

The issues are: (1) whether the Office properly refused to reopen appellant's claim for a further review of the merits of her claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On November 10, 1998 appellant, then a 35-year-old accounting technician, filed an occupational disease claim alleging that on April 1, 1998 she first became aware of her depression. Appellant further alleged that on October 21, 1998 she first realized that her depression was caused or aggravated by her federal employment. Appellant stated that she had been exposed to issues, situations, false accusations and unfair treatment that contributed to a hostile work environment. She further stated that stressful conditions which included, false accusations, unfair treatment and nonselection for a position caused her emotional condition. Along with her claim, appellant submitted employment records and a medical report from Dr. Thomas E. McCloud, a clinical neuropsychologist, finding that she had an emotional condition caused by factors of her employment.

By letter dated December 1, 1998, the Office advised appellant that the evidence submitted was insufficient to establish her claim. The Office further advised about the type of factual and medical evidence she needed to submit to establish her claim. In response, appellant submitted additional factual information by letter dated January 6, 1999.

By decision dated February 4, 1999, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. The Office found that the alleged incidents were either vague and unsubstantiated or involved administrative matters and no error or abuse by the employing establishment had been established. In a February 4, 2000 letter, appellant requested reconsideration alleging that she was harassed and discriminated against by management. Appellant also alleged that her coworkers and management falsely accused her of not following standard operating procedures. Further, she alleged that Julie Martin, financial operations officer of the employing establishment, recorded false information on her occupational disease claim form. Appellant contended that she was overworked due to the absence of several coworkers. She submitted factual and medical evidence in support of her request.

In further development of appellant's claim, the Office, in a February 25, 2000 letter, requested that the employing establishment respond to appellant's allegations. In response, Ms. Martin submitted a March 17, 2000 letter explaining the existence of the employing establishment's standard operating procedures. She stated that she never informally or formally counseled or otherwise disciplined appellant for not following standard operating procedures. By letter dated March 21, 2000, the Office advised appellant about the employing establishment's response and advised her to submit comments or relevant documents within 20 days if she wished to do so.

In a March 23, 2000 decision, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. By letter dated March 23, 2001, appellant requested reconsideration asserting that the documents she submitted with her previous request for reconsideration had not been reviewed and they supported her allegations that her emotional condition was caused by being accused of failing to follow standard operating procedures and involved in workplace violence/threat, the assignment of additional work duties, and false information provided by the employing establishment on her occupational disease claim form.

Appellant submitted an October 24, 1996 letter from Dr. William Oliver Inman, Jr., a family practitioner and medical consultant, finding objective evidence of her physical disability.

By decision dated July 3, 2001, the Office denied appellant's request for a merit review of her claim on the grounds that the evidence and argument submitted were repetitious in nature. In a letter dated July 10, 2001, appellant requested reconsideration. She contended that her original occupational disease claim form was filed as a medical claim only for aggravation of her right wrist assigned claim number 06-0708102 and emotional stress. She also contended that the employing establishment did not provide her with an authorization for treatment (Form CA-16) and she was not notified about continuation of pay. Appellant noted the evidence she had previously submitted in support of her claim and argued that management provided false statements to the Office in connection with her right wrist claim.

By decision dated July 26, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.¹

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 1

In her March 23, 2001 request for reconsideration, appellant contended that the documents she submitted with her previous request for reconsideration had not been reviewed and they supported her allegations that her emotional condition was caused by being accused of failing to follow standard operating procedures and workplace violence/threat, the assignment of additional work duties and false information provided by the employing establishment on her occupational disease claim form. Appellant's arguments were previously considered by the

¹ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

Office in its March 23, 2000 decision. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵

With respect to Dr. Inman's October 24, 1996 letter revealing that there was objective evidence of appellant's physical disability which was submitted by appellant, the Board notes that the Office's March 23, 2000 decision found that appellant did not sustain an emotional condition in the performance of duty because she had not substantiated a compensable work factor. Only when a compensable work factor has been substantiated does the medical evidence become relevant as to whether appellant has established an employment-related emotional condition.⁶ Moreover, Dr. Inman's letter did not address whether appellant suffered from an emotional condition caused by compensable factors of her employment. Accordingly, Dr. Inman's report does not constitute relevant and pertinent new evidence with respect to the issue presented.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit any relevant and pertinent new evidence not previously considered by the Office, the Board finds that the Office properly refused to reopen appellant's claim for review of the merits in the July 3, 2001 decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁹

Section 10.607 of the Office's implementing regulations states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.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

⁵ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁶ See *Parley A. Clement*, 48 ECAB 302 (1997).

⁷ 5 U.S.C. § 8128(a).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

and must be manifest on its face that the Office committed an error.¹² Evidence that 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 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 -- ISSUE 2

In denying appellant's July 10, 2001 request for reconsideration, the Office properly determined that appellant failed to file a timely application for review in its July 26, 2001 decision. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁸ The last merit decision in this case was issued on March 23, 2000 wherein the Office denied modification of its February 4, 1999 decision finding that appellant failed to establish that she sustained an emotional condition in the performance of duty. Appellant's July 10, 2001 request for reconsideration was made more than one year later. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

Section 10.607(a) is unequivocal in setting forth the time limitation period and does not indicate that late filing may be excused by extenuating circumstances. The Office properly determined that appellant failed to file a timely application for review.

The issue for purposes of establishing clear evidence of error in this case is whether there was an error in the Office's determination that appellant failed to establish that she sustained an emotional condition in the performance of duty.

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

¹⁴ *Leona N. Travis*, *supra* note 12.

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

¹⁶ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁸ *Larry L. Litton*, 44 ECAB 243 (1992).

The Board finds that appellant's untimely letter requesting reconsideration fails to show clear evidence of error. Appellant asserted that her original occupational disease claim form was filed as a medical claim only for aggravation of her right wrist assigned claim number 06-0708102 and emotional stress. She also asserted that the employing establishment did not provide her with a Form CA-16 and notify her about continuation of pay. Appellant's reason for filing an occupational disease claim does not relate to the relevant issue in this case, whether she sustained an emotional condition in the performance of duty. Further, the employing establishment's failure to give her a Form CA-16 and information about continuation of pay does not address any error on the part of the Office.

Appellant's argument that she submitted a large quantity of documents in support of her claim for an emotional condition and that the employing establishment provided false statements to the Office in connection with her right wrist claim were previously considered by the Office in its March 23, 2000 decision. These arguments are repetitive and do not demonstrate clear evidence of error.

As appellant has not submitted any evidence raising a substantial question as to the correctness of the Office's March 23, 2000 decision, she has failed to establish clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for a further review of the merits of her claim under 5 U.S.C. § 8128(a). The Board further finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 26 and 3, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 5, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member