

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THU M. MCGILL and OVERSEAS PRIVATE INVESTMENT
CORPORATION, Washington, DC

*Docket No. 98-1867; Submitted on the Record;
Issued July 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Office accepted appellant's claim for depressive reaction in 1989, No. 25-463786. In April 1994 she originally filed a claim for a recurrence of disability but was advised by the Office that it appeared that she should file a claim for a new injury. On March 1, 1995 appellant filed a claim for an occupational disease, Form CA-2, alleging that on April 30, 1994 she became aware that she was suffering from depression and subsequently realized it was work related. She alleged that she was "unfairly treated" and "humiliated" by her four supervisors. Appellant stated that from April 1994 and continuing, she was subject to "unlawful discrimination and severe harassment" by her supervisor and the Director of Personnel, Connie Downs. She stated that Ms. Downs and the personnel officer, Stephanie Mannion, "failed to make reasonable accommodations for her mental disability by requiring her to obtain a physician's certificate" whenever she used sick leave. She also stated that Ms. Downs and Ms. Mannion closely monitored her work assignments but "failed to provide her with proper training and workable resources to complete the assignments."

Specifically, appellant stated: (1) I was the only staff member charged annual leave instead of credit leave to attend the Secretary Day event and her supervisor, Ms. Downs, threatened to put her on absence without leave (AWOL) even though she had ample annual leave; (2) Ms. Downs denied her credit time for 40 to 45 hours of extra work in a 2-week pay period; (3) Ms. Downs collected funds for flowers for four other legal assistant's birthdays but not for hers; (4) Ms. Downs reprimanded her for matters beyond her control such as not showing up on time for a meeting when Ms. Downs sent the e-mail message informing her of the meeting three minutes before it started; and (5) she received an unsatisfactory performance appraisal in October 1994 after she filed an Equal Employment Opportunity (EEO) complaint alleging discrimination based on disability, race and national origin (*i.e.*, Vietnamese). In the complaint,

among other contentions, appellant stated that Ms. Downs singled her out from the other employees in requiring her to submit a progress report on her work production for attending an aerobic class during the lunch hour which the other employees taking the class were not required to do and which ultimately discourage appellant from taking the class.

By letter dated April 19, 1995, appellant emphasized that the basis of her claim was not the change in work load but the fact that she felt Ms. Downs was discriminating against her by: (1) allowing other employees to accrue credit time for extra work but not her; (2) initially denying appellant's request for training but granting it after appellant appealed to the Deputy General Counsel; (3) Management Services' ignoring her request for help on the computers in four instances in July and August 1984; (4) being cited for insubordination in May 1994 because she "questioned Ms. Downs' discrimination" regarding the employing establishment's leave policy; (5) Ms. Downs challenging her reasons for taking sick leave in September 19 and 20, 1994 when appellant's reasons were legitimate; and (6) Ms. Downs making her work environment "hostile and intimidating" by such instances of charging her 30 minutes leave for arriving late when she allowed other employees who arrived late to make up the time during lunch or at the end of the day.

By decision dated May 25, 1995, the Office denied the claim, stating that the evidence of record failed to establish that the injury occurred in the performance of duty. The Office noted in its decision that the EEO complaint has not "been determined by an appropriate fact-finder."

On July 20, 1995 appellant initially requested an oral hearing but then requested written review of the record by an Office hearing representative. She specifically requested that her treating physician's reports since August 1994 and the employing establishment's October 1994 response to her claim be reviewed and stated that there was "modified handling of her case" after "Ms. Adams" and her supervisor, Madeline O'Brien, accepted her injury as work related in March 1995. The record contains the report of appellant's treating physician, Dr. Stephen J. Rojcewicz, a psychiatrist, dated April 6, 1995 in which he considered appellant's history of injury, numerous factors at work that have distressed her such as being the only staff worker required to obtain a physician's certificate for sick leave and receiving a performance appraisal that was unfair and discriminatory. He diagnosed depression and stated that appellant's supervisors' unfair treatment of her as in the work incidents he described had caused a recurrence and aggravation of her earlier depression.

By decision dated December 1, 1995, the Office hearing representative affirmed the Office's May 25, 1995 decision.

On January 22, 1996 appellant sought review of the Office's decision by the Board. After some correspondence with the Clerk of the Board, by letter dated December 9, 1997, appellant's attorney advised that appellant wished to have the appeal dismissed and have the matter remanded for reconsideration. In an order dismissing appeal, the Board ordered that the appeal docketed as No. 96-801 be dismissed and the case record return to the Office.

In an undated request for reconsideration received by the Office on January 29, 1998, appellant requested reconsideration of the Office's decision. In her request, appellant stated that she had filed a law suit against the employing establishment in the U.S. District Court for the

District of Columbia in which she alleged violations of Federal Title VII and the American with Disability Act (ADA). On April 11, 1997 the jury returned a verdict in favor of the claimant, finding: (1) the employing establishment intentionally discriminated against appellant on the basis of a handicap and treated her less favorably than similarly situated nonhandicapped employees; and (2) intentionally terminated her because of her handicap and failed to provide her with reasonable accommodation. The jury awarded appellant \$75,000.00 in compensatory damages. Appellant stated that she alleged the same factors of mistreatment by the employing establishment in her occupational claim to the Office, and the jury's verdict corroborated her complaints of discrimination and unfair treatment.

