U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BELINDA A. ROPER and DEPARTMENT OF THE ARMY, EISENHOWER ARMY MEDICAL CENTER, Fort Gordon, GA

Docket No. 02-1735; Submitted on the Record;
Issued March 10, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On May 14, 1997 appellant, then a 41-year-old supervisor of occupational health nursing, filed a claim for severe mental stress. She related that her stress was due to harassment and working in a hostile environment at the employing establishment. Appellant contended that she was harassed by Colonel Kevin M. McNeill and Major Gregory Page and alleged that Major Page initiated a complaint against her with the state licensing board for nursing in retaliation for complaints she had filed against him.

In a September 26, 1997 decision, the Office denied appellant's claim on the grounds that she had not established fact of injury. The Office stated that she had failed to specify employment factors that interfered in the performance of her job. It indicated that the events appellant described were only disagreements with her superiors. The Office stated that her statement lacked details of specific events, dates, confrontations, description of quotas, time frames and practices that would indicate that the alleged condition was related to factors of her employment.

Appellant requested reconsideration and submitted additional evidence, including a chronology of events. In an August 7, 1998 merit decision, the Office found that she had not established that she sustained an injury in the performance of duty. The Office found that the events cited by appellant were either related to administrative actions or were not substantiated to have occurred as she alleged.

In a July 28, 1999 letter, appellant again requested reconsideration. In a January 13, 2000 merit decision, the Office denied her request for modification of its prior decisions.

In a November 12, 2001 letter, appellant requested a hearing before an Office hearing representative. In a January 24, 2002 decision, the Office denied her request for a hearing on the grounds that, as she had previously requested reconsideration, she was not entitled to a hearing. The Office reviewed appellant's request under its own discretion and found that her request could be equally satisfied by requesting reconsideration and submitting additional evidence.

In a February 7, 2002 letter, appellant requested reconsideration. In a February 25, 2002 decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act[1] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."[2] In this case, appellant had sought reconsideration under section 8128(a) prior to requesting a hearing before an Office hearing representative. She, therefore, was not entitled to a hearing as a matter of right.

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. In this case, the Office found that appellant's request for a hearing could be equally well addressed by requesting reconsideration. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[3] There is no evidence that the Office's denial of appellant's request for a hearing constituted an abuse of discretion.

The Board also finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and lacking in clear evidence of error.

[1] 5 U.S.C. § 8124(b)(1).

[2] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[3] *Daniel J. Perea*, 42 ECAB 214 (1990).

Under section 8128(a) of the Act,[4] 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,[5] 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."[6] In *Leon D. Faidley, Jr.*,[7] 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 13, 2000. As the Office did not receive the application for review until February 7, 2002, after appellant requested a hearing on November 11, 2001 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.[8]

To establish 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 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 to show that the evidence could be construed so 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] To show

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606.

[6] 20 C.F.R. § 10.607.

[7] 41 ECAB 104 (1989).

[8] *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 -- Claims, *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."

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

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

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

[12] *See Leona N. Travis, supra* note 10.

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

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.[14] 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.[15]

Appellant alleges error in the Office's determination that her emotional condition did not arise in the performance of duty. In support of her contention, she resubmitted a February 29, 1996 memorandum from Colonel John Vigna, Chief of Staff at the employing establishment, which was previously of record and considered. She also submitted a January 30, 2002 statement from Jimmy L. Blount.

Colonel Vigna noted meeting with appellant concerning the working environment of the preventative medicine department. He stated that the role of Major Page had never been made clear prior to assignment to preventative medicine and addressed decisions made by Colonel McNeill pertaining to appellant's recommendations. Colonel Vigna noted that appellant expressed great emotional stress and frustration over several incidents but that she was predisposed to find fault with Major Page and Colonel McNeill and that the effect of these operational disagreements was exaggerated. He found that Colonel McNeill had exercised poor judgement in issuing a memorandum concerning disciplinary actions and that the roles and responsibilities of the military and civilian supervisors and leaders needed to be clarified. The Board finds that this evidence is insufficient to establish clear evidence of error. It is not enough to show that the evidence of record could be construed so as to produce a contrary result. Rather, the evidence must be of sufficient value to *prima facie* shift the weight of evidence in favor of the claimant. The evidentiary value of Colonel Vigna's memorandum is limited in that it does not establish the fact to which it relates. The material issue of fact, harassment, was contested and adjudicated with appellant and the employing establishment producing evidence, including Colonel Vigna's report. The fact that the Office did not construe this evidence to make a finding of harassment of abuse by appellant's supervisors does not rise to the level of clear evidence of error.

Mr. Blount stated that he was an investigating officer who conducted a review of appellant's complaint against Major Page. He reviewed appellant's allegations and noted his presence at the meeting with Colonel Vigna, indicating that the Inspector General's report was used to make recommendations to the Commander. The evidentiary value of this evidence does not rise to the level of clear evidence of error. The statement of Mr. Blount is insufficient to establish the facts to which it relates. As noted, the mere fact that the evidence can be construed to produce a contrary result does not establish clear evidence of error. This new evidence does not shift the weight of the evidence in favor of appellant's claim. Rather, it merely reiterates the material contained in Colonel Vigna's memorandum.

[14] *Leon D. Faidley, Jr., supra* note 7.

[15] *Gregory Griffin, supra* note 8.

The decisions of the Office of Workers' Compensation Programs dated February 25 and January 24, 2002 are hereby affirmed.

Dated, Washington, DC
March 10, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member