United States Department of Labor
Employees' Compensation Appeals Board

SHARON J. PALMIERI, Appellant	)	
and	)	**Docket No. 04-1668**
	)	**Issued: December 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Herman D. Palmieri, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 21, 2004 appellant filed a timely appeal of an April 9, 2004 decision of the Office of Workers' Compensation Programs that found her request for reconsideration was not timely filed and did not demonstrate clear evidence of error. As the most recent merit decision in appellant's case was issued more than one year before June 21, 2004, the Board does not have jurisdiction to review the merits of appellant's case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

This case has been before the Board on three prior appeals. The Board's decision on the first appeal, issued on April 21, 1992, is the only Board decision to address the merits of appellant's case. The Board found that appellant did not establish that her emotional condition was sustained in the performance of duty on the basis that neither appellant nor her attending

psychologist, Dr. Arnold Freedman, had cited compensable factors of employment.[1] An October 17, 2000 Board decision affirmed the Office's July 6, 1998 decision finding that appellant's March 20, 1998 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.[2]

On appellant's most recent prior appeal, the Board affirmed an April 17, 2002 Office decision finding that her January 26, 2002 request for reconsideration was not timely filed and did not demonstrate clear evidence of error. In the December 2, 2002 decision, the Board stated:

> "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. The mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse by the employing establishment. The disposition of appellant's EEO [Equal Employment Opportunity] 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.
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> "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. 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." (Citations omitted.)[3]

By letter dated September 27, 2003, appellant requested reconsideration and submitted a report from Dr. Freedman dated March 20, 2003. Dr. Freedman stated:

> "[Appellant] contacted me in January 2003 asking me to explain how the incident of disparate treatment to which she was subjected resulted in her disabling emotional condition.

[1] Docket No. 91-1640 (issued April 21, 1992).

[2] Docket No. 99-268 (issued October 17, 2000).

[3] Docket No. 02-1919 (issued December 2, 2002).

"In reviewing and expanding on my [p]sychological [e]valuation/[r]eport of April 2, 1990, copy attached, I concluded now, as I did in April of 1989 after administering the [m]innesota [m]ultiphasic [p]ersonality [i]nventory, the [m]ulti-[m]odal [l]ife [h]istory [i]nventory, the [b]eck [d]epression [i]nventory and having had several office visits with [appellant], that the pattern of symptoms that [appellant] displayed, for which I was treating her, including depression, difficulties handling her anger, passive-aggressive tendencies, and somatic (physical) symptoms are consistent with and a direct consequence of the disparate treatment which was documented in the April 8, 1988 [m]anagement [d]esignee's [d]ecision [o]n [i]nformal EEO [c]omplaint.

"She perceived the disparate treatment, which required that *she alone* had to hit the time clock as unfair and discriminatory. This was intensified with each and every hit of the time clock over a period of several months. This unfair condition led to a build up of tension and frustration for which she had no adequate outlet. The frustration and tension then led to the depression, passive-aggressive and somatic symptoms, much as a tea kettle which is boiling with the lid on kept on tightly starts making noise. She could not express her distress and anger openly. The fact that she was subjected to the disparate treatment led her to conclude that her complaints would not be heard fairly. This added to the cycle of frustration and distress further aggravating her symptom pattern. (Emphasis in the original.)

"I hold the above assessment with a high degree of psychological certainty."

By decision dated April 9, 2004, the Office found that appellant's September 27, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error. Regarding Dr. Freedman's March 20, 2003 report, the Office found:

"The record already contains a detailed medical report from Dr. Freedman. It is only following the Board's latest decision that Dr. Freedman provides a report solely addressing disparate treatment as cause of the claimant's condition. However, in this instant case there is no showing that the agency acted erroneously or abusively in showing disparate treatment and as such it is not a compensable factor of employment."

LEGAL PRECEDENT

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 awarded; or

(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).[4]

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.[5] 20 C.F.R. § 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.[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 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 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.[12]

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

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

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

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

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

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

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

[11] *Leon D. Faidley, Jr.*, *supra* note 4.

[12] *Gregory Griffin*, *supra* note 5.

ANALYSIS

As noted, the most recent merit decision was the Board's decision issued on April 21, 1992. As appellant's September 27, 2003 request for reconsideration was not made within one year of the most recent merit decision, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The only new evidence submitted with appellant's September 27, 2003 request for reconsideration -- a March 20, 2003 report from Dr. Freedman -- does not demonstrate clear evidence of error. This report attributes appellant's emotional condition to disparate treatment to which appellant was subjected when she alone had to hit the time clock, and states that this is the same conclusion Dr. Freedman reached in April 1989. If so, it is not reflected in his April 2, 1990 report, which is the only other report from Dr. Freedman in the record. The April 2, 1990 report does mention that appellant "was required to hit a time clock while none of the other scheme examiners were required to do so," but this is only one of a long list of abusive, harassing and unfair treatment set forth in this same portion of Dr. Freedman's report, and it is not specifically mentioned in his conclusion on causal relationship in the April 2, 1990 report. Dr. Freedman does not explain how this one example of disparate treatment became elevated to the sole cause of appellant's emotional condition between April 2, 1990 and March 20, 2003.

Dr. Freedman also does not explain how appellant's disability, which began on March 17, 1989, is related to the disparate treatment that ended, at the latest, on April 8, 1988 when her supervisor withdrew the letter of warning and required the other scheme examiner to also hit the clock. Dr. Freedman states that this "disparate treatment led her to conclude that her complaints would not be heard fairly," yet her complaint about the letter of warning resulted in withdrawal of that letter and in the ending of the disparate treatment regarding the clock rings. Dr. Freedman also theorizes, in his March 20, 2003 report, that each time appellant hit the time clock it intensified her feeling of unfairness and discrimination. Yet it is not at all clear when appellant first became aware that the other scheme examiner, who worked on a different shift, was not hitting the time clock.

CONCLUSION

Appellant's September 27, 2003 request for reconsideration was not timely filed and the March 20, 2003 report of Dr. Freedman, while supportive of appellant's claim, is insufficient to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member