

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA M. NAKAMURA and DEPARTMENT OF THE AIR FORCE,
McALLEN AIR FORCE BASE, Sacramento, Calif.

*Docket No. 96-2389; Submitted on the Record;
Issued August 11, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 53-year-old quality control specialist, filed a Form CA-2 claim for occupational disease on April 4, 1993, alleging that she suffered an anxiety reaction due to employment-related stress, and that she first became aware of this condition on March 15, 1993. Appellant indicated on the form that her condition resulted from the "attitude and methods" of her supervisor, and in an April 20, 1993 handwritten statement she submitted to the Office appellant alleged that her supervisor had verbally abused and humiliated her during a March 15, 1993 staff meeting.

By decision dated February 2, 1994, the Office denied appellant's claim, finding that she failed to establish that she had suffered an emotional condition in the performance of duty. In a memorandum incorporated into the decision, the claims examiner found that the specific incidents appellant cited did not constitute factors of employment sufficient to establish that she had an emotional condition arising from her employment.

By letter to the Office postmarked March 24, 1994, appellant requested reconsideration.

In a decision dated April 20, 1994, the Office denied appellant's request for reconsideration. The Office found that her application was *prima facie* insufficient to warrant review of its February 2, 1994 decision because she had failed to submit any new, additional evidence in support of her request.

By letter to the Office dated December 28, 1994, appellant, through her attorney, requested reconsideration. Accompanying the letter was an April 27, 1994 report from

Dr. Robert L. Saunders, Board-certified in internal medicine, a May 6, 1994 report from Ms. Barbara Goldberg, a psychologist, and an October 21, 1994 report from Dr. A. Clifton Lamb, Jr., a Board-certified orthopedic surgeon.

By decision dated January 13, 1995, the Office denied reconsideration of appellant's claim. In a memorandum incorporated into the decision, the claims examiner found that the specific incidents appellant cited did not constitute factors of employment sufficient to establish that she had an emotional condition arising from her employment. The claims examiner stated that appellant failed to submit any additional factual statements or advance any legal argument to warrant review of its previous determination that there was no showing that the alleged emotional condition resulted from appellant's regular or specifically assigned job duties or a special requirement of the employment.

In a letter to the Office dated January 9, 1996, received by the Office January 18, 1996, appellant, through her attorney, requested reconsideration. Appellant submitted three statements from two coworkers who alleged that they witnessed appellant's supervisor verbally abusing her, which she had not previously submitted to the Office,¹ in addition to Dr. Lamb's October 21, 1994 report, which she had previously submitted.

By decision dated April 9, 1996, the Office again denied appellant's claim on reconsideration, finding 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, on its face, showed that the Office made an error, and that the medical evidence in the instant case did not meet this standard. The Office noted that appellant had submitted new witness statements, which, with further development, may have clarified the issue of whether appellant sustained an emotional condition in the performance of duty. The Office found, however, that this new factual evidence fell short of appellant's burden to establish clear evidence of error with respect to the Office's February 2, 1994 merit decision. 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. § 10.138(b)(2).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on July 29, 1996, the only decision properly before the Board is the April 8, 1996 Office decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

¹ These statements were dated February 21, February 24 and December 15, 1995.

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2)

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ 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 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).⁵ 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.⁶ 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 under 5 U.S.C. § 8128(a).⁷

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 February 2, 1994. Appellant requested reconsideration on January 18, 1996. 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.⁸ 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. § 10.138(b)(2), if the appellant's application for review shows “clear evidence of error” on the part of the Office.⁹

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *See* cases cited *supra* note 3.

⁸ *Rex L. Weaver*, 44 ECAB (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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 as substantial question as to the correctness of the Office decision.¹⁵ 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 fact of such evidence.¹⁶

In the instant case, appellant's January 9, 1996 request for reconsideration fails to show clear evidence of error with regard to the Office's finding in its February 2, 1994 decision that appellant failed to cite specific incidents of employment constituting factors of employment sufficient to establish that she had an emotional condition arising from her employment. Appellant submitted new statements from two coworkers who indicated generally that they witnessed disagreements between appellant's supervisor and appellant in the course of her employment. These statements, while relevant to the issue of whether appellant cited specific factors of employment which could have resulted in an emotional condition arising in the performance of duty, fail to establish clear evidence of error with respect to the Office's February 2, 1994 decision. The witness statements do not establish error or abuse on the part of appellant's supervisor in her dealings with appellant.

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.

Lastly, appellant concedes in her July 8, 1996 letter accompanying her appeal to the Board that her request for reconsideration to the Office was untimely filed, but contends that this was the fault of her former attorney. These allegations made by appellant in support of her

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.* *supra* note 4.

¹⁶ *Gregory Griffin*, 41 ECAB 458 (1990).

request for reconsideration do not excuse her untimely filing, however, and do not constitute the necessary clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated April 9, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member