

FACTUAL HISTORY

On February 26, 2002 appellant, then a 51-year-old supervisory clerk, filed an occupational disease claim alleging that she sustained stress causally related to factors of her federal employment. In a statement accompanying her claim, appellant attributed her stress to losing her position as supervisor of the file room and working with a coworker who missed work and came to work intoxicated. She maintained that she had to do the coworker's job in addition to her own. Appellant indicated that she had filed an Equal Employment Opportunity (EEO) complaint. The Office assigned the claim file number 16-2037765.

By letter dated November 22, 2002, appellant related that when she became a supervisor her staff did not like the changes she implemented and "eventually filed a complaint against me full of lies..."¹ She stated that management did not provide her with what she required to perform the position. Appellant related that, when she returned to work after being off due to stress, she sat in a corner with no desk, computer or chair and needed security to accompany her to the file room. She asserted that she now worked with an alcoholic.

By decision dated January 10, 2003, the Office denied appellant's claim on the grounds that she did not establish that she sustained an emotional condition in the performance of duty. The Office found that appellant had not established any compensable employment factors.

In an undated letter, received by the Office on July 14, 2004, appellant requested reconsideration. Appellant related that she was currently unable to work due to her health and noted that she had asked for "whistleblower protection." She submitted a list of her EEO activity, medical reports, and the last page of a hearing representative's decision reversing an Office decision and accepting a claim for situational depressive disorder and anxiety.

By decision dated July 28, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² 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.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ The Office procedures state

¹ In a statement dated June 19, 2002, the employing establishment noted that appellant had requested "a demotion to [a] nonsupervisory position." In a statement dated October 28, 2002, an official with the employing establishment noted that appellant was reassigned from her position as a supervisor due to allegations that she was "creating a hostile work environment."

² 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997).

that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which 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. 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. 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.⁸ 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.⁹

ANALYSIS

The Office found that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁰ The last merit decision in this case was the Office's January 10, 2003 decision denying appellant's emotional condition claim on the grounds that she failed to establish a compensable factor of employment. As appellant's July 14, 2004 letter requesting reconsideration was submitted more than one year after the last merit decision of record, it was

⁵ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ *Dorletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004).

⁸ *Id.*

⁹ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁰ *Veletta C. Coleman*, *supra* note 4; *Larry L. Lilton*, 44 ECAB 243 (1992).

untimely. Consequently, she must demonstrate “clear evidence of error” by the Office in denying her claim for compensation.¹¹

Appellant submitted a list of her EEO activity; however, the record contains no resolution of any EEO complaint or finding regarding actions taken by the employing establishment. This evidence does not address the pertinent issue of whether appellant has established a compensable employment factor. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹²

Appellant also enclosed the last page of an Office hearing representative’s decision regarding an unknown claimant; however, as this evidence does not address the claim at hand, which is whether appellant sustained an emotional condition due to compensable work factors, it is insufficient to establish clear evidence of error.¹³

Regarding the medical evidence submitted, the Board notes that it is not pertinent as the Office’s January 10, 2003 decision found that appellant did not sustain an emotional condition because she had not substantiated a compensable work factor. Only when a compensable work factor has been established is the medical evidence relevant to determining whether appellant has established an employment-related emotional condition.¹⁴

The evidence submitted in support of appellant’s untimely reconsideration request is irrelevant and thus insufficient to establish clear evidence of error. To establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office’s decision.¹⁵ The Board finds that the evidence submitted on reconsideration fails to meet this standard.

On appeal appellant contended that she changed her address with the EEO Commission repeatedly but all information was sent to her old address. She also noted that she changed her address with the employing establishment. The Office, however, is part of the Department of Labor, which is a government entity separate from the EEO Commission and appellant’s employing establishment. There is no evidence that appellant notified the Office of an address change until her untimely request for reconsideration on July 14, 2004. Appellant has not demonstrated any error on the part of the Office relative to issuing its decisions on her claim.

Appellant further described, on appeal, extensive problems at her employing establishment and noted that she has pending EEO claims. She did not, however, submit any evidence to the Office, such as an EEO decision, supporting her allegations. It is appellant’s

¹¹ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹² *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹³ *Id.*

¹⁴ *See Parley A. Clement*, 48 ECAB 302 (1997).

¹⁵ *See Veletta C. Coleman*, *supra* note 4.

burden to support his or her allegations with probative and reliable evidence; her perceptions alone are insufficient to establish an employment-related emotional condition.¹⁶

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review on July 28, 2004. The Board finds that appellant's reconsideration request was untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2004 is affirmed.

Issued: January 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁶ *Roger Williams*, 52 ECAB 468 (2001).