

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**TAMMY D. COX, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cartersville, GA, Employer**

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**Docket No. 04-1314  
Issued: October 26, 2004**

*Appearances:*  
*Tammy D. Cox, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On April 20, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 22, 2004, which denied her January 15, 2004 reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 7, 2003 and the filing of this appeal on April 20, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

On November 28, 2001 appellant, then a 32-year-old window clerk, filed an occupational disease claim alleging that she sustained "stress" in the performance of duty on or before September 1, 1999. She attributed her condition to a threat by acting supervisor, Sherri Cantrell,

a November 26, 2001 meeting with Postmaster Greg Blake and a December 12, 2001 notice of removal issued as she left work early without permission on November 24, 2001, failed to “clock out” and falsified her payroll record. She also alleged in a December 5, 2001 letter, that Mr. Blake attempted to prejudice her claim by having her complete a traumatic injury claim (Form CA-1), although she claimed an occupational disease. Appellant also asserted that the employing establishment officials tampered with two certified letters addressed to her household. She stopped work on November 26, 2001 and was terminated in December 2001.<sup>1</sup> The record indicates that appellant may have returned to work following her reinstatement on June 12, 2002.

Appellant submitted evidence regarding the events of November 24, 2001 and subsequent disciplinary actions. A November 24, 2001 timekeeping card indicates that she left work at 1:50 p.m., although a clock ring report showed no tour end time. Ms. Cantrell, Mr. Blake, supervisor J.T. Stickney and coworker Michael Rogers submitted statements asserting that appellant left work early without permission at approximately 12:40 p.m. on November 24, 2001. Appellant also submitted reports from Dr. Susan Butler-Sumner, an attending family practitioner, who treated her for stress beginning in 1990. She held appellant off work from November 28, 2001 to October 1, 2002 due to stress while pregnant.

By decision dated February 20, 2002, the Office denied appellant’s claim as she did not establish that the alleged employment factors occurred in the performance of duty.

Appellant then requested an oral hearing, held October 25, 2002. At the hearing, she explained that Ms. Cantrell threatened her in February 2001, as she filed an Equal Employment Opportunity (EEO) complaint. Appellant newly asserted that she was fired in retaliation for filing the complaint, that Ms. Cantrell screened her telephone calls and that her termination was erroneous as it was later rescinded. She submitted additional evidence.

Appellant submitted statements from four coworkers. In a January 3, 2002 letter, Sandra Long asserted that, on November 27, 2001, Mr. Blake stated that he “got upset and lost his temper” when speaking to appellant on November 26, 2001. In an undated statement, Felicia Key asserted that appellant mentioned not feeling well on November 24, 2001. In an undated statement, Brandon Meadows recalled that appellant was upset on November 26, 2001 after leaving Mr. Blake’s office. In a January 9, 2002 statement, Delores Hatch discussed her difficulties with supervisors. Appellant also submitted a June 12, 2002 grievance settlement modifying the December 12, 2001 notice of removal to a seven-day suspension.

By decision dated and finalized January 7, 2003, the Office hearing representative affirmed the Office’s February 20, 2002 decision, finding that appellant had not established any compensable factors of employment. The hearing representative found that there was no evidence of error or abuse regarding the administrative matters of appellant’s termination, reinstatement and being told to file a Form CA-1. He noted that the reduction of the termination to a suspension did not prove that the original sanction was erroneous or abusive. The hearing representative further found that appellant had not established that Ms. Cantrell threatened her.

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<sup>1</sup> The Board notes that in the November 28, 2001 claim form, appellant commented that her “job [was] stressful anyway due to dealing with the public and being short-handed every day.” However, she did not allege that public contact or a personnel shortage caused or aggravated the claimed stress condition.

The hearing representative also found that Ms. Long's statement, that Mr. Blake admitted losing his temper, was insufficient to demonstrate either that the incident occurred as alleged or that it constituted error or abuse.

In an undated letter received by the Office on January 15, 2004, appellant requested reconsideration.<sup>2</sup> She asserted that, in a November 26, 2001 meeting, Mr. Blake accused her of being absent without leave on November 24, 2001, lying about the time she left and falsifying her payroll record. Appellant asserted that she told Mr. Stickney that she left at 1:30 p.m. as she was distracted. She alleged that employees were told to falsify timekeeping records and that Ms. Carter once refused to verify her cash drawer total. Appellant also asserted that on January 5, 2002 Vivian Robinson, an employing establishment injury compensation official, stated that Mr. Blake should not have had her file a Form CA-1. She submitted additional evidence.

