United States Department of Labor
Employees' Compensation Appeals Board

F.B., Appellant	)	
and	)	**Docket No. 08-2489**
	)	**Issued: June 22, 2009**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, DEPARTMENTAL ENFORCEMENT CENTER, Chicago, IL, Employer	)	

Appearances:
Craig D. Leavell, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 17, 2008 appellant filed a timely appeal of a September 3, 2008 decision of the Office of Workers' Compensation Programs, finding that her 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 July 7, 2004, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for reconsideration was untimely and failed to show clear evidence of error by the Office.

FACTUAL HISTORY

On March 18, 2004 appellant, then a 44-year-old enforcement analyst, filed a traumatic injury claim (Form CA-1) alleging that she sustained an asthma attack on March 16, 2004 as a result of stress from a meeting with her supervisors. She also alleged harassment and retaliation by her supervisors.

By decision dated July 7, 2004, the Office denied the claim for compensation. It found appellant had not established any compensable work factors. On August 26, 2004 appellant requested a hearing before an Office hearing representative. In a decision dated October 28, 2004, the Office denied the hearing request as untimely and advised her that the issue could equally well be addressed through the reconsideration process.

On March 19, 2008 appellant requested reconsideration of her claim. She argued that she had established her claim for compensation. Appellant contended that the Office's finding that the medical evidence did not need to be evaluated was illogical and a circular proposition. She also alleged that she did not receive a copy of the July 7, 2004 decision. With respect to additional evidence, appellant submitted unsigned and undated affidavits from a Dr. Joyce Miller, Dr. Daniel Senseng and Yvonne Hannah, a union representative.

By decision dated September 3, 2008, the Office found appellant's application for review untimely. It denied the application for review on the grounds that it did not demonstrate clear evidence of error by the Office.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[1] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[2]

Section 8128(a) of the Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations,

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.605 (1999).

[3] 5 U.S.C. § 8128(a).

[4] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 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."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[7] The Board has found that the 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).[8]

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.[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] The Board makes an

[6] 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, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[7] 20 C.F.R. § 10.607(a).

[8] *See Leon D. Faidley, Jr.*, *supra* note 4.

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

[13] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

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.[17]

ANALYSIS

Appellant's application for reconsideration was dated March 19, 2008. The merit decision in the case was dated July 7, 2004. Since the application for reconsideration was filed more than one year after the merit decision, it is considered untimely. As an untimely application for reconsideration, appellant must show "clear evidence of error" by the Office.

The claim was denied on the grounds that appellant had not alleged and substantiated a compensable work factor. The application for reconsideration does not provide any relevant evidence on the issue. The affidavits submitted are not signed and therefore are of no probative value.[18] With respect to medical evidence, the Board notes that the Office properly found that there is no medical issue on causal relationship until a compensable work factor is established.[19] In her application for reconsideration, appellant argues that she did establish her claim, but she does not identify any evidence of record that is sufficient to establish a compensable work factor. She noted, for example, two e-mails from Ms. Hannah dated March 8 and 10, 2004. These communications generally refer to allegations of harassment without providing any probative evidence of harassment.

As noted, the evidence must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim and raise a substantial question as to the correctness of the Office decision. Appellant did not present clear evidence of error by the Office, and her application for reconsideration was properly denied without merit review of the claim.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review on the grounds that the application for reconsideration was untimely and failed to show clear evidence of error.

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

[18] Documents lacking proper identification are of no probative value. *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572 (1988). Without a signature or other evidence, there is no indication that the affidavits submitted were authorized by the named individuals.

[19] *See Lori A. Facey*, 55 ECAB 217 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 3, 2008 is affirmed.

Issued: June 22, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board