

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHERINE M. WHEATFALL and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

*Docket No. 01-632; Submitted on the Record;
Issued November 2, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office properly determined that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

On June 9, 1998 appellant, then a 55-year-old manual clerk, filed a claim for an emotional stress condition, which she attributed to a certain supervisor.¹ By decision dated December 10, 1998, the Office denied appellant's claim on the grounds that she failed to establish that the claimed condition occurred within the performance of duty. The Office found that many of appellant's allegations concerning harassment, discrimination or the punishment by her supervisor were unsubstantiated and, therefore, the events did not occur as appellant claimed. The Office further found that appellant's condition was due to self-generated frustration over not holding the position she desired and that there was no evidence that the employing establishment either erred or acted abusively in the administrative actions such as the assignment of specific duties, the denial of leave, requiring medical or factual documentation, the denial of visits to the in-house nurse, placing appellant in an absent without leave (AWOL) status and the issuance of disciplinary letters.

Appellant disagreed with the decision and requested reconsideration on October 19, 2000. By decision dated November 13, 2000, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

¹ Appellant stopped work April 29, 1998 and has not returned.

The only decision before the Board on this appeal is the Office's November 13, 2000, decision denying appellant's reconsideration request of her claim for a disabling emotional condition. Because more than one year has elapsed between the issuance of the Office's December 10, 1998 merit decision and December 20, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the merits of appellant's claim.²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office 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.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was in error.⁴ Since more than one year elapsed from the December 10, 1998 merit decision of the Office to appellant's October 19, 2000 reconsideration request, the request for reconsideration is untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Federal Employees' Compensation Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰

² See 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.607(a) (1999).

⁴ 20 C.F.R. § 10.607(b) (1999).

⁵ *Id.*

⁶ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *Leona N. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹¹ The Board makes an 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.¹²

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In support of her October 19, 2000 reconsideration request, appellant presented arguments concerning the various factors of employment, which the Office had previously found to have occurred but were considered to be outside the performance of duty and, therefore, not compensable. Appellant argued that her supervisor either erred or acted abusively in the administration of such personnel actions.

Appellant alleged that her supervisor had directed appellant to stand and had removed her stool from the work floor. She argued that her supervisor abused her by removing the rest bar/stool from the work floor and provided excerpts from various sources, which related that the stool is an anti-fatigue device, the Supervisor's Safety Handbook provided for use of rest bars and storage for the rest bar/stool should be near the working case. Appellant also asserted that as she was the only employee to stand, it was humiliating to her and added to her fatigue.

Appellant noted that her supervisor had rotated appellant's work duties and argued that rotation was not part of her duty assignment. Documentation submitted stated that "Normally, the successful bidder shall work the duty assignment as posted and shall not be displaced by a junior employee. This does not prohibit the employer from assigning other employees to work the assignment for training purposes."

Appellant stated that her supervisor was obligated to administer the leave program and to consider the welfare of the individual employee. She asserted that her supervisor had refused to consider her welfare and, thus, abused her authority. Excerpts from the ELM 12, May 1989 and

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *Gregory Griffin*, 41 ECAB 458, 466 (1990).

the employing establishment's official leave policy were submitted along with previously submitted absence analysis for the leave year 1997. A copy of a March 18, 1997 settled grievance stated that "The parties mutually agree that the AWOLs will be deleted and the approved fifty-six (56) hours of sick leave inserted." Appellant argued that her supervisor's mistreatment of her and her abusive application of the leave program was documented and found to be a violation.

Appellant further alleged that a supervisor is obligated to record leave, maintain and review PS 3972 forms and is mandated to approve leave when an employee shows regular attendance. Appellant asserted that her supervisor continued to abuse her supervisory discretion. Documentation to support her contention that she did not have an irregular attendance and had limited instances of sick leave usage in a nine-month period was provided.

Appellant further alleged that supervisors do not have the right to deny medical attention to an employee and submitted documentation to support her assertion.

Appellant additionally submitted an April 29, 2000 medical report from Dr. Roland S. Jefferson.

The additional evidence submitted with appellant's request for reconsideration does not establish clear evidence of error in the Office's December 10, 1998 decision. It is well established that matters involving leave or disciplinary actions are administrative functions of the employer rather than duties of the employee.¹³ Similarly, actions taken by the employing establishment regarding the assignment of duties and the approval/disapproval of leave usage are administrative matters and not duties of the employee. Where the evidence demonstrates that the employing establishment has neither erred or acted abusively in administration of personnel matters, coverage will not be afforded.¹⁴ The March 18, 1997 settlement of appellant's grievance failed to address any error or abuse on the employing establishment's part in the administration of its personnel functions. Dr. Jefferson's medical report is irrelevant to the issue of whether appellant established compensable work factors as defined by the Act. The documentation appellant submitted, although informative, does not establish that appellant's supervisor abused her supervisory duties or acted abusively in the administration of administrative or personnel matters. Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence, which on its face shows that the Office made an error, appellant has failed to establish clear evidence of error with respect to its December 10, 1998 decision.

The November 13, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 2, 2001

¹³ *Barbara J. Nicholson*, 43 ECAB 803 (1994); *Diane C. Bernard*, 45 ECAB 223 (1993).

¹⁴ *See Sharon R. Bowman*, 45 ECAB 187, 194 (1993).

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member