In addition to the jury verdict, appellant submitted a six page affidavit describing incidents of alleged discrimination which she apparently submitted as evidence in her civil action as it is stamped at the bottom with the case name and number. Appellant also submitted investigation reports from the EEOC written by Marguerite A. Donnelly and Robert Fletcher which she alleged showed that the employing establishment knew of her disability, *i.e.*, depression, and had been working on accommodations or restrictions for her when she returned to work. Appellant additionally submitted affidavits from her coworkers including a legal assistant and secretary as well as a vocational rehabilitation counselor's report which appellant alleged also showed that the employing establishment had knowledge of her disability. Appellant stated that notwithstanding the knowledge of her disability, the Office increased her work load and denied only her the opportunity to participate in the exercise program and to obtain work credits which would have helped her manage the excessive work load.

Appellant stated that the employing establishment terminated her in April 1995 while she was on sick leave, and that this termination caused or contributed to her depression as stated by her treating physician. She stated that Ms. Donnelly's investigative report supported her allegation that she was impermissibly terminated. In conclusion, appellant asserted that consistent with the jury's findings, the employing establishment discriminated against her on the basis of her disability, gender, race and national origin regarding the implementation of its use of the work credit system, sick leave, granting her exercise opportunities, terminating her and Ms. Downs' excessively interviewing her, and that these discriminatory actions contributed to her depression. Appellant contends the Office committed reversible error and denied her due process by failing to meet its duty of developing her claim.

By decision dated April 8, 1998, the Office denied appellant's request for reconsideration as untimely and found that the evidence submitted presented no clear evidence of error on the part of the Office. In the attached memorandum, the Office noted the jury's verdict in the district court's civil action and stated that appellant did not show clear evidence of error.

The Board finds that this case is not in posture for decision.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that

¹ 5 U.S.C. § 8128(a).

decision.² When an application for review is untimely, the Office takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.³

The Board finds that, since more than one year had elapsed since the date of the issuance of the Office's December 1, 1995 merit decision to the date appellant's request for reconsideration was filed with the Office on December 9, 1997,⁴ appellant's request for reconsideration is untimely.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ 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.¹¹

The underlying claim in this case is for an emotional condition based on harassment and discrimination. The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment as contributing to

² 20 C.F.R. § 10.138(b)(2). See also *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ Although appellant's request for reconsideration is undated, the Office accepted the date appellant's attorney requested reconsideration, December 9, 1997, as the date the request was filed.

⁵ *Jimmy L. Day*, 48 ECAB 654, 656 (1997); see *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, *supra* note 3.

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *Gregory Griffin*, *supra* note 2.

her condition. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.¹² However, it is an elementary principle of workers' compensation law, which the Board has often reiterated, that the Office is required to make findings of fact and a statement of reasons regarding the material facts of the case.¹³ In the April 8, 1998 decision, the Office summarily stated that the jury verdict did not establish clear evidence of error. The Office did not provide any reasons why the jury verdict and appellant's accompanying affidavit which was marked as evidence in the civil case did not establish clear evidence of error. The Office also did not address the significance of the other evidence appellant submitted including the investigative reports by the EEOC counselors and affidavits of her coworkers, particularly in the context of appellant's contentions in her request for reconsideration, and provide reasons for accepting or rejecting them.

Since, in the present case, appellant asserted that her emotional condition arose from the discriminatory treatment she received from the employing establishment concerning the use of sick leave, credit time, options to use the gym and excessive monitoring by her supervisors, the jury verdict and appellant's accompanying evidence could if credited establish that the employing establishment discriminated against her on the basis of her disability. The Board therefore finds that the April 11, 1997 jury verdict, while not binding in its result,¹⁴ could shift the weight of the evidence in this case in favor of appellant as it offers support to appellant's allegations of error or abuse and may raise a substantial question as to whether the employing establishment committed error or abuse in the handling of its personnel matters with respect to appellant. The Office's summary findings in rejecting the evidence appellant submitted in her request for reconsideration do not comply with the review requirements under the Act. Therefore, despite the untimeliness of appellant's request for reconsideration, the case must be remanded for the Office to describe the evidence appellant submitted and give detailed reasons for accepting or rejecting it.

¹² *Pamela R. Rice*, 38 ECAB 838 (1987).

¹³ *See* 20 C.F.R. § 10.130; *Beverly Dukes*, 46 ECAB 1014, 1017 (1995).

¹⁴ *See Jimmy L. Day*, *supra* note 5 at 658.

The decision of the Office of Workers' Compensation Programs dated April 8, 1998 is hereby set aside and the case remanded to the Office for a merit review to be followed by a *de novo* decision.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member