because appellant filed the current appeal more than a year after the Office's June 29, 2005 merit decision, the Board does not have jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether the Office properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

[1] 20 C.F.R. §§ 501.2(c), 501.3(d) (2007). The record on appeal includes additional medical evidence received after the Office issued its December 5, 2006 decision. The Board cannot consider evidence for the first time on appeal. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c).

FACTUAL HISTORY

On October 27, 2004 appellant, then a 52-year-old ophthalmology health technician, filed a claim for work-related stress. She first became aware of her condition on January 1, 2004, but it was not until September 1, 2004 that she first realized her condition was caused or aggravated by her employment. Appellant stopped work on October 27, 2004.

Dr. Robert M. Gray, a clinical psychologist, examined appellant on October 26, 2004 and diagnosed major depression. He noted that appellant had a good deal of stress in her life and work-related issues were the primary cause of her stress. Dr. Gray found appellant disabled from all work effective October 27, 2004. He subsequently advised that the basic problem was that appellant had to work at a rapid pace for extended periods without sufficient assistance from technicians or front desk support. Appellant also had to deal with many disgruntled patients. Dr. Gray released appellant to return to work in December 2004. Appellant worked part time for several weeks and then resumed her regular, full-time duties.

In a December 10, 2004 statement, appellant described the eye clinic where she worked as "dysfunctional." The clinic was reportedly understaffed and she was overworked and underpaid. Appellant indicated that patient appointments were backlogged and overbooked, resulting in long delays and frequent cancellations and rescheduling. Her time was divided between scheduling duties and conducting various eye examinations. Appellant alleged that her work was often interrupted by telephone calls from irate patients and walk-in patients who demanded immediate medical attention. She also claimed she was subjected to verbal abuse from disgruntled patients. The clinic's director, Dr. May, reportedly had anger-management issues and he offered little support to his subordinates. Appellant described an October 15, 2001 incident when Dr. May allegedly slammed a door in her face. Dr. May was rude, unreliable and difficult to locate at times. Appellant explained that the problems in the clinic escalated over time to the point that she suffered a breakdown in October 2004.

In a January 12, 2005 response, the employing establishment acknowledged the scheduling difficulties appellant described. The problem was attributed to budgetary constraints. The employing establishment noted that the scheduling crisis at the eye clinic was beyond the scope of appellant's particular job duties. As to her interaction with irate patients, the employing establishment stated it was not uncommon to encounter an upset patient while working in a clinical environment. However, appellant was not expected to deal with complaints regarding scheduling or clinic operations. These complaints should have been referred up the chain of command for resolution. According to the employing establishment, appellant assumed responsibility for a number of issues that were not within the scope of her assigned duties. As to the allegations regarding Dr. May, the employing establishment noted that he resigned effective November 15, 2004, and was unavailable for comment.

In a decision dated June 29, 2005, the Office denied appellant's emotional condition claim. It found appellant's allegations either unsubstantiated or insufficiently documented. Therefore, she did not establish a compensable factor of employment.

On June 16, 2006 appellant requested reconsideration. She submitted an annotated copy of the June 29, 2005 decision, which identified specific findings she disagreed with. The Office denied appellant's request in a nonmerit decision dated July 26, 2006.

On September 11, 2006 appellant filed a request for reconsideration. She explained that chronic pain associated with a prior back injury (12-2006697) affected her ability to cope with the enormous stress at work. The combination of back pain and work factors caused her disability beginning October 27, 2004. Since December 2004, she continued to work under stressful conditions, feeling isolated, overworked, unappreciated, underpaid and depressed. In a July 11, 2006 report, Dr. Barbara N. Briggs, a clinical psychologist, diagnosed chronic pain syndrome, post-trauma stress and major depression.

The Office issued a December 5, 2006 decision denying reconsideration, finding appellant's September 11, 2006 request was untimely and she failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[2] The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.[3] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[4] When a request for reconsideration is untimely, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."[5]

ANALYSIS

Appellant's request for reconsideration was dated September 11, 2006, which is more than a year after the Office's June 29, 2005 merit decision.[6] Because appellant's request was

[2] This section provides in pertinent part: "[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 U.S.C. § 8128(a) (2000).

[3] 20 C.F.R. § 10.607.

[4] 20 C.F.R. § 10.607(a).

[5] 20 C.F.R. § 10.607(b).

[6] If a request is submitted by mail, timeliness will be determined by the postmark if legible. 20 C.F.R. § 10.607(a).

untimely she must demonstrate "clear evidence of error" on the part of the Office in denying her claim for work-related stress and depression.[7]

Appellant's claim was denied because she did not establish a compensable employment factor arising in the performance of duty. The denial was not premised on the lack of medical evidence to support appellant's claim. Therefore, the submission of additional medical evidence from Dr. Briggs does not establish clear evidence of error with respect to the issue of whether appellant established a compensable employment factor. In her September 11, 2006 request for reconsideration, appellant essentially reiterated prior allegations that her condition was due to work-related stressors. However, she did not submit any additional evidence to substantiate any of the previously alleged employment incidents. Merely reiterating one's prior contentions does not constitute clear evidence of error. As such, there is no basis for further merit review. Accordingly, the Office properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's September 11, 2006 request was untimely and she failed to demonstrate clear evidence of error and, therefore, she is not entitled to further merit review.

[7] 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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