

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

---

**D.C., Appellant**

**and**

**U.S. POSTAL SERVICE, ATLANTA AIRPORT,  
Atlanta, GA, Employer**

---

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

**Docket No. 08-2463  
Issued: June 22, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 15, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 2, 2008 denying her untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated March 2, 2006 and the filing of this appeal on September 15, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

**FACTUAL HISTORY**

This case has been before the Board on prior appeal. By decision dated March 2, 2006, the Board affirmed the Office's July 7, 2005 denial of appellant's claim that she sustained an

emotional condition in the performance of duty.<sup>1</sup> The Board found that the evidence of record was insufficient to support appellant's allegations of harassment and discrimination by coworkers and her supervisor. The Board also found that the employing establishment did not err or act abusively when it scheduled an April 28, 2005 meeting with appellant to discuss her return to work. As appellant had not established a compensable factor of employment, the Board affirmed the Office's determination that she failed to meet her burden of proof in establishing that she sustained an emotional condition in the performance of duty. The facts and the law contained in that decision are incorporated herein by reference.<sup>2</sup>

On May 13, 2008 appellant requested reconsideration before the Office. In support of her request, she submitted copies of documents from 2005 which were received and reviewed by the Office. Appellant also submitted new factual and medical evidence including an April 10, 2008 disability note by Dr. Andrei I.F. Serbanescu, a treating Board-certified neurologist, copies of pages from the drug encyclopedia, and an award notice for a clerk position. Dr. Serbanescu noted he was treating appellant for her headaches which he stated would be managed better if she did work the night shift. In her request for reconsideration, appellant detailed a list of factors and allegations regarding harassment and retaliation by the employment establishment occurring in 2005 that were not mentioned in her original claim.

In a May 20, 2008 statement, appellant provided details of a meeting held on May 20, 2008 with management regarding a disciplinary action. She stated that she requested a Family and Medical Leave Act form, which was not provided. Appellant alleged that the employing establishment was harassing and retaliating against her for filing an Equal Employment Opportunity claim.

In a decision dated July 15, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.<sup>3</sup>

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>4</sup> provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the

---

<sup>1</sup> Docket No. 05-1556 (issued March 2, 2006).

<sup>2</sup> On May 16, 2005 appellant, then a 35-year-old computerized mark-up clerk, filed a claim alleging that on April 28, 2005 she first realized that her stress and anxiety were due to harassment by the employing establishment. Specifically she attributed the condition to the employing establishment instructing her "to attend a meeting regarding 'transitioning back to work'" and that "[n]o one in the meeting was authorized to make a decision." Appellant also alleged that meeting was contrary to her physician's work restrictions and recommendations.

<sup>3</sup> The Board notes that, following the June 2, 2008 nonmerit decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB \_\_\_\_ (Docket No. 06-1564, issued February 27, 2007). *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>5</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>6</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>7</sup>

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit, and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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.<sup>9</sup>

### ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>10</sup> However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>11</sup>

The last merit decision in this case was the Board's March 2, 2006 decision. The Board found that the Office properly determined that appellant did not sustain an emotional condition in the performance of duty as she failed to establish any compensable employment factors. As appellant's May 13, 2008 letter requesting reconsideration was made more than one year after the Board's March 2, 2006 merit decision, the Board finds that it was not timely filed.

---

<sup>5</sup> 20 C.F.R. § 10.605.

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989)

<sup>8</sup> *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>9</sup> *See Alberta Dukes*, *supra* note 8; *see S.D.*, 58 ECAB \_\_\_\_ (Docket No. 07-1120, issued September 24, 2007).

<sup>10</sup> 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB \_\_\_\_ (Docket No. 08-977, issued September 12, 2008).

<sup>11</sup> *D.G.*, 59 ECAB \_\_\_\_ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, 57 ECAB 292 (2005).

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was clear evidence of error in the Office's finding that she did not establish a compensable factor of employment. The Board finds that appellant has not met her burden. Appellant did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

In support of her request for reconsideration, appellant resubmitted medical evidence from 2005, pages from a drug encyclopedia, an award notice of clerk position, an April 10, 2008 letter from Dr. Serbanescu regarding night-shift work and her statements dated May 13 and 20, 2008. None of this evidence addresses her original allegation regarding an event occurring on April 28, 2005. In her original claim, appellant attributed her emotional condition to being instructed to attend a meeting regarding her transitioning back to work, which she contended violated her physician's instructions. The factual evidence discusses events occurring prior to April 28, 2005 and an event occurring on May 20, 2008. Dr. Serbanescu's April 10, 2008 letter diagnoses headaches and recommended she not work nights, but did not identify any compensable factors of appellant's employment as the cause of her emotional conditions. The Office is not required to consider medical evidence in an emotional condition case where no work factors have been established.<sup>12</sup> For these reasons, the Board finds that Dr. Serbanescu's April 10, 2008 report and the factual evidence submitted by appellant do not raise a substantial question concerning the correctness of the Office's decision and therefore do not establish clear evidence of error.

The evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office.

### **CONCLUSION**

The Board finds that appellant's May 13, 2008 request for reconsideration was untimely filed and appellant has failed to submit evidence establishing clear error on the part of the Office. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Board finds that the Office properly denied further review on June 2, 2008.

---

<sup>12</sup> See *Richard Yadron*, 57 ECAB 207 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 2, 2008 is affirmed.

Issued: June 22, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board