

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURA A. JACKSON and DEPARTMENT OF VETERANS AFFAIRS,
LOUGANS MEDICAL CENTER, Reno, NV

*Docket Nos. 02-299 & 02-840; Submitted on the Record;
Issued December 20, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether, in its December 15, 2000 decision, the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for a further review of the merits pursuant to 5 U.S.C. § 8128(a); and (2) whether appellant's request for reconsideration dated October 15, 2001 was untimely filed and failed to present clear evidence of error.

On December 22, 1997 appellant, then a 47-year-old employees relations specialist, filed an occupational claim, alleging that on September 2, 1995 she became aware that she sustained a work-related paper cut on her right middle finger which became infected. She alleged that as a result of the incident, she sustained stress on the job, chest pain, insomnia, headaches, stomach problems, diarrhea, burning throat, ruptured eardrums and breathing problems.

By decision dated July 24, 1998, the Office denied the claim, stating that the evidence of record failed to establish that appellant sustained an emotional condition in the performance of duty.

By letter dated August 17, 1998, appellant requested reconsideration of the Office's decision and submitted additional evidence.

By decision dated September 29, 1998, the Office denied appellant's request for modification.

By letter dated June 16, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence.

By decision dated July 22, 1999, the Office denied appellant's request for reconsideration.

By letter dated September 29, 1999, received by the Office on August 2, 2000, appellant requested reconsideration of the Office's decision.

By letter dated July 22, 2000, appellant requested to amend her September 29, 1999 reconsideration request and submitted additional evidence. She submitted documents related to her appeals with different agencies as in the Office of Personnel Management's (OPM) decision dated January 11, 1999 denying her application for disability retirement, the OPM's decision dated July 20, 1999 affirming its January 11, 1999 decision, appellant's request for reconsideration to OPM dated February 9, 1999, a letter from appellant to OPM dated March 8, 1999 restating the basis for her reconsideration request and OPM's response to appellant's notice of appeal dated September 10, 1999.

Appellant submitted evidence related to her Equal Employment Opportunity (EEO) complaint as in the counselor's report of her complaint dated October 30, 1997 and related investigative documents and correspondence. These included the deposition of the employing establishment's medical director, Gary R. Whitfield, and a letter from appellant to an EEO counselor dated October 19, 1997 informing the counselor that she had resigned. Appellant submitted a copy of her petition for review of the Merit Systems Protection Board's (MSPB) July 9, 1998 decision and witness statements dated November 3 and December 23, 1997, January 20, February 5 and June 23, 1998. She submitted applications for refunds of retirement deductions dated January 25, 1980 and December 27, 1985, notifications of personnel actions dated approximately from February through August 1987 and charts of leave she took from 1996 through 1998. Appellant also submitted medical reports from her treating physician, Dr. Mujahid Rasul, a Board-certified psychiatrist and neurologist, dated February 3 and March 9, 1999 and medical records dated approximately from March 11, 1995 through March 9, 1998.

By decision dated December 15, 2000, the Office denied appellant's request for reconsideration.

By letter dated January 22, 2001, appellant requested that the Office "reopen and modify" her claim "based on new evidence and arguments pertaining" to the December 15, 2000 decision. She submitted additional evidence.

By letter dated May 24, 2001, the Office informed appellant that it was not "in the position to reopen" her claim "under the Director's own motion based upon the evidence [she] submitted." The Office informed appellant that she could appeal to the Board.

By letter dated October 15, 2001, appellant requested reconsideration of the Office's decision and submitted additional evidence. The evidence she submitted included administrative documents related to the filing of her claim as in a copy of appellant's March 15, 2001 letter to the Board requesting the reopening of her claim but not a review by the Board, a letter from the Board dated April 5, 2001 advising her that her correspondence dated March 15, 2001 was unclear, a copy of an application for review form to the Board dated December 4, 2001 and a copy of the Office's December 15, 2000 decision. Appellant submitted copies of Dr. Rasul's reports dated February 3 and March 9, 1999, a letter from Mr. Whitfield stating that her notice of occupational claim (Form CA-2) dated February 22, 2001 was incomplete, her notice of

occupational claim dated October 26, 2001 and the employing establishment's undated controversion to her claim filed on December 22, 1997.

