

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE A. CLARK and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 02-1091; Submitted on the Record;
Issued June 5, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On March 16, 2000 appellant, then a 38-year-old distribution clerk, filed an occupational disease claim stating that she sustained increased stress at work which "led to joint pain and depression." She alleged that "these physical symptoms made it impossible to work at [the] job effectively." On her Form CA-2 appellant stated that she first became aware of her emotional condition and that it was caused or related to her employment on June 28, 1999. On the reverse of the Form CA-2, she indicated that she notified her supervisor of her condition on February 1, 2000. Appellant's supervisor indicated that appellant's work assignment had not changed. She left blank the date appellant first received medical care.

In support of her claim, appellant stated:

"I first experienced neck, shoulder, upper and lower back, chest, knee and leg pains. Thus resulting in my having to take off from work from June 29 through August 1999.

"I was wrongly blamed for mail left in the station on my day off.... I was chastised for being 15 minutes late in a blizzard, after that I was put up for removal, which caused me undo stress and suffering. As a result of this I started to experience neck, shoulder, leg and chest pains. I also suffered with right arm pain. Heart problems, migraine headaches and elevated cpk [creatine phosphokinase], all due to stress.

"Stress and improper seating ... 8 hours per day, 40 hours a week from January 1999 until present."

In further support of her claim, appellant submitted an undated report from Dr. Carol Krohm, a Board-certified family practitioner and her treating physician, addressed to appellant's supervisor. Dr. Krohm advised appellant's supervisor that she had been treating appellant for several months for significant physical pain and emotional stress. She stated that she supported appellant's request for medical leave due to her physical condition and work environment and anticipated that appellant would be on medical leave for two months.

In a report dated December 7, 1999, addressed to appellant's employer, Dr. Krohm reiterated that appellant had been under her care for several months while experiencing significant neck, chest, shoulder and back pain. She noted that appellant was seeing a rheumatologist with ongoing physical therapy. Dr. Krohm advised that appellant would require a chair with back support to "increase comfort and improve function."

In a final medical report from Dr. Krohm dated February 17, 2000, she noted findings of "depressed mood, muscle tenderness and spasms." She diagnosed:

"Osteoarthritis c-spine, knees. Sinusitis. Mild pericardial effusion. Nonspecific elevation muscle enzymes. Significant mood disorder. Persistent muscle spasms right chest, shoulder, upper back and right lower extremity. Stress and difficulty coping with job environment."

Dr. Krohm further stated:

"[Appellant] describes ongoing stress in her life (including work) which promotes muscle spasms, chronic pain and a depressed mood.... [S]he will benefit from emotional counseling and exploration of coping skills which might help her on the job."

By letter dated May 9, 2000, the Office requested further specific information in support of appellant's claim for an emotional injury. The Office provided specific questions to be followed in assisting appellant with listing factors she implicated in causing her condition.

By decision dated June 19, 2000, the Office found that fact of injury was not established, as the evidence of record failed to establish that an emotional condition was sustained in the performance of duty. The Office found that appellant's allegations regarding the factors of employment alleged to have caused the condition were too vague to evaluate.

On February 7, 2002 appellant filed a request for reconsideration and noted that she experienced shooting pain in her neck on the right side as she bent down to load a ledge at work. She further noted that x-rays revealed osteoarthritis or degenerative joint disease and straightening of the spine due to muscle spasms, fibromyalgia, chronic fatigue syndrome and cardiomyopathy.

By decision dated February 21, 2002, the Office denied appellant's request for reconsideration for a merit review finding that her request was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review.

The only decision before the Board on this appeal is the Office's February 21, 2002 decision denying appellant's request for a review on the merits of its June 19, 2000 decision. Because more than one year has elapsed between the issuance of the Office's June 19, 2000 decision and March 27, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 19, 2000 Office decision.¹

In its February 21, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 19, 2000 and appellant requested reconsideration by letter received February 7, 2002, which was more than one year after June 19, 2000.

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."² Office procedures provide that the Office 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.³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ 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

¹ See 20 C.F.R. § 501.3(d)(2).

² 20 C.F.R. § 10.607(b)(1999).

³ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ See *Leona N. Travis*, *supra* note 5.

⁸ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.⁹ The Board makes an independent determination as to 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.¹⁰

The Board notes that the Office denied appellant's claim on the grounds that she failed to establish that she sustained an emotional condition in the performance of duty, as her allegations of work-related factors were too vague to evaluate. On reconsideration appellant submitted a letter in which she stated that she experienced shooting pain in her neck while bending to load mail on a ledge and reiterated her diagnosis. Appellant did not submit the necessary factual and medical evidence explaining the alleged factors in detail and explaining how improper seating, being blamed for leaving mail in the station on her day off, being chastised for being 15 minutes late or being put up for removal caused her emotional condition. Appellant has not established clear evidence of error in this case.

The February 21, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *Thankamma Matthews*, 44 ECAB 765 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).