Appellant submitted additional documents from her supervisors. In statements dated November 26, 2001 and January 17, 2002, Ms. Cantrell reiterated that appellant left the employing establishment on November 24, 2001 at approximately 12:45 p.m. without permission and without clocking out. Mr. Blake made similar assertions in December 11, 2001 and January 16, 2002 memoranda. In November 29 and December 11, 2001 letters, supervisor, Janice Carter advised appellant to contact her to schedule further investigative interviews. Ms. Carter recommended on December 11, 2001 that appellant be terminated from employment for falsifying her November 24, 2001 payroll record.

Appellant also submitted copies of the employing establishment recordkeeping and grievance procedures, two unsigned and undated coworker statements, undated statements from coworker Sammy Maybern concerning his own experiences at work and a January 14, 2002 note alleging that Ms. Carter timed one of appellant's personal calls on an unspecified date in 2001, appellant's request for sick leave to cover a late arrival on November 24, 28 and 29, 2001 absences, January 2002 forms regarding the denial of a Step 2 grievance related to appellant's termination, a January 16, 2002 note from Mr. Stickney regarding ill employees, statements from coworkers Diane Jacobs, Fannie Blair, Billy Worthington and Bob Davenport alleging improprieties with timekeeping records and a March 19, 1999 arbitration decision regarding employee Ronald Ruten. In an undated statement, Ms. Long asserted that appellant was upset after meeting with Mr. Blake on November 26, 2001.

Appellant also submitted periodic form reports and chart notes from Dr. Butler-Sumner, diagnosing "stress" on January 7 and September 23, 2002.<sup>3</sup>

Appellant also submitted documents previously of record: her November 26 and December 5, 2001 letters; statements by Mr. Meadows, Ms. Key and Mr. Rogers; the

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<sup>2</sup> Appellant newly alleged that employing establishment officials threatened her husband and manufactured evidence against her. However, there is no claim of record regarding these allegations.

<sup>3</sup> Appellant also submitted unsigned February 2, 2002 notes from a psychologist's office. As these forms lack a legible signature and cannot be properly identified, they cannot be considered as probative medical evidence. *Merton J. Sills*, 39 ECAB 572 (1988).

November 24, 2001 timekeeping forms; Mr. Stickney's November 26, 2001 statement; a December 12, 2001 notice of removal; Ms. Long's January 3, 2002 statement; Ms. Hatch's January 9, 2002 statement.

By nonmerit decision dated January 22, 2004, the Office denied appellant's January 15, 2004 request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error. The Office found that the evidence submitted did not corroborate appellant's allegations, establish administrative error or abuse with regard to discipline imposed or otherwise establish that the January 7, 2003 merit decision was in error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>7</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.<sup>9</sup> Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</sup> Evidence which does not raise a

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>6</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>7</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>8</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 5 at 769; *Jesus D. Sanchez*, *supra* note 6 at 967.

<sup>9</sup> *Thankamma Mathews*, *supra* note 5 at 770.

<sup>10</sup> 20 C.F.R. § 10.607(b).

<sup>11</sup> *Thankamma Mathews*, *supra* note 5 at 770.

<sup>12</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> 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.<sup>15</sup> 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's decision.<sup>16</sup> The Board must make 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.<sup>17</sup>

### ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on January 7, 2003. Appellant's undated letter requesting reconsideration, received by the Office on January 15, 2004 was untimely as it was submitted more than one year after the last merit decision.<sup>18</sup> It must now be determined whether her January 15, 2004 request for reconsideration demonstrated clear evidence of error in the Office's January 7, 2003 decision.

In support of her January 15, 2004 request for reconsideration, appellant submitted statements and a transcript of a conversation with an employing establishment official. She admitted leaving work early on November 24, 2001 without permission and without clocking out. Appellant alleged that on November 26, 2001 Postmaster Greg Blake forced her to file an inappropriate claim form and accused her of lying and falsifying records. She asserted that postal officials tampered with her certified mail and allowed other employees to falsify payroll records. Appellant also alleged that Ms. Carter once refused to verify her cash drawer total. The Board finds that appellant's statements are insufficient by themselves to establish that the Office clearly erred in issuing the January 7, 2003 decision. Without probative, reliable corroborating evidence, these statements are insufficient to establish the alleged employment factors as factual.<sup>19</sup> Appellant's statements do not raise a substantial question as to the correctness of the Office's January 7, 2003 decision, which found that appellant had not established any

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<sup>13</sup> *Jesus D. Sanchez*, *supra* note 6 at 968.

