

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LILLIAN V. SEPULVEDA and U.S. POSTAL SERVICE,  
SOUTH JACKSONVILLE STATION, Jacksonville, FL

*Docket No. 99-2467; Submitted on the Record;  
Issued May 23, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

On August 11, 1995 appellant, then a 37-year-old letter carrier, filed a claim for job stress and depression, which she attributed to constant harassment and retaliation from management. Appellant indicated in subsequent statements that she had applied to become an acting supervisor but had to file an Equal Employment Opportunity (EEO) complaint to be included in the program. She claimed that she was not given adequate training and was restricted to the employing establishment while white males and white females at the employing establishment were given better training by being allowed to go to other locations. Appellant indicated that she was not listed on the employing establishment's list of available acting supervisors. These problems led her to seek to reopen her EEO complaint. She claimed that, subsequently, after receiving a positive verbal evaluation, she was given a poor written evaluation, which indicated that she was too emotional and unable to properly supervise others. As a result of the evaluation, appellant was dropped from the acting supervisor program. She stated that her supervisor subsequently accused her of stealing documents from a personnel folder. Appellant indicated that the two meetings she had with her supervisor related to the charge constituted harassment as the supervisor became accusatory.

In a December 8, 1995 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty. In a December 22, 1995 letter, appellant's representative requested reconsideration. In a January 29, 1996 merit decision, the Office denied appellant's request for modification of the December 8, 1995 decision.

In a February 10, 1999 letter, appellant again requested reconsideration. She submitted in support of her request a July 16, 1998 decision by an administrative judge, who found that appellant had established discrimination on the basis of reprisal in her evaluation and removal from the acting supervisor program. The administrative judge, however, found that appellant

had not established that she had been harassed when the supervisor asked her how she had received documents from personal files. The Office subsequently received a September 23, 1998 decision from the employing establishment which overturned the administrative judge's decision and found that appellant had not established discrimination. Appellant also submitted extensive medical notes and reports, which described her condition and treatment from September 6, 1995 through November 30, 1998.

In a May 20, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error in the Office's prior decisions which rejected her claim.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>1</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in the implementing federal regulations<sup>2</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>3</sup> In *Leon D. Faidley, Jr.*,<sup>4</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The Office issued its last merit decision on January 29, 1996. As the Office did not receive the application for review until February 10, 1999, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.606.

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> 41 ECAB 104 (1989).

<sup>5</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- *Reconsiderations*, Chapter 2.1602.3(b), which states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error".

<sup>6</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> 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.<sup>10</sup> To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.<sup>11</sup> 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.<sup>12</sup>

Appellant submitted the decision of an administrative judge, who concluded that appellant had been subjected to discrimination by the employing establishment. However, other evidence submitted showed that the employing establishment overturned the decision of the administrative judge and appellant was found not to have established discrimination. Emotional conditions are not considered to arise in the performance of duty if the conditions are alleged to be the result of performance evaluations or failure to receive a promotion.<sup>13</sup> Such factors of employment can be considered within the performance of duty if it can be demonstrated that the actions of the employing establishment were in error or abusive.<sup>14</sup>

While the decision of the administrative judge supported appellant's contention of error and abuse on the part of the employing establishment, that decision was overturned. Appellant, therefore, has not submitted sufficient evidence of error or abuse by the employing establishment in its actions, such that either the Office or the Board could conclude that there was clear evidence of error in the rejection of appellant's claim for an emotional condition on the grounds that the condition did not arise within the performance of duty.

The medical evidence submitted by appellant is irrelevant to the issue in this case, as appellant has not established that she sustained an injury in the performance of duty. The

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<sup>7</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>9</sup> *See Leona N. Travis*, *supra* note 7.

<sup>10</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon Faidley, Jr.*, *supra* note 4.

<sup>12</sup> *Gregory Griffin*, *supra*, note 5.

<sup>13</sup> *Peggy Ann Lightfoot*, 48 ECAB 490 (1997); *Harriet J. Landry*, 47 ECAB 543 (1996).

<sup>14</sup> *Janet I. Jones*, 47 ECAB 345 (1996).

evidence submitted would be relevant only if appellant established that she had sustained an injury within the performance of duty.

The decision of the Office of Workers' Compensation Programs, dated May 20, 1999, is hereby affirmed.

Dated, Washington, DC  
May 23, 2001

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member