United States Department of Labor
Employees' Compensation Appeals Board

YOUNGHE OAK, Appellant	)	
and	)	**Docket No. 06-447**
	)	**Issued: April 19, 2006**
DEPARTMENT OF THE ARMY, DEFENSE LANGUAGE INSTITUTE, Monterey, CA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 19, 2005 appellant filed a timely appeal of a November 17, 2005 decision of the Office of Workers' Compensation Programs, finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued June 29, 2004, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly refused to reopen the case for merit review on the grounds that the application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

On April 19, 2004 appellant, then a 63-year-old assistant professor, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition as a result of her

federal employment. She submitted statements alleging incidents with department chairpersons, Yong Kim and Ti Han, as well as the Dean, Hoam N. Kanbar. Appellant also alleged she was exposed to a student using profanity. By decision dated June 29, 2004, the Office denied the claim for compensation. The Office found that appellant had not established any compensable work factors with respect to her claim.

Appellant submitted a request for a hearing before an Office hearing representative on July 24, 2004. In a letter to the Office's Branch of Hearings and Review dated November 5, 2004, her representative stated in pertinent part, "please withdraw [appellant's] request for an oral hearing. We intend to file a request for reconsideration."

The record contains a January 4, 2005 letter from appellant stating that she had requested the Office return her case record to San Francisco so that she could request reconsideration, but the Office had not responded. In a letter dated March 30, 2005, the Branch of Hearings and Review advised her that her request for a hearing had been withdrawn and the case record had been returned. On May 17, 2005 the Office advised appellant's representative that a copy of the case record was enclosed.

By letter dated August 23, 2005, appellant, through her representative, requested reconsideration of her claim. She argued that her reaction to a new assignment and the work involved was a compensable work factor. Appellant submitted a memorandum dated September 18, 2003 from members of Mr. Kim's staff regarding allegations of unprofessional conduct by Mr. Kim. She alleged that the staff members who signed the memorandum all quit or were transferred to new assignments concurrently with her and it "strains credibility" to accept Mr. Kanbar's statement that this was a routine reorganization. According to appellant, neither Mr. Kanbar, nor Mr. Kim explicitly rebutted her allegations that Mr. Kim yelled at her, so it should be accepted as factual. In addition, appellant argued that the warnings and reprimands for not following leave procedures were administrative error. Appellant submitted a copy of the employing establishment labor agreement, including leave policies and argued that she should not have been reprimanded for calling in her request for emergency leave prior to her tour of duty. She also submitted additional medical evidence.

By decision dated November 17, 2005, the Office determined that appellant's request for reconsideration was untimely. The Office further determined that the request for reconsideration failed to show clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for reconsideration within one year of the date of that decision.[1] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[2]

[1] 20 C.F.R. § 10.607(a).

[2] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

The Office, however, may not deny an application for reconsideration solely on the grounds that the application was not timely filed. When an application for reconsideration is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[3] Office regulations and procedure provide 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(a), if the claimant's application for reconsideration shows clear evidence of error on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] 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.[8] 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.[9] 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.[10]

ANALYSIS

On appeal, appellant contends that the application for reconsideration should be considered timely, in that: (1) she indicated in November 2004 that she wanted reconsideration rather than an oral hearing and; (2) the Office delayed in sending appellant's representative a copy of the record until May 2005 and this effectively delayed her ability to file a timely reconsideration. With respect to the first argument, the record does not establish that the November 5, 2004 letter to the Branch of Hearings and Review was a request for

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[3] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[4] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides: "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 (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id*. at Chapter 2.1602.3c.

[5] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[6] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[7] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[8] *See Leona N. Travis, supra* note 6.

[9] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[10] *Leon D. Faidley, Jr., supra* note 2.

reconsideration. The letter advised the Branch of Hearings and Review that appellant wished to withdraw her request for a hearing as she intended to file a reconsideration request; it does not represent an application for reconsideration.[11] As to the second argument, she was not precluded from requesting reconsideration at any time during the year following the June 29, 2004 merit decision. While appellant may have chosen to wait until she received a copy of the case file, her ability to request reconsideration was not dependent on receipt of the case record. Moreover, her representative acknowledged that the Office sent a copy on March 17, 2005 and appellant had until June 29, 2005 to request reconsideration in a timely manner.

The actual application for reconsideration was dated August 23, 2005. Since this is more than one year after the June 29, 2004 final decision, it is untimely. The issue then is whether the evidence establishes clear evidence of error by the Office.

As noted above, the clear evidence of error standard is a difficult standard requiring the evidence be sufficient to *prima facie* shift the weight of the evidence to appellant. In this case, she argues that the evidence establishes compensable work factors, but the evidence of record is not of sufficient probative value to show clear evidence of error. Appellant argues that the evidence shows error or abuse in her reassignment.[12] The memorandum regarding Mr. Kim, however, does not involve her and does not itself show how appellant's reassignment was administrative error. Appellant did not submit evidence establishing verbal abuse, nor did she establish administrative error regarding any disciplinary action. The labor agreement submitted does not establish that any specific action of the employing establishment was erroneous in this case.

There is no evidence of such probative value that it would establish a compensable work factor and show clear evidence of error by the Office in denying the claim. The Board accordingly finds that the evidence is not sufficient to establish clear evidence of error.

CONCLUSION

Appellant's August 23, 2005 application for reconsideration was untimely and failed to show clear evidence of error.

[11] 20 C.F.R. § 10.606 provides that an application for reconsideration should be sent to the address as instructed in the appeal rights accompanying the final decision; it must be in writing and set forth arguments.

[12] As the Office noted in its June 29, 2004 decision, an emotional reaction to an administrative or personnel matter is not covered unless there is evidence of error or abuse by the employing establishment. *See, e.g.*, *Kim Nguyen*, 53 ECAB 127 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2005 is affirmed.

Issued: April 19, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board