U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHAU M. KING and U.S. POSTAL SERVICE,
POST OFFICE, Santa Ana, CA

Docket No. 98-2156; Submitted on the Record;
Issued November 13, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established that she developed an emotional condition in the performance of duty, causally related to factors of her employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and not establishing clear evidence of error.

The Board finds that appellant has not established that she developed an emotional condition in the performance of duty, causally related to factors of her employment.

On October 18, 1994 appellant filed an occupational disease claim (Form CA-2) alleging that her depression was due to her federal employment and attached a statement describing her work history and factors she believed caused her depression.[1] She alleged that the employing establishment required her to work outside of her physical restrictions due to her employment injuries; refused to give her limited duty of four hours a day, ignored her physician's recommendation that she be given light duty, and coerced appellant into having her physician release her from her disabled status to bid on a lower paying job. Appellant stated that she was unable to sleep or rest due to pain caused by working outside her medical restrictions, that she was terrified about her condition, that she was given incorrect information regarding the filing of a recurrence of disability, and that she was coered into signing a paper granting the employing establishment access to her medical records. She added that a supervisor indicated that he would do something about disabled workers getting the same pay doing light-duty work, as regular workers got for full duty that the employing establishment harassed her by requiring her to submit monthly updates of her physical restrictions from her physician, that she was ordered to have a fitness-for-duty examination on her own time, that Dr. Robert P. Kropac's report was irresponsible and caused her to be injured again, that she was scolded for being late, that the employing establishment ordered her to work full duty even though it was contrary to her

[1] This was assigned claim number A13-108254.

physician's restrictions, that she was threatened with being charged for absence without leave (AWOL) if she did not comply, that she was singled out to continue to keep track of the time it took her to throw a U-cart of mail due to her disability, and that her Equal Employment Opportunity (EEO) complaint for harassment and hostile work environment was decided in her favor.

The employing establishment responded to appellant's allegations and submitted evidence in support. The employing establishment indicated that appellant's favorable EEO settlement concerned a 10-minute wash-up time which she was awarded without a finding of harassment.

By decision dated May 23, 1996, the Office denied appellant's claim that she sustained a psychiatric condition in the performance of duty.[2] The Office determined that appellant had failed to establish that the alleged incidents and factors were factual and that the remaining incidents accepted as factual were not in the performance of duty.

By decision dated March 6, 1998, the Office hearing representative affirmed the decision finding that appellant's depression was not work related.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[3] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[4]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[5] This burden includes the submission of a detailed

[2] The Office noted that appellant had filed a traumatic injury claim for an injury sustained on August 20, 1988 which was assigned claim number A13-8663331 and accepted for a cervical strain. Appellant filed a recurrence of disability due to her emotional condition on November 2, 1997. By letter dated April 14, 1998, the Office advised appellant that her recurrence claim could not be accepted as her emotional condition claim had been denied by the Office on May 23, 1996.

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[6]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[7] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

In this case, appellant alleged that she sustained severe depression as a result of a number of employment incidents and conditions. By decision dated March 6, 1998, the Office hearing representative affirmed the May 23, 1996 decision which denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment improperly assigned her work duties, refused to recognize her disability and unreasonably monitored her activities at work, the Board finds that these allegations concern administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, and thus do not fall within the coverage of the Act.[9] The handling of the assignment of work duties and the monitoring of activities at work are generally related to employment, but are considered administrative functions of the employer and not duties of the employee.[10] While administrative or personnel matters will be considered employment factors where the evidence discloses error or abuse on the part of the employing establishment, the record contains no evidence that the employing establishment erred or acted abusively in its dealings with appellant. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.[11]

[6] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[7] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[8] *Id.*

[9] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[10] *Id.*

[11] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

Appellant has also alleged that harassment and discrimination on the part of her supervisors contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[12] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[13]

In this case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was discriminated against or harassed by her supervisors.[14] Appellant alleged that her supervisors caused a hostile work environment, but she provided no corroborating evidence, such as witness statements, to establish that harassment or a hostile work environment actually occurred.[15] The only evidence appellant submitted to support her allegation is an EEO decision which concerned a 10-minute wash-up time and contained no finding of harassment. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[16]

The Board further finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to demonstrate clear evidence of error.

On September 15, 1994 appellant, then a 42-year-old clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on September 13, 1994 she injured both shoulders while pulling a full tub of mail off the rack.[17]

By decision dated January 10, 1995, the Office found that the evidence was insufficient to support that appellant suffered a bilateral shoulder injury causally related to the September 13, 1994 employment incident.

---

[12] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[13] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[14] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[15] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[16] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[17] This was assigned claim number A13-1058350. The Office doubled claim numbers A13-1075296 and A13-1058350 with A13-1058350 designated as the master file number.

