United States Department of Labor
Employees' Compensation Appeals Board

ADA J. McKINSIE, Appellant	)	
and	)	**Docket No. 06-427**
	)	**Issued: March 10, 2006**
U.S. POSTAL SERVICE, PEARL RIVER	)	
Pearl River, LA, Employer	)	

Appearances:
Ada J. McKinsie, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 16, 2005 appellant filed a timely appeal from a September 14, 2005 decision of the Office of Workers' Compensation Programs denying her August 25, 2005 request for reconsideration 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 February 25, 2002 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501(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 present clear evidence of error.

FACTUAL HISTORY

On September 1, 2001 appellant, then a 43-year-old clerk, filed a claim for stress and secondary hair loss related to accepting a job offer on April 26, 2001.[1] She returned to work on April 23, 2001 following an accepted January 5, 1989 incident in which she was robbed at gunpoint in the employing establishment parking lot.[2] Appellant asserted that Cynthia Staes, an employing establishment injury compensation specialist, erred by offering her a rehabilitation position in the part-time flexible clerk craft because her date-of-injury position was full time. In a September 27, 2001 letter, Ms. Staes explained that the April 2001 job offer was for a full-time position in the part-time flexible craft and that this placement did not violate procedures. Postmaster William J. Read characterized Ms. Staes' April 26, 2001 conference call with appellant as "professional and clear."

By decision dated December 6, 2001, the Office denied appellant's claim on the grounds that the April 26, 2001 incident was an administrative matter not arising in the performance of duty. The Office found that appellant did not establish any error or abuse in the employing establishment's handling of the job offer.

In a December 31, 2001 letter, appellant requested reconsideration. She again asserted that the employing establishment violated procedures by offering her a full-time position in the part-time flexible craft as she had been a full-time clerk. She submitted Equal Employment Opportunity grievance documents alleging discrimination on the basis of race, sex and disability. The employing establishment submitted a January 25, 2002 letter asserting that the rehabilitation job offer was a full-time position and was therefore in compliance with appropriate procedures.

By decision dated February 25, 2002, the Office denied modification of its December 6, 2001 decision, finding that appellant had not established any compensable factors of employment. The Office found that the evidence submitted on reconsideration failed to establish administrative error or abuse.

In a January 28, 2003 letter, appellant requested reconsideration. She reiterated her prior arguments that the April 2001 job offer did not comply with procedures. Appellant submitted copies of a union arbitration decision. She also submitted a duplicate copy of the employing establishment's January 25, 2002 letter.

By decision dated March 7, 2003, the Office denied reconsideration on the grounds that the evidence submitted was irrelevant. The Office found that appellant's letter and accompanying documents did not indicate that the Office erred in denying her claim.

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[1] In an October 24, 2001 letter, the Office advised appellant of the additional factual and medical evidence needed to establish her claim, including a detailed description of the April 26, 2001 meeting and conference call.

[2] The Office accepted the January 5, 1989 incident under File No. 16-0155991. This claim is not before the Board on the present appeal.

In a March 17, 2003 letter, appellant requested reconsideration.[3] She asserted that Ms. Staes did not have the authority to instruct her to sign the job offer. Appellant also contended that the offered position was not suitable work as only one of her physicians approved it. She asserted that Ms. Staes was abusive to her by instructing her to return to work against medical advice. Appellant submitted chart notes and duty status reports dated from March 10, 2000 to February 26, 2003 from Dr. Beverly Stubblefield, Ph.D an attending licensed clinical psychologist. Appellant also submitted February 22, 2000 and May 8, 2001 reports from Dr. Serge Celestine, an attending psychiatrist, who approved the offered position on February 13, 2001. In a July 8, 2003 letter, appellant again requested reconsideration, reiterating that Ms. Staes had no authority to require her to sign the job offer on April 26, 2001.

By decision dated July 22, 2003, the Office denied reconsideration on the grounds that appellant's request was untimely filed and failed to present clear evidence of error. The Office found that the medical evidence submitted was irrelevant to the underlying issue of whether appellant had established a compensable factor of employment. The Office further found that appellant's statements did not establish administrative error or abuse that would bring the April 26, 2001 incident under coverage of the Act.

In an August 25, 2005 letter, appellant requested reconsideration. She reiterated her contention that Ms. Staes did not have the authority to require her to sign the April 2001 job offer. Appellant enclosed her diagram of the employing establishment's chain of command. She also submitted an undated employing establishment letter regarding her duty status after March 7, 2003.

By decision dated September 14, 2005, the Office denied appellant's August 25, 2005 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. The Office found that appellant's August 25, 2005 request was untimely as it was filed more than one year after the February 25, 2002 merit decision. The Office further found that appellant's August 25, 2005 letter and the undated employing establishment letter did not establish that the Office erred in denying her claim or that the employing establishment erred in requiring her to sign the April 2001 job offer.

LEGAL PRECEDENT

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that

[3] Appellant requested that the Office double File No. 16-0155991 with File No. 062044188. In March 25 and 31, 2003 letters, the Office explained that the two claims could not be doubled as they concerned two distinct work incidents. The Office noted that File No. 16-0155991 remained open for medical treatment.

[4] 5 U.S.C. § 8128(a).

[5] *Thankamma Mathews,* 44 ECAB 765, 768 (1993).

[6] *Thankamma Mathews*, *supra* note 5; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

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.[7] 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).[8]

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.[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] The Board will 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.[17]

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[7] 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).

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

[9] *Thankamma Mathews, supra* note 5 at 770.

[10] 20 C.F.R. § 10.607(b).

[11] *Thankamma Mathews, supra* note 5 at 770.

[12] *Leona N. Travis,* 43 ECAB 227, 241 (1991).

[13] *Jesus D. Sanchez, supra* note 6 at 968.

[14] *Leona N. Travis, supra* note 12.

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

[16] *Leon D. Faidley, Jr.,* 41 ECAB 104, 114 (1989).

[17] *Gregory Griffin*, *supra* note 7.

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on February 25, 2002. Appellant's August 25, 2005 letter requesting reconsideration was untimely filed as it was submitted more than one year after the last merit decision.[18] It must now be determined whether appellant's August 25, 2005 request for reconsideration demonstrated clear evidence of error in the Office's February 25, 2002 decision.

Appellant's August 25, 2005 letter asserted that Ms. Staes, an employing establishment injury compensation specialist, did not have the authority to direct her to accept the April 2001 job offer. The Board finds that this contention does not raise a substantial question as to whether the Office's February 25, 2002 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error. The undated employing establishment letter does not address the alleged April 26, 2001 incident and is thus irrelevant to the claim. Therefore, it is insufficient to raise a substantial question as to the correctness of the Office's February 25, 2002 decision.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her August 25, 2005 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 February 25, 2002 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 February 25, 2002 decision, the last merit decision in the case. Therefore, the September 14, 2005 decision of the Office denying appellant's August 25, 2005 request for reconsideration was proper under the law and the facts of this case.

[18] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2005 is affirmed.

Issued: March 10, 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