<sup>14</sup> *Leona N. Travis*, *supra* note 12.

<sup>15</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>17</sup> *Gregory Griffin*, *supra* note 7.

<sup>18</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>19</sup> *Ruthie M. Evans*, 41 ECAB 416 (1990).

compensable factors of employment. The statements do not *prima facie* shift the weight of the evidence in her favor.<sup>20</sup> Therefore, they are insufficient to establish clear evidence of error.<sup>21</sup>

Appellant also submitted copies of statements by Mr. Blake and supervisors Ms. Carter, Sherri Cantrell and J.T. Pinkney, regarding her unauthorized early departure on November 24, 2001 and falsification of her payroll form. Employing establishment forms corroborate that appellant did not clock out on November 24, 2001 and later reported leaving at 1:50 p.m. Based on this evidence, the employing establishment terminated appellant and later denied her grievance of the termination. She alleged that the termination was erroneous or abusive as it was later modified to a retroactive seven-day suspension. However, as the hearing representative found in the January 7, 2003 decision, rescission or modification of a disciplinary action does not, in and of itself, establish error or abuse that would bring such administrative action under coverage of the Act.<sup>22</sup> Thus, the supervisory and administrative documents do not *prima facie* shift the weight of the evidence in appellant's favor or create a substantial question as to the correctness of the January 7, 2003 decision. They are insufficient to establish clear evidence of error.

Appellant also submitted coworker statements from Ms. Key, Ms. Long, Mr. Meadows and Mr. Rogers corroborating, as a whole, that she felt ill and left work at approximately 12:40 p.m. on November 24, 2001 and was upset after meeting with Mr. Blake on November 26, 2001. These statements support appellant's account of events, but do not contain relevant evidence regarding whether the administrative actions appellant identified constituted error or abuse. Thus, these statements do not raise a substantial question as to whether the Office's January 7, 2003 decision was in error or *prima facie* shift the weight of the evidence in appellants favor. Therefore, they are insufficient to establish clear evidence of error.

Also, in a January 14, 2002 note, Mr. Maybern indicated that Ms. Carter timed one of appellant's personal calls. Although appellant alleged that a supervisor had monitored her personal calls on an unspecified date, Mr. Maybern's statement is too vague to establish the incident as factual. Thus, the note is insufficient to create a substantial question as to the correctness of the Office's January 7, 2003 decision.

Appellant also submitted evidence that does not address any of her allegations: copies of postal administrative procedures; sick leave requests; a January 16, 2002 note from Mr. Stickney about ill employees; two unsigned, undated statements; a March 19, 1999 arbitration decision regarding Ronald Ruten; statements from coworkers Ms. Jacobs, Ms. Blair, Mr. Worthington, Mr. Davenport, Ms. Hatch and Mr. Maybern, alleging difficulties with supervisors and falsification of timekeeping records. Appellant also submitted form reports and chart notes from

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<sup>20</sup> *Thankamma Mathews, supra* note 5.

<sup>21</sup> *Id.*

<sup>22</sup> See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Richard J. Dube*, 42 ECAB 916 (1991) (reduction of a disciplinary letter to an official discussion did not constitute abusive or erroneous action by the employing establishment). The Board notes that in the present case, the record does not contain a grievance decision finding error in an administrative action.

Dr. Butler-Sumner, an attending family practitioner, diagnosing stress. As these documents do not mention any of the employment factors alleged, they are insufficient to *prima facie* shift the weight of the evidence in appellant's favor or raise a substantial question as to the correctness of the Office's January 7, 2003 decision. They are insufficient to demonstrate clear evidence of error.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her January 15, 2004 request for reconsideration do not *prima facie* shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's January 7, 2003 decision and are thus, insufficient to demonstrate clear evidence of error.

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's January 7, 2003 decision, the last merit decision in the case. Therefore, the January 22, 2004 decision of the Office denying appellant's January 15, 2004 request for reconsideration was proper under the law and the facts of this case.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member