On March 6, 1995 appellant filed an occupational disease claim alleging that her back, right shoulder, neck and right hip conditions were due to the September 13, 1994 employment incident.[18]

By decision dated September 6, 1995, the Office denied appellant's claim that her back condition was causally related to factors of her federal employment or to the September 13, 1994 employment incident.

By letter dated September 20, 1995, appellant requested an oral hearing.

By decision dated January 21, 1997, the Office hearing representative found that the evidence of record was insufficient to establish a causal relationship between appellant's back, shoulder and right hip condition and her federal employment.

By letter dated January 26, 1998, appellant requested reconsideration alleging that the hearing representative made errors of fact and law and submitting reports from Dr. J. Chang-Zen Hong, Dr. Raymond Felman, Dr. Joseph Asher, Dr. Brian S. Andrews and Dr. Stuart L. Silverman in support of her request. In addition, appellant alleged that the January 21, 1997 decision was postmarked January 29, 1998 and thus her reconsideration request was timely.

On June 1, 1998 the Office denied appellant's request for reconsideration as untimely because her request was dated January 26, 1998 and postmarked January 28, 1998. The Office also found that none of the evidence or argument submitted by appellant presented clear evidence of error in the prior decision.

Section 8128(a) of the Federal Employees' Compensation Act[19] does not entitle a claimant to a review of an Office decision as a matter of right.[20] This section 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."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[21] As one such limitation, the Office has stated

[18] This was assigned claim number A13-1075296. As noted *supra*, footnote 1, this case was doubled into claim number A13-1058350.

[19] 5 U.S.C. § 8128(a).

[20] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[21] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against

that it 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. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 USC § 8128(a).[22]

The Office properly determined in this case that appellant failed to file a timely request for reconsideration. The Office issued its last merit decision on the issue of whether appellant's back problems were causally related to her implicated factors of employment on January 21, 1997. Appellant filed her request for reconsideration by letter dated January 26, 1998 which was postmarked January 28, 1998 and received by the Office on February 5, 1998. As appellant's January 26, 1998 request was outside the one-year time limit which began the day after January 21, 1997 and ended on January 26, 1998, appellant's request for reconsideration was untimely.[23]

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[24] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[25]

To establish clear evidence of error, the claimant must submit relevant evidence to the issue which was decided by the Office.[26] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[27] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[28] It is not enough merely to show that the evidence could be

---

payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[22] *Leon D. Faidley, Jr., supra* note 20.

[23] The record contains an envelope postmarked January 29, 1998 from the Office's Branch of Hearings and Review. This envelope does not establish that appellant did not receive the January 21, 1997 decision until January 29, 1998 or later. First, appellant's request for reconsideration was postmarked the day before. Second, appellant acknowledged receiving the January 21, 1997 decision on February 3, 1997. Therefore, appellant's request for reconsideration was untimely filed.

[24] *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *petition for recon. denied*, 44 ECAB 535 (1992).

[25] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1996).

[26] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[27] *See Leona N. Travis*, 43 ECAB 227 (1991).

[28] *See Jesus D. Sanchez, supra* note 20.

construed as to produce a contrary conclusion.[29] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence of record and whether the new evidence demonstrates clear error on the part of the Office.[30]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict of the 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's decision.[31] 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.[32]

In accordance with its internal guideline and Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant but found that this evidence was irrelevant as it either did not address the issue of causation or medical reports contained no supporting medical rationale or were duplicates of reports already contained in the record and previously considered. Therefore her evidence did not establish clear evidence of error in the Office's prior decision.

In the Office's January 21, 1997 decision, the Office denied appellant's claim on the basis that the evidence was insufficient to establish a causal relationship between her back, shoulder and right hip conditions and her federal employment.

In support of her January 26, 1998 request for reconsideration, appellant did not submit any new evidence, but submitted medical evidence already contained in the record.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board finds that appellant's January 26, 1998 request for reconsideration fails to show clear evidence of error. In the January 21, 1997 decision, the Office hearing representative found that appellant had not established an injury causally related to factors of her federal employment as compensable work factors were not established and because the medical evidence was insufficient with regard to the established factors. In her reconsideration request, appellant submitted medical reports which the Office had previously considered.

---

[29] *See Leona N. Travis, supra* note 27.

[30] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[31] *Leon D. Faidley, Jr., supra* note 20.

[32] *Gregory Griffin*, 41 ECAB 458 (1990).

For these reasons, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* shift the weight of the evidence in appellant's favor such that appellant has not established clear evidence of error.

As appellant has failed to establish clear evidence of error, on the part of the Office the Office did not abuse its discretion in denying further review of the case.

The decisions of the Office of Workers' Compensation Programs dated June 1 and March 6, 1998 are hereby affirmed.

Dated, Washington, DC
November 13, 2000

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member