U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON F. PALMIERI and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

Docket No. 02-1919; Submitted on the Record;
Issued December 2, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On May 31, 1989 appellant, then a 37-year-old scheme examiner, filed a claim for an occupational disease for emotional stress and depression.

By decision dated July 7, 1989, the Office rejected appellant's claim on the basis that she had not submitted evidence necessary to establish the essential elements of her claim.

By letter dated July 5, 1990, appellant requested reconsideration and submitted further evidence including a medical report from a psychologist.

By decision dated April 22, 1991, the Office found that "the medical evidence submitted still does not support a causal relationship between the claimant's condition to any factors or conditions of the employment. In fact, the factors and conditions mentioned and supported by the psychologist are not considered factors of employment under the Federal Employees' Compensation Act; thus are not covered by the Act."

Appellant appealed this decision to the Board. By decision dated April 21, 1992, the Board found that appellant had not established that she sustained an emotional condition in the performance of duty.[1] The Board subsequently denied appellant's petition for reconsideration.

By letter dated March 20, 1998, appellant requested reconsideration and submitted additional evidence.

[1] Docket No. 91-1640.

By decision dated July 6, 1998, the Office found that appellant's request for reconsideration was not timely filed and did not establish clear evidence of error.

Appellant appealed this decision to the Board, which, by decision and order dated October 17, 2000, found that appellant's request for reconsideration was not timely and that appellant's contentions and the evidence submitted did not establish evidence of error.[2]

By letter to the Office dated January 26, 2002, appellant requested reconsideration. Appellant submitted duplicates of documents already in the case record, and submitted an April 8, 1988 decision from appellant's supervisor in an informal Equal Employment Opportunity (EEO) complaint removing a February 23, 1988 letter of warning issued to appellant for failure to adhere to her assigned schedule. The basis of this decision was that the other scheme examiner was not hitting a time clock, and the corrective action was to require the other scheme examiner to hit the time clock.

By decision dated April 17, 2002, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

The Board finds that appellant's January 26, 2002 request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees' Compensation Act 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 --
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> (1) end, decrease, or increase the compensation awarded; or
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> (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). As one such limitation, 20 C.F.R. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought." 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 U.S.C. § 8128(a).[3]

In the present case, the most recent merit decision was the Board's April 21, 1992 decision and order. The Office properly determined that appellant's application for review dated January 26, 2002 was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

[2] Docket No. 99-268.

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office, however, 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 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] 20 C.F.R. § 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

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 Board finds that appellant's January 26, 2002 request for reconsideration and the evidence submitted in support thereof do not demonstrate clear evidence of error.

The only new evidence appellant submitted with her January 26, 2002 request for reconsideration was her supervisor's decision to remove a letter of warning.[12] The mere fact that

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[4] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

[7] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

[10] *Leon D. Faidley*, *supra* note 3.

[11] *Gregory Griffin*, *supra* note 4.

[12] In her request for reconsideration, appellant indicated that she submitted a transcript of a hearing in an arbitration between the employing establishment and the American Postal Workers' Union, but this document does not appear in the case record.

personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse by the employing establishment.[13] The disposition of appellant's EEO complaint in this case illustrates the reason for this rule: appellant's letter of warning was removed not because she did not commit the infraction for which it was issued -- failure to adhere to her assigned schedule -- but rather because another employee was not required to "hit the time clock." The removal of the letter of warning does not show that it was issued in error.

In the April 8, 1988 decision removing the letter of warning, however, appellant's supervisor acknowledged that appellant was subjected to disparate treatment in that she, but not a coworker performing the same duties on another tour, was required to hit the time clock. Disparate treatment can be a compensable factor of employment.[14] The showing of disparate treatment, however, does not establish clear evidence of error, as it does not *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. The most recent merit decisions denied appellant's claim not only on the basis of the absence of compensable employment factors, but also on the basis that the medical evidence was insufficient to establish causal relation. Although appellant's psychologist included the incident of disparate treatment discussed above in his history, he did not explain how this incident resulted in appellant's disabling emotional condition.

The April 17, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 2, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[13] *Michael Thomas Plante*, 44 ECAB 510 (1993).

[14] *Frederick D. Richardson*, 45 ECAB 454 (1994).