

**United States Department of Labor
Employees' Compensation Appeals Board**

ANNA MARIA FEELEY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Belmont, MA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1643
Issued: October 17, 2005**

Appearances:
Anna Maria Feeley, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 29, 2005 appellant filed a timely appeal of the April 28, 2005 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration as untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 4, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 15, 2002 appellant, then a 52-year-old window distribution clerk, filed an occupational disease claim for major depressive disorder. She alleged a vicious, vindictive, loud

and mendacious work environment. Appellant stated that she had to leave before she killed herself or others. She identified November 25, 2000 as the date she first became aware of her employment-related condition. This was also the date appellant last worked.

Appellant stated that she had difficulties with depression intermittently throughout her life and prior attempts to treat her with anti-depressant medications proved unsuccessful. Despite her condition she had always been able to function in a productive manner with very little outward signs of her depressive mood. She indicated that for the past six years she endured a hostile, disruptive and abusive work environment that not only interfered with her job performance, but also affected her thought process. Appellant was regularly bombarded with deliberate, unsolicited vulgar remarks, indecent gestures, crude and offensive language and yelling and shouting. Her lack of control over the situation and her inability to escape the noise finally took its toll. Appellant stated that she became increasingly frustrated and thoughts of suicide and murder became a daily routine. She indicated that on November 25, 2000 she conceived a plan that would result in the death of her coworkers. When she arrived home later that day she came to her senses and decided to seek medical help. On the advice of her physician she did not return to work.

The employing establishment controverted appellant's claim. In a July 22, 2002 letter, Henry P. Carfanga, the Belmont facility manager, indicated that he initiated disciplinary action against appellant in January 2002, because of her unauthorized absence since November 2000. Appellant reportedly did not respond to his recent correspondence regarding her absence and on June 17, 2002 the employing establishment issued a notice of removal. Mr. Carfanga further stated that appellant did not indicate to him at any time over the past two years that she was going to be out of work due to stress.¹

On July 30, 2002 the Office requested that appellant submit additional evidence, including a detailed description of the employment activities she believed contributed to her condition. The Office also instructed appellant to submit a comprehensive medical report addressing the cause and extent of her claimed emotional condition.

On August 22, 2002 the Office received an undated statement from appellant. She explained that in 1996 there was a lot of loud talking, yelling and shouting going on at work. Coworkers blurted obscenities, used profanity and told stories and jokes of a sexual nature. Although none of this was directed at appellant, she was nonetheless shocked. The noise interfered with normal levels of speech and communication was difficult and sometimes impossible. Appellant stated that she felt isolated and alone and she became tense, irritable and heavily fatigued. By 1998 she sunk deeper into her depression. Appellant advised the Office that there were far too many incidents to put them all on paper in such a short time and some were too painful for her to report. She did, however, describe two specific incidents involving coworkers Sharon Sharappa and Joe Tighe.

Appellant stated that she had problems with Ms. Sharappa dating back to 1997. She believed Ms. Sharappa had a crush on her and for years she had been colliding, bumping,

¹ This latter statement tends to contradict Mr. Carfanga's acknowledgement on the claim form that appellant first informed her supervisor of her medical condition on November 29, 2000.

nudging and persistently pushing appellant. However, appellant was unsure whether Ms. Sharappa was being flirtatious or just trying to aggravate her and she did her best to stay out of Ms. Sharappa's way. In October 2002, appellant was at her case distributing the mail. She characterized her disposition at the time as "an ugly state of anguish -- having fantasies of decapitations via machete." Appellant stated that she lost control of herself and came dangerously close to committing bodily harm when Ms. Sharappa "suddenly startled [her] and proceeded to knock [her] off [her] seat by leaning the weight of her body against me." She told her to "Get away" and then walked into the supervisor's office and told him that she had "had it" and if Ms. Sharappa touched her again she would charge her with sexual harassment. Appellant told her supervisor that Ms. Sharappa "[had] to keep her tits to herself."

The second reported incident involved Mr. Tighe, a letter carrier and occurred in either October or November 2000. He reportedly bellowed "Blah, blah, blah!" for a good portion of the morning and other coworkers screamed obscenities in response. Appellant stated that she put in her earplugs but they did not help. The shouting continued and after about two hours appellant was mentally exhausted and could not focus on anything but "slicing [Mr. Tighe's] throat." She went for a walk and when she returned an hour later the bellowing and screaming continued. Mr. Tighe eventually stopped when all the mail was ready for delivery. When he later came to appellant's desk and asked her for something in a normal tone of voice, she responded "Blah, blah, blah!" She continued this for a while and Mr. Tighe told appellant she was nuts.

Coworkers John Cahill, Christopher Thompson and Victor B. provided statements attesting to the noisy work environment, the use of profanity and the prevalence of sexual remarks. Appellant was seen walking out of the employing establishment crying and shaking some days. Appellant's husband, Richard W. Feeley provided an August 18, 2002 statement, addressing a profound change in her demeanor in 1998.

Appellant submitted medical evidence from four physicians who diagnosed recurrent major depressive disorder.