Appellant submitted the MSPB decision dated April 23, 2001 finding that her emotional injury was not compensable and she was not entitled to restoration rights, her petition for review of the MSPB's April 23, 2001 decision and part of a decision from the United States Court of Appeals for the Federal Circuit dated June 6, 2001 apparently affirming the MSPB's April 23, 2001 decision. Appellant submitted her complaint of employment discrimination dated October 15, 2001, an amended EEO counselor's report dated December 22, 2000, the dismissal of her EEO complaint dated February 28, 2001 finding that she was not subject to discrimination and an undated EEO decision describing appellant's rights to appeal in a civil action. Appellant additionally submitted numerous correspondence from her to the employing establishment or the Office dated April 20, August 30, October 1, October 9, October 10, October 15 and December 4, 2001.

By decision dated January 2, 2002, the Office found that appellant's October 15, 2001 request for reconsideration, filed more than a year after the Office's last merit decision on September 29, 1998, was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on December 14, 2001 and February 14, 2002, the only decisions before the Board are the Office's nonmerit decisions, dated December 15, 2000 and January 2, 2002, denying appellant's requests for reconsideration.

The Board finds, in its December 15, 2000 decision, that the Office did not abuse its discretion in refusing to reopen appellant's claim for a further review of the merits pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.² A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).³

In this case, the evidence appellant submitted in support of her request for reconsideration is either repetitive or duplicative of evidence contained in the record or is not relevant to the issue on appeal of whether appellant has established an emotional claim arising from her

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² Section 10.606(b)(2)(i-iii).

³ Section 10.608(a).

employment. The October 30, 1997 EEO complaint, Mr. Whitfield's May 12, 1998 affidavit, appellant's October 19, 1997 letter to an EEO counselor, Dr. Rasul's February 3 and March 9, 1999 medical reports and one of the witness statements were contained in the record. The OPM's January 11, 1999 decision denying her application for disability retirement and the July 20, 1999 affirmance of its decision are duplicative of evidence in the record or are not relevant to her claim because they do not establish that there were any compensable factors of employment. Similarly, other evidence appellant submitted including documents related to her claim with OPM, documents or witness statements related to her MSPB claim, notifications of personnel actions from February through August 1987 and charts of leave from 1996 through 1998 are not relevant to her claim because they do not establish compensable factors of employment. They are also duplicative of evidence appellant previously submitted. For instance, investigative EEO reports in the record dated May 12, May 13 and May 15, 1998 recommended a finding that no discrimination occurred.

To establish an emotional claim, appellant must show her disability resulted from an emotional reaction to her regular or specially assigned duties or to an administrative action if the action was abusive or erroneous.⁴ She had not shown that the Office committed any error in finding appellant did not establish any compensable factor of employment. Further, because appellant has not established a compensable factor of employment, the medical evidence need not be considered and is not relevant.⁵ The Office, therefore, acted within its discretion in denying appellant's request for reconsideration.

The Board finds that appellant's request for reconsideration dated October 15, 2001 was untimely and failed to establish clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ 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 decision.⁷ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such a decision was erroneous.⁸

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must

⁴ *Clara T. Norga*, 46 ECAB 473, 480 (1995); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁵ *See Diane C. Bernard*, 45 ECAB 223, 228 (1993).

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *Willie J. Hamilton*, 52 ECAB _____ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed to as to produce a contrary conclusion.¹² 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.¹³

None of the evidence appellant submitted to support her request for reconsideration establishes that the Office committed clear evidence of error. The Office's December 15, 2000 decision and the documents appellant submitted challenging that decision do not show that the Office erred. Her October 26, 2001 claim, the employing establishment's December 22, 1997 controversion of her claim, Mr. Whitfield's letter informing her that her February 22, 2001 claim was incomplete also do not establish error by the Office. Further, the April 23, 2001 MSPB decision finding that appellant's emotional injury was not compensable and she was not entitled to restoration rights and the June 6, 2001 district court decision affirming the MSPB's decision rather than showing the Office committed error are supportive of the Board's decision that appellant did not establish a compensable emotional injury. Similarly, the dismissal of appellant's EEO complaint dated February 28, 2001 is also supportive of the Board's decision. The numerous correspondence appellant submitted approximately from April 20 through December 4, 2001 do not establish that the Office committed any error. The Office, therefore, properly denied appellant's request for reconsideration dated October 15, 2001 and found no clear evidence of error.

¹⁰ *Willie J. Hamilton, supra* note 4; *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *Leona N. Travis, supra* note 5.

¹³ *Willie J. Hamilton, supra* note 5.

The January 2, 2002 and December 15, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 20, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member