

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREA P. MERSIOVSKY and DEPARTMENT OF VETERANS AFFAIRS,
OLIN E. TEAGUE VETERANS CENTER, Temple, Tex.

*Docket No. 96-1056; Submitted on the Record;
Issued April 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 6, 1995 request for reconsideration as untimely and failing to show clear evidence of error.

The Office last issued a decision on the merits of the claimant's case on September 17, 1993, when it denied her claim on the grounds that fact of injury was not established. Specifically, the Office found that appellant had failed to substantiate any of her allegations of sexual harassment and uneven distribution of work load. The Office also found that appellant failed to respond to a request for information regarding any prior history of emotional conditions and medical records for treatment of such conditions.

In an attached statement of review rights, the Office notified appellant that any request for reconsideration must be made within one year of the date of the decision, clearly state the grounds upon which reconsideration was being requested, and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made.

In a letter dated November 6, 1995, regarding reinstatement of her case, appellant asked the Office to look into several problems and alleged procedural violations that occurred during the processing of her claim. She asserted that she did not receive documentation from the Office on several dates in August 1993 and was therefore not aware that the Office had requested more information or that her claim had been denied. She argued that the employing establishment failed to make a viable job offer in her case and that the offer was mailed to the wrong address. She asserted a violation of 5 U.S.C. § 7701(c)(2)(B). She requested that her claim be reinstated for proper evaluation and that her resignation be overturned on grounds of extreme duress.

In a decision dated January 26, 1996, the Office denied reconsideration of the merits of appellant's claim on the grounds the request was untimely and failed to show clear evidence of error.¹

The Board finds that the Office properly denied appellant's November 6, 1993 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision. Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, 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 that was decided by the Office.⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁵ Evidence that 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

¹ On January 25, 1996 appellant sent a second letter to the Office asserting, among other things, that the Office erroneously found in its September 17, 1993 decision that the investigation of her sexual harassment charges showed no basis for the charges. The Office received this letter on February 5, 1996, which means that the letter was not before the Office at the time of its January 26, 1996 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 502.2(c). Therefore, the Board currently has no jurisdiction to review appellant's January 25, 1996 letter.

² 5 U.S.C. § 8128(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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).

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 and raise a substantial question as to the correctness of the Office decision.⁹ 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 a merit review in the face of such evidence.¹⁰

Appellant did not file her November 6, 1995 request for reconsideration within one year of the Office's September 17, 1993 decision denying her claim for an emotional condition. The request was therefore untimely. Further, her request does not show clear evidence of error in the Office's decision. The Office denied appellant's claim on the grounds that she failed to substantiate her allegations of sexual harassment and uneven distribution of work load. Appellant's arguments pertaining to the viability of the job offered by the employing establishment are irrelevant to the grounds upon which the Office denied her claim; the Office did not deny compensation on the grounds that she refused suitable work. Appellant's arguments pertaining to an asserted violation of another statute and pertaining to her resignation are also irrelevant.

Appellant asserts she did not receive Office correspondence on certain dates in August 1993 and did not receive the Office's September 17, 1993 decision. The record shows that the Office's request for additional information, mailed on August 2, 1993, was properly addressed to appellant, as was the Office's decision denying her claim. Appellant's November 6, 1995 letter fails to show clear evidence of error in this regard.

Because appellant's November 6, 1995 request for reconsideration was untimely and failed to show clear evidence of error in the Office's September 17, 1993 decision, the Board finds that the Office properly denied that request.

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

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

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

¹⁰ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The January 26, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
April 20, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member