

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, WILLIAM PENN
ANNEX, Philadelphia, PA, Employer**

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**Docket No. 10-518
Issued: May 6, 2010**

Appearances:
Appellant, 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 December 14, 2009 appellant filed a timely appeal from the November 25, 2009 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration as untimely filed and failing to present clear evidence of error. As the most recent merit decision is dated April 29, 2003, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board does not have jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

On appeal, appellant contends that her mental health was compromised by the actions of her supervisor.¹

¹ By order dated March 22, 2010, the Board denied appellant's request for oral argument.

FACTUAL HISTORY

On August 17, 2001 appellant, then a 35-year-old distribution/window clerk, filed a claim for an emotional condition. She alleged stress, an inability to sleep, panic attacks and depression due to harassment by a manager and supervisor and a false accusation that she assaulted her supervisor. Appellant stated, "I was put off the clock and not allowed to enter the building." By letter dated August 23, 2001, the employing establishment controverted the claim.

Appellant filed additional statements pertaining to her claim. On July 11, 2001 when she attempted to clock in Trudy Brockington, her supervisor, prevented her from doing so. Appellant alleged that Ms. Brockington accused her of striking her which resulted in a police investigation and appellant was escorted from the building. She was placed on an emergency placement during the investigation and was off the clock without pay for five weeks. After being cleared to return to work, she continued to be harassed by Ms. Brockington, who had filed harassment and assault charges against appellant. Appellant alleged that her supervisor used her personal information for personal use. Appellant listed numerous incidents of alleged harassment by Ms. Brockington.

In reports dated May 16, 2000 and February 7, 2002, Lisa Pollack a licensed social worker, noted that appellant was being treated for stress, anxiety and depression precipitated by increasing difficulties at work. Appellant also submitted reports dated May 3, 2000 through July 22, 2002 from Dr. Josette C. Palmer-Bradshaw, a Board-certified family practitioner, who noted that appellant was under treatment for depression and anxiety and opined that appellant's condition was caused by pressure in working at the employing establishment. Dr. Palmer-Bradshaw noted the July 11, 2001 incident when appellant was accused of assaulting her supervisor.

In a letter dated October 9, 2001, the employing establishment addressed incidents arising when appellant returned from vacation from July 6 through July 13, 2001. These were resolved through a grievance settlement agreement. Appellant's emergency placement was expunged from her record and she received back pay for lost wages.

In a decision dated January 24, 2002, the Office denied appellant's claim.

Appellant requested reconsideration.

In an April 29, 2003 decision, the Office denied modification. It accepted that the July 11, 2001 incident occurred; however, appellant's statements concerning feelings of harassment were vague and not supported by sufficient evidence. The Office denied the claim based on the insufficiency of the medical evidence of record.

By letter dated September 30, 2009, appellant requested reconsideration. Appellant contended that she told the truth to her physicians, that her pay was suspended for five weeks and was not reinstated until two years later and that she was under a psychiatrist's care. She reiterated her complaints concerning her supervisor. Appellant submitted a letter she wrote her union representative and resubmitted evidence previously in the record. Finally, she also submitted medical forms related to her emotional status in 2009.

In a decision dated November 25, 2009, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.² As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.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 manifested 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 must raise a substantial question as to the correctness of the Office's decision.⁹ The Board makes an independent determination of whether appellant 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

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The last merit decision was dated April 29, 2003. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since appellant did not file a request until September 30, 2009, it was filed well outside the one year time period.

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.607.

⁴ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

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).

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

¹⁰ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

As her request was untimely, she must submit evidence or argument that shows clear evidence of error in the Office's decision denying her claim. The term clear evidence of error is intended to represent a difficult standard.¹¹ Appellant's request would have to establish on its face that the Office's denial of her claim was erroneous. It cannot be a matter of opinion; it must be a matter of proof.

Appellant's request for reconsideration does not establish clear evidence of error. The Office found that the July 11, 2001 work incident occurred; however, compensation was denied because appellant failed to provide sufficient medical evidence to support an emotional condition as a result of the July 11, 2001 incident. Appellant did not submit any medical evidence with her request for reconsideration sufficient to establish clear evidence of error. She provided medical notes that do not pertain to her claimed condition in 2001. Records from her present treatment in 2009 do not pertain to the time period in 2001 when she filed her claim or address the accepted July 11, 2001 incident. The remaining arguments made by appellant were repetitive of her earlier arguments. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹² Appellant did not submit such evidence.

CONCLUSION

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

¹¹ *D.L.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 25, 2009 is affirmed.

Issued: May 6, 2010
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