U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORI L. PAAKAULA and U.S. POSTAL SERVICE,
DISTRIBUTION & PROCESSING CENTER, Honolulu, HI

Docket No. 02-1168; Submitted on the Record;
Issued September 11, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

Appellant's claim for panic attacks and aggravation of her psychiatric disorder, which was filed on October 14, 1999 was initially denied on June 2, 2000 because the evidence she submitted failed to establish a compensable employment factor. The Office found that incidents involving appellant's sick leave, alleged intimidation and retaliation by her supervisor and an instruction regarding lunch were not part of appellant's regular or specially assigned duties and thus did not occur in the performance of duty. The Office also found that appellant failed to provide any corroborating evidence that she worked excessive overtime, that appellant was threatened after filing a grievance and that she was forced to stay in a supervisor's office to complete her statement about sexual harassment by another supervisor.

On October 22, 2001 appellant, wrote to the Office and enclosed "factual evidence" to support her emotional condition claim. The documents consisted of statements from coworkers who witnessed the incidents between August 4, 1999 and the present, medical reports from appellant's clinical psychologist, Dr. Margaret B. Steadman and numerous copies of a letter of warning, grievances, excerpts from the collective bargaining agreement and employing establishment manuals and an Equal Employment Opportunity (EEO) complaint.

On November 8, 2001 the Office informed appellant that her appeal rights concerning the June 2, 2000 decision had expired. However, the Office reviewed the documents she had

submitted and found them insufficient to show that the Office had erred in its previous decision that appellant had failed to establish a compensable employment factor.[1]

On February 7, 2002 appellant, again wrote to the Office requesting reconsideration on the grounds that a "key witness" had finally responded to her request for corroboration of the event on September 30, 1999 that she claimed had caused her panic attack. On March 9, 2002 the Office denied her request to reopen her claim.

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decisions before the Board on appeal are dated March 9, 2002 and November 8, 2001 denying appellant's requests for reconsideration. Because more than one year has elapsed between the Office's last merit decision dated June 2, 2000 and the filing of this appeal on April 11, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] 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."[4]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[5] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing

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[1] The Office stated that, while appellant had not specifically requested reconsideration, it had reviewed the materials submitted with her October 22, 2001 letter under section 10.607(b) to determine whether they were "clear evidence that the Office's final merit decision dated June 2, 2000 was erroneous." The Office found that none of this evidence related to its finding that appellant's emotional condition did not arise out of or in the performance of duty.

[2] 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8128(a).

[5] *Diane Matchem*, 48 ECAB 532-33 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[6]

In this case, appellant's initial letter, which the Office construed as a request for reconsideration, was dated October 22, 2001, more than one year from the Office's June 2, 2000 decision and was, therefore, untimely. Similarly, the February 7, 2002 letter, to the Office was well outside the one-year limitation on timely requests for reconsideration and was, therefore, also untimely filed.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[8] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[9] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10]

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.[11]

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.[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] The Board makes an independent

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[6] 20 C.F.R. § 10.607(a).

[7] 20 C.F.R. § 10.607(b).

[8] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[9] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[10] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[11] *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[12] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[13] *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

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 a merit review in the face of such evidence.[14]

In this case, the documents submitted by appellant do not establish clear evidence of error. The undated statement by a union steward that he was present when appellant was completing her affidavit of sexual harassment against a supervisor does not establish that the action of completing this document was a compensable factor of employment. The steward's statement describes interaction between him and other supervisors present and does not establish any harassment by them against appellant. The fact that she stated she "felt nauseated by the whole thing" also fails to establish any error on the part of the Office in finding that this incident did not occur in the performance of duty.

The personnel action notice simply reveals that the union steward was separated from the employing establishment on January 1, 2001. This fact is irrelevant to appellant's emotional condition claim and cannot establish any clear evidence of error.

The voluminous materials submitted with appellant's October 22, 2001 letter, are also insufficient to establish any error by the Office in its June 2, 2000 decision. The Office found that the events of September 29 and 30, 1999, did not occur in the performance of duty. The documents submitted by appellant discuss the events of those two days in some detail, but fail to establish any error by the Office in determining that these events were administrative or personnel matters and that she had presented no evidence of error or abuse by the employing establishment in obtaining a requisite statement from appellant.

Other documents refer to the July 17, 1993 incident of two coworkers fighting on the workroom floor. Appellant's claim for fear and anxiety reaction was initially denied on October 13, 1993 but subsequently accepted for post-traumatic stress disorder. However, this claim has no relevance to the incidents alleged as causing appellant's 1999 disability.

The reports from appellant's psychologist are also irrelevant because appellant has failed to establish any compensable employment factors.[15] Thus, they do not demonstrate clear evidence of error in the June 2, 2000 decision.

All the materials from the employing establishment's manuals and memoranda are similarly irrelevant to appellant's claim and do not address specifically her burden of proof in establishing a compensable employment factor. The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

[14] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[15] *See John Polito*, 50 ECAB 347, 350 n. 18 (1999) (finding that because appellant failed to establish any compensable employment factors, the Board need not consider the medical evidence of record).

The March 9, 2002 and November 8, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 11, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member