In a decision dated April 24, 2003, the Office found that appellant failed to establish that she sustained an emotional condition in the performance of duty. The Office explained that the record did not support the alleged incidents with Ms. Sharappa and Mr. Tighe were not compensable factors. While the swearing and yelling that occurred on the workroom floor upset appellant, this was not a compensable employment factor of employment. The Office further found that, while the medical evidence mentioned appellant's job, it did not establish that her work environment was a factor in her mental illness.

Appellant requested an oral hearing, which was held on October 21, 2003. The Office received a May 1, 2003 report from Dr. Beth Murphy, who diagnosed severe recurrent major depressive disorder and post-traumatic stress disorder. In a report dated November 14, 2003, Dr. Brian Gondos similarly diagnosed major depressive disorder. He stated that appellant's most recent episode of severe unremitting depression began over three years ago, which was generally coincident with increasing stress at work because of persistent harassment by fellow postal employees. Dr. Gondos explained that the events appellant described as taking place at work "could have caused sufficient stress to likely help trigger [her] most recent depression."

By decision dated February 4, 2004, the Office hearing representative affirmed the April 24, 2003 decision. He found that appellant had not established any compensable employment factors. The hearing representative explained that she did not substantiate any incident of harassment and there was no evidence of verbal abuse directed at her.

On February 8, 2005 the Office received an undated request for reconsideration. Appellant indicated that she was submitting new evidence to substantiate her allegation that she was harassed. She submitted statements from Christopher S. Varner and Mr. Thompson. Mr. Varner, a letter carrier at the Belmont facility from 1990 to 2000, stated that he witnessed appellant leave her station because of verbal abuse from managers, supervisors and employees. He characterized the work environment as loud and riddled with obscenities and arguments. Both managers and letter carriers would yell at clerks, including appellant, to hurry up with the mail. Appellant reportedly wore headphones to block out the noise and obscenities. Mr. Thompson indicated that he witnessed two letter carriers, Ms. Sharappa and Frank Mersicano, harass appellant on a regular basis. The two reportedly bullied appellant until she either cried or left the workroom floor. Mr. Thompson also indicated that he witnessed them screaming in appellant's ear to startle her out of her seat. He noted that, when this did not work, Ms. Sharappa would "physically push [appellant] off her seat."

In a decision dated April 28, 2005, the Office found that appellant's request was untimely and failed to demonstrate clear evidence of error on the part of the Office in denying her emotional condition claim. Accordingly, the Office declined to review the merits of appellant's claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁵ In those instances when a request for reconsideration is not timely filed, the Office

² 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 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." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁶

ANALYSIS

Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷ The one-year time limitation begins to run the day following the Office’s issue of the February 4, 2004 decision, as this was the last merit decision in the case.⁸ The regulations further provide that, if the request is “submitted by mail, the application will be deemed timely if postmarked ... within the time period allowed.”⁹ The Office received appellant’s undated request for reconsideration on February 8, 2005. The record does not include a copy of the envelope in which appellant submitted her request for reconsideration or any other evidence of mailing or receipt that would otherwise establish a timely filing.¹⁰ As the request was undated and the record is devoid of any additional information that would render appellant’s request timely, the Office properly relied on the February 8, 2005 date of receipt, rendering the request untimely. Because the Office received appellant’s request more than one year after its February 4, 2004 merit decision, she must demonstrate “clear evidence of error” on the part of the Office in denying her claim for an emotional condition.¹¹

The Office hearing representative denied the claim because appellant failed to establish a compensable employment factor as the cause of her major depressive disorder. To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.¹² The two statements from Mr. Varner and Mr. Thompson do not establish clear

⁶ 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁷ 20 C.F.R. § 10.607(a) (1999).

⁸ *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000).

⁹ 20 C.F.R. § 10.607(a) (1999).

¹⁰ The Office’s procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹¹ 20 C.F.R. § 10.607(b) (1999).

¹² *See Dean D. Beets*, *supra* note 6.

evidence of error on the part of the Office hearing representative. Mr. Varner claimed to have witnessed appellant leave her station because of verbal abuse from managers, supervisors and employees. Appellant noted that she was disturbed by the loud noise, obscenities, lewd stories and profanity in the workplace but indicated that none of it was directed at her. The statement of Mr. Varner is unclear of what instances of alleged verbal abuse he witnessed. His undated statement does not establish clear evidence of error and it is in conflict with appellant's own statements.

Mr. Thompson, who provided an earlier statement dated August 20, 2002, indicated generally that Ms. Sharappa had been colliding, bumping, nudging and persistently pushing appellant. However, the only incident appellant specified identified as contributing to her emotional condition was the October 2002 incident where Ms. Sharappa allegedly knocked her "off [her] seat by leaning the weight of her body against [her]." Mr. Thompson's statement on reconsideration does not address this specific allegation. Mr. Thompson's statement is insufficient to establish clear evidence of error. Accordingly, appellant failed to demonstrate clear evidence of error on the part of the Office in denying her claim for an employment-related emotional condition.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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