

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL Y. HOLMES and U.S. POSTAL SERVICE,
POST OFFICE, Oak Park, MI

*Docket No. 02-2053; Submitted on the Record;
Issued March 17, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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

On November 9, 2000 appellant, then a 39-year-old letter carrier, filed a claim alleging that she sustained an emotional condition as a result of stress at her workplace. She became aware of her condition on June 19, 2000. Appellant stopped work on June 30, 2000 and did not return.¹

In support of the claim, appellant submitted a report from Dr. Carol Stratman, a psychologist, and a narrative statement. Dr. Stratman noted that she had treated appellant since August 24, 2000 for stress-related symptoms due to her medical conditions and a stressful work environment. Appellant's narrative statement indicated that she felt depressed because of her physical disabilities and because of the unjust treatment she received from management. Appellant indicated that she was in constant pain due to her accepted injuries of shoulder bursitis and costochondritis of the chest wall and noted that because she was a limited-duty employee she was treated differently including being assigned inappropriate lunch times, forbidden from using a radio in the station and berated by her supervisor, Gerry Wendt.

The employing establishment submitted a statement from appellant's supervisor, Ms. Wendt, dated July 27, 2000; and three other notes from the employing establishment dated August 11, November 16 and December 19, 2000. The supervisor's statement indicated that appellant was on scheduled leave from July 9 to July 23, 2000. On July 24, 2000 appellant did not return and was charged with unscheduled leave. The employing establishment notice of August 11, 2000 indicated that appellant had taken leave without official notice. In a letter dated

¹ The record indicates that appellant filed two previous claims which were accepted by the Office for temporary aggravation of the left shoulder bursitis and costochondritis of the chest wall.

November 16, 2000, the employing establishment filed a notice of contravention indicating that appellant had not submitted sufficient evidence to support that she sustained an emotional condition in the performance of duty. The employing establishment summarized appellant's accepted injuries and noted that she had been noncompliant in advising her employer of her duty status. They further noted that her alleged emotional condition was not caused by her employment. The employing establishment indicated that appellant's continued absence from work, her conduct, work performance and discipline history contradicted appellant's allegations.

In a decision dated January 18, 2001, the Office denied appellant's claim as the evidence was insufficient to establish that appellant sustained an emotional condition as alleged.

By letter postmarked February 28, 2002, appellant requested reconsideration of the Office's decision dated January 18, 2001 and submitted a narrative statement. She indicated that she was in constant pain due to her accepted injuries of shoulder bursitis and costochondritis of the chest wall and noted that because she was a limited-duty employee she was treated differently including being assigned inappropriate lunch times, forbidden from using a radio in the station and berated by her supervisor, Ms. Wendt. Appellant submitted witness statements indicating that other postal employees were permitted to play radios in the station and a note from a witness indicating that appellant was denied an extended lunch period. She also submitted a copy of a class action complaint against the employing establishment branch by the employees, an employing establishment climate assessment report and a complaint by the employees against the supervisor, Ms. Wendt. Appellant submitted a medical report from Dr. Abiola Dianne Obayan, a family practitioner, and Dr. Frederick K. Lewerenz, an osteopath. Dr. Obayan's report dated September 5, 2000 summarized her treatment of appellant for her left shoulder injury and anterior chest injury. She noted that on June 19, 2000 appellant was depressed about her physical limitations and reported significant stress at work. Dr. Obayan diagnosed appellant with mental stress disorder related to employment and aggravation of costochondritis secondary to her stressful work environment. Dr. Lewerenz diagnosed appellant with bilateral shoulder bursitis; chest costochondritis and emotional lability -- anxiety neurosis. He noted appellant's unsound physical condition and depressive state have prevented her from performing normal daily activities without pain and was physically and mentally unable to return to employment.

By decision dated April 29, 2002, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated April 29, 2002. Since more than one year elapsed from the date of issuance of the Office's January 18, 2001 merit decision to the date of the filing of appellant's appeal, July 31, 2002, the Board lacks jurisdiction to review this decision.²

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

² See 20 C.F.R. § 501.3(d).

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 --

- (1) end, decrease or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”³

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

In its April 29, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 18, 2001 and appellant's request for reconsideration was postmarked February 28, 2002, which was more than one year after January 18, 2001. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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's decision.⁶

Evidence that 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

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ 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 a merit review in the face of such evidence.¹⁰

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board notes that appellant has not established clear evidence of error in this case. In support of her request for reconsideration, appellant submitted medical reports from Dr. Obayan and Dr. Lewerenz. Dr. Obayan's report dated September 5, 2000 summarized her treatment of appellant for her accepted work-related conditions of left shoulder injury and anterior chest injury. She noted that on June 19, 2000 appellant was depressed about her physical limitations and reported significant stress at work due to her limited-duty position. Dr. Obayan diagnosed appellant with mental stress disorder related to employment and aggravation of costochondritis secondary to her stressful work environment. Dr. Lewerenz diagnosed appellant with bilateral shoulder bursitis; chest costochondritis and emotional lability -- anxiety neurosis. He noted appellant's unsound physical condition and depressive state have prevented her from performing normal daily activities without pain and was physically and mentally unable to return to employment. However, these reports are cumulative of information already in the record which documented appellant's pain from her accepted work injuries and were considered by the Office in the January 18, 2001 decision. The Board has determined that duplicative evidence has no evidentiary value.¹¹ Appellant also submitted witness statements, a climate assessment report and a complaint against the manager; however, this evidence is insufficient to show that appellant was harassed or discriminated against.¹² Therefore, these medical reports and other documents do not establish clear evidence of error as they do not raise a substantial question as

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ See *Daniel Deparini*, 44 ECAB 657 (1993) (where the Board determined that duplicative evidence has no evidentiary value).

¹² *Dennis J. Balogh*, 52 ECAB ____ (Docket No. 99-1512, issued January 25, 2001).

to the correctness of the Office's most recent merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.¹³

Consequently, appellant has not established clear evidence of error on the part of the Office.¹⁴

The decision of the Office of Workers' Compensation Programs dated April 29, 2002 is hereby affirmed.

Dated, Washington, DC
March 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ Appellant submitted additional evidence to the Board; however, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision; see 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting additional evidence to the Office along with a request for reconsideration.