U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBBIE R. TIPLER and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, MO

Docket No. 01-694; Submitted on the Record;
Issued March 4, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128 on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On February 9, 1999 appellant, then a 40-year-old distribution clerk, filed an occupational disease claim stating that she sustained stress and pain causally related to factors of her federal employment because of "management's repeated harassment, intimidation and taunting." On her CA-2 form appellant alleged that she first became aware of her condition and that it was caused or related to her employment on December 30, 1998. On the reverse of the CA-2 form appellant indicated that she notified her supervisor of her condition on February 12, 1999. Appellant's supervisor indicated that to her knowledge appellant had not received any medical treatment and did not stop work.

By letter dated March 4, 1999, the employing establishment noted that appellant's claim was being challenged.

By letter dated March 11, 1999, the Office advised appellant and the employing establishment that under the Federal Employees' Compensation Act,[1] additional evidence supporting her claim for an emotional condition was necessary as she had not proven that her condition was due to factors of her employment. A detailed list of questions was provided.

[1] 5 U.S.C. §§ 8101-8193.

In response to the Office's request, appellant stated:

> "[The employing establishment] and the clerk union are in the process of firing me because I have medical documentation proving I need gloves to work in. They've suspended me, reduced my hours, duties and break time and refused to promote me to full-time status and training.
>
> "These individuals are using cruel and unusual tactics along with harassment, taunts and intimidation. I requested a protection order in civil court against Postmaster [Mary] Greble for waving a letter opener in my face, rushing me with a pen in her hand, snatching my time card out of my hand, putting her hand in my pocket, placing her shoulder on my shoulder and bumping me in my flat case…."

Appellant also submitted a copy of a grievance she filed with the union, February 17 and 18, 1999 and December 30, 1998 medical reports and a return to work slip from Dr. Phyllis Sullivan, an osteopath, diagnosing dermatitis of the hands and gastritis. She instructed appellant to wear preferably cotton gloves indefinitely while working to help prevent potential chronic dermatitis outbreaks and prescribed Prilosec daily for 30 days.

On March 17, 1999 the employing establishment submitted a response to appellant's grievance issues and cited articles of the National Agreement to resolve these issues and notified appellant that none of her rights had been violated. The employing establishment noted that a further investigation into appellant's allegations of a hostile work environment would be done before findings and recommendations were made.

In a letter dated February 26, 1999, the union representative who further investigated appellant's allegations of a hostile work environment related that upon interviewing appellant she reiterated the events that occurred when postmaster Ms. Greble waved a pen and a letter opener at her and snatched her time card. The representative stated:

> "During this conversation, I asked [appellant] if Ms. Greble had ever uttered any words that were threatening bodily harm. [Appellant] denied hearing such words. She said she felt threatened by the waving of the aforementioned objects in the air as Ms. Greble spoke with her concerning work issues. She also denied that Ms. Greble ever made any stabbing, poking, or lunging motions with the pen or letter opener in an attempt to stab her. She did say that Ms. Greble got too close to her and that made her feel uncomfortable to the extent that she felt she had to put a floor cart between the two of them on occasion when Ms. Greble spoke with her."

By decision dated June 11, 1999,[2] the Office denied appellant's claim for an emotional condition on the grounds that she had not established an injury in the performance of duty.

[2] The Board notes that even though appellant's OWCP file number and the facts of the decision belong to appellant, her name has been incorrectly indicated on this decision.

In a letter dated February 14, 2000, appellant submitted a request for an appeal to the Office. Subsequently, the Office forwarded the request to the Board on February 28, 2000.

By letter received November 14, 2000, appellant requested reconsideration before the Office. She submitted an October 2, 2000 medical report from Dr. Herman H. Lucke, a Board-certified psychologist, who diagnosed an adjustment disorder and noted that appellant started psychological and medical treatment on May 10, 2000 but had improved enough to enable her to return to work to normal work duties. He further noted that "[a]t no time, her mental state, personality and diagnosis represented any possibility of harm to herself or others."

By decision dated December 5, 2000, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review.

The only decision before the Board on this appeal is the Office's December 5, 2000 decision denying appellant's request for a review on the merits of its June 11, 1999 decision. Because more than one year has elapsed between the issuance of the Office's June 11, 1999 decision and January 10, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 11, 1999 Office decision.[3]

In its December 5, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 11, 1999 and appellant requested reconsideration by letter received November 14, 2000, which was more than one year after June 11, 1999.

The Office, however, may not deny an application for review 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[4] Office procedures provide 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[5] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

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

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

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] 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.[11] The Board makes an independent determination as to 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.[12]

The Board notes that the Office denied appellant's claim on the grounds that she failed to establish harassment or abuse by the employing establishment during their attempts to use authority to control her work conduct. The Office had previously addressed appellant's allegations, finding that the evidence established that the employing establishment only used its authority in attempts to control appellant's conduct while she performed her work duties. The Office, therefore, had denied appellant's claim on the grounds that she had not established a compensable factor of employment. On reconsideration appellant submitted a medical report but did not submit any evidence to substantiate a compensable factor of employment. Appellant, therefore, did not establish clear evidence of error in this case.

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

[9] *See Leona N. Travis, supra* note 7.

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

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

[12] *Thankamma Matthews*, 44 ECAB 765 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

The December 5, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 4, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member