

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH K. WALL and U.S. POSTAL SERVICE,
POST OFFICE, Queens Village, NY

*Docket No. 00-1462; Submitted on the Record;
Issued June 4, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained an injury while in the performance of duty on June 1, 1997 causally related to factors of her employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On July 9, 1997 appellant, then a 46-year-old letter carrier, filed a claim for an emotional condition, which she attributed to discrimination and harassment by the employing establishment.

By decision dated January 20, 1998, the Office denied appellant's claim on the grounds that she had failed to establish that she sustained an emotional condition causally related to compensable factors of her employment.

On October 8, 1999 appellant filed an occupational disease claim alleging that on June 1, 1997 she sustained an emotional condition causally related to factors of her employment. She alleged that she had been subject to a hostile environment, discrimination and sexual harassment from a supervisor.

By letter dated December 22, 1999, appellant requested reconsideration of the Office's January 20, 1998 decision denying her claim for an injury on July 9, 1997.

In a letter dated October 7, 1999, appellant stated that a federal judge had determined that there was substance to her lawsuit against the employing establishment for disparate treatment and a hostile environment and that the case qualified for trial by jury. She submitted a copy of a docket history for her case filed in federal court on October 31, 1996 against the employing establishment.

By decision dated February 25, 2000, the Office denied appellant's request for reconsideration of its January 20, 1998 decision denying her claim for an emotional condition on

July 9, 1997 on the grounds that her request was not timely filed and failed to show clear evidence of error.

By decision dated March 20, 2000, the Office denied appellant's claim on June 1, 1997 on the grounds that she had failed to establish that she sustained an emotional condition causally related to compensable factors of her employment. The Office noted that appellant had filed two claims for an emotional condition with dates of injury of June 1 and July 9, 1997 and the cases would be combined for any future proceedings.¹

The Board finds that appellant failed to establish that she sustained an emotional condition on June 1, 1997 causally related to factors of her employment.

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.² 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.³

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 employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

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.⁶ If a claimant does implicate a factor of

¹ The Board notes that the record contains additional evidence, which was not before the Office at the time it issued its March 20 and February 25, 2000 decisions. (documents in docket file) The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473 (1993).

⁶ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

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.⁷

In this case, appellant failed to identify the specific employment incidents or situations that she felt had caused or contributed to her emotional condition. Appellant has the burden to submit a detailed description of the employment factors or conditions that she believes caused or adversely affected the condition for which compensation is claimed. Without a detailed description of these employment factors, the Office is unable to make the necessary factual findings in adjudicating the claim. As appellant failed to provide this necessary information in support of her claim, the Office properly denied her claim for compensation for an injury on June 1, 1997.

The Board further finds that the Office properly denied appellant's request for reconsideration.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁸ As appellant filed her appeal with the Board on March 14, 2000 the only decision properly before the Board regarding appellant's claim for an injury on July 9, 1997 is the Office's February 25, 2000 decision denying appellant's request for reconsideration.

Section 8128(a) of the Act⁹ does not entitle a claimant to a review of an Office decision as a matter of right.¹⁰ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹¹

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, the Office has stated 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.¹² The Board has found that the

⁷ *Id.*

⁸ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

⁹ 5 U.S.C. § 8128(a).

¹⁰ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *Jesus D. Sanchez* and *Leon D. Faidley, Jr.*, *supra* note 10. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

¹² 20 C.F.R. § 10.607 (1999).

imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹³

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision, upon presentation of new evidence that the decision was erroneous.¹⁴ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁵

Since more than one year elapsed from the January 20, 1998 decision denying appellant's claim for an emotional condition on July 9, 1997 to her December 22, 1999 application for review, the request for reconsideration is untimely. In accordance with its internal guidelines and with Board precedent, the Office then properly proceeded to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of her application.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁹ 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.²⁰

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.²¹ The Board makes an independent determination of whether a claimant has submitted clear evidence

¹³ See *Gregory Griffin and Leon D. Faidley, Jr.*, *supra* note 10.

¹⁴ See *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁷ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁸ See *Jesus D. Sanchez*, *supra* note 10.

¹⁹ See *Leona N. Travis*, *supra* note 17.

²⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

²¹ *Leon D. Faidley, Jr.*, *supra* note 10.

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.²²

In support of her untimely request for reconsideration, appellant submitted a copy of a docket history for her case filed in federal court against the employing establishment. She alleged that a federal judge had determined that there was substance to her lawsuit against the employing establishment for disparate treatment and a hostile environment and the case qualified for a jury trial. However, the mere fact that appellant filed a claim in federal court against the employing establishment is not sufficient to establish that she sustained an emotional condition on July 9, 1997 causally related to her employment. The filing of a lawsuit initiates the legal process through which a judge or jury makes factual findings and then renders a judgment. The mere filing of a lawsuit does not establish that appellant's allegations of harassment against the employing establishment are factual. Therefore, this evidence does not show clear evidence of error in the Office's January 20, 1998 decision.

The March 20 and February 25, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 4, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

²² *Gregory Griffin, supra* note 10.