United States Department of Labor
Employees' Compensation Appeals Board

D.O., Appellant	)	
and	)	**Docket No. 06-1106**
	)	**Issued: August 7, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
D.O., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 11, 2006 appellant filed a timely appeal from the March 3, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. Because the Office has not issued a decision on the merits of the claim within the year prior to the filing of this appeal, the Board has no jurisdiction to review the merits of this case.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her present appeal with the Board on April 11, 2006, the only decision properly before the Board is the Office's March 6, 2006 nonmerit decision denying appellant's request for reconsideration. *See Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On April 28, 2004 appellant, then a 49-year-old customer service supervisor, filed a traumatic injury claim alleging that she sustained a stress-related injury on April 27, 2004, when one of her employees threatened her life by stating, "You're going down" and another employee took her picture without her consent. In an accompanying narrative statement, she stated that both employees had been rude, disrespectful and obnoxious in the past and had acted in a threatening manner toward her.

Appellant submitted a note dated April 29, 2004 from Dr. Joseph R. Eraci, a treating physician, who opined that appellant could not return to work because of fear.

On May 20, 2004 the Office informed appellant that the information submitted was insufficient to establish her claim and advised her to submit witness statements and a comprehensive medical report, with a diagnosis and opinion as to the cause of her condition. She submitted a note dated May 13, 2004 from Dr. John Ghesquiere, a treating physician, who diagnosed "acute stress reaction to occupational stress." In a report dated June 15, 2004, Virginia M. Stack, a licensed clinical professional counselor, opined that appellant suffered from post-traumatic stress disorder (PTSD) as a direct consequence of having been threatened while at work on April 27, 2004 by a mail carrier, and by being photographed by another employee. In a June 29, 2004 attending physician's report, Dr. Ghesquiere noted that on April 27, 2004 appellant had been physically threatened by subordinates, and that another employee had photographed her on that day. He provided a diagnosis of acute stress disorder.

By decision dated August 5, 2004, the Office denied appellant's claim, finding that the evidence submitted was insufficient to establish that she had sustained an emotional condition in the performance of duty. Specifically, the Office determined that the evidence of record failed to demonstrate that the incidents occurred at the time, place and in the manner alleged.

The record contains a statement from Juan Trevino. He indicated that, on April 27, 2004, he overheard appellant call Ms. Goss a "mother fuckin bitch." Mr. Trevino stated that he then told appellant that she "was going down." He stated, "I said that meaning that the EEO case that I have against her."

On September 13, 2004 appellant requested reconsideration.

The record contains a "Report of Unusual Occurrence" dated April 27, 2004 and signed by Theresa Crayton, customer service manager. She stated that, on that date, appellant reported to her that Mr. Trevino had threatened her by saying to her, "You're going down." Appellant also reported that Ms. Goss took her picture twice without permission. She stated that she felt intimidated by these actions and that she left work despondent. In an April 27, 2004 statement, Ms. Goss indicated that she took appellant's picture for Kim Latiker's photo album. She also stated that, as she walked away, she heard appellant call her a "mother fucking bitch."

By decision dated December 6, 2004, the Office denied modification of its August 5, 2004 decision. The record reveals that the decision was mailed to appellant at 3972 Van Buren Street, Bellwood, IL 60104.

By letter dated September 12, 2005, the Office advised appellant that, pursuant to her request, a copy of the December 6, 2005 decision was enclosed. The letter and copy of the December 6, 2005 decision was addressed to appellant at 3922 Van Buren Street, Bellwood, IL 60104.

In a memorandum of a September 1, 2005 telephone call with appellant, Michael Muiyn noted that appellant had contacted the Office regarding the status of her request for reconsideration. Mr. Muiyn indicated that upon reviewing the file, he realized that, because it had been sent to an incorrect address, appellant had never received the decision.

The record also contains a record of a November 29, 2005 telephone call in which appellant asked Mr. Muiyn if she would be granted an extension of time regarding her appeal, in that the decision had originally been sent to the wrong address. Mr. Muiyn told appellant that "deadlines for appeal rights of reconsideration decision begin with letter dated September 12, 2005."

On a form dated December 9, 2005, appellant requested reconsideration. The record contains an envelope date stamped December 10, 2005. In a letter dated November 20, 2005, appellant reiterated her allegations that the threats made by Mr. Trevino and the actions of Ms. Goss caused her acute PTSD. Appellant denied allegations that she had verbally assaulted Ms. Goss and contended that Ms. Goss and Mr. Trevino had conspired to demean her character of professionalism. She stated that Mr. Trevino's actions were a serious violation of the policies of the employing establishment and that she had filed an assault complaint with the Chicago police.

By decision dated March 3, 2006, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[3]

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[4]

[2] 5 U.S.C. § 8101 *et seq.*

[3] 20 C.F.R. § 10.605.

[4] 20 C.F.R. § 10.606.

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[5] Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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. 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.[8]

ANALYSIS

In its March 3, 2006 decision, the Office denied appellant's December 10, 2005 request for reconsideration, finding that it was not timely filed and failed to present clear evidence of error. The Board, however, finds that it was timely and that the Office evaluated the request under an improper standard of review.

The most recent merit decision in this case was dated December 6, 2004. However, the evidence established that the decision was mailed to an incorrect address. Upon appellant's inquiry, Michael Muiyn of the Office discovered that the December 6, 2004 decision had been sent to 3972 Van Buren Street, rather than to appellant's address of record, 3922 Van Buren Street, and that appellant had never received a copy of the decision. On September 12, 2005 the Office forwarded a copy of the December 6, 2004 decision to appellant at her 3922 Van Buren Street address. On November 29, 2005 when appellant asked if she would be granted an extension of time in order to file an appeal, she was told that the deadlines for appeal rights

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[5] *Donna L. Shahin*, 55 ECAB ___ (Docket No. 02-1597, issued December 23, 2003).

[6] 20 C.F.R. § 10.608.

[7] *See Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005); *see also Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004).

[8] *See Alberta Dukes, supra* note 7.

relating to her reconsideration decision would begin with the September 12, 2005 letter. The Board finds that the December 6, 2004 decision was effectively reissued when it was mailed to appellant on September 12, 2005, in that the Office gave proper notice to appellant of its decision for the first time on that date.[9] Accordingly, appellant had until September 12, 2006 to file a timely request for reconsideration.

Appellant's request for reconsideration was postmarked December 10, 2005, clearly within the one-year time limitation.[10] The Board finds that appellant timely filed her request for reconsideration within one year of the most recent merit decision that was reissued on September 12, 2005. The Board further finds that the Office improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request, pursuant to section 10.606(b)(2) of the Office's procedures. Following the application of the proper standard of review and any further development, the Office will issue an appropriate decision.

CONCLUSION

The Board finds that appellant's December 10, 2005 request for reconsideration was timely filed and was improperly reviewed under the clear evidence of error standard.

[9] The Board has held that a decision under the Act is not deemed to have been issued unless appellant has been sent a copy of the decision. *Belinda J. Lewis,* 43 ECAB 552 (1992). Since the record in this case indicates that the Office's December 6, 2004 decision was sent to an improper address and was not received by appellant, technically, it was not properly issued. However, this action by the Office constituted harmless error, in that the time for filing an appeal commenced on September 12, 2005 when the Office resent a copy of the December 6, 2004 decision to appellant.

[10] Chapter 2.1602.3(b)(1) of the Office Procedure Manual provides that timeliness for a reconsideration request is determined by the postmark on the envelope, if available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.1602.3(b)(1) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 3, 2006 is set aside and this case is remanded for further proceedings consistent with this decision.

Issued: August 7, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board