

FACTUAL HISTORY

On October 1, 2003 appellant, then a 54-year-old senior financial analyst, filed an occupational disease claim alleging that she sustained severe anxiety, depression and heart problems due to employment-related stress. She asserted that these conditions were “a result of five years of continuous stress and a perception of a hostile work environment.”² Appellant claimed that she perceived a hostile work environment since being transferred from the Memphis office to the Puerto Rico office five years prior. She believed that her “new position apparently was not accepted” by the staff in the Puerto Rico office. In October 2000, the “out-stationed employees” in Puerto Rico were eliminated and that in March 2001 she accepted a position in Florida. Appellant claimed that the employing establishment denied her hardship request to stay in Puerto Rico for additional months in order to resolve some family situations. After she filed a grievance, “new and different tense situations were increased.”³ Appellant stopped work on July 22, 2003.

By letter dated March 30, 2003, the Office requested that appellant submit additional factual and medical evidence in support of her claim. Appellant submitted medical reports detailing her emotional and physical problems, including several reports of Dr. Jose R. Rodriguez Cay, an attending Board-certified psychiatrist.

By decision dated December 31, 2003, the Office denied appellant’s emotional condition claim on the grounds that she did not establish any compensable employment factors. The Office noted that appellant did not submit a clear statement detailing the specific employment factors which she believed caused her condition or otherwise submit evidence sufficient to support the existence of employment factors.

The record contains an undated letter in which appellant asserted that she called the Office in February 2005 and asked about a reconsideration request she submitted to the Office in November 2004. The Office responded that it had not received any such request.⁴

On May 25, 2005 the Office received a large submission of documents from appellant. This packet included a November 11, 2004 letter in which she requested reconsideration of the Office’s December 31, 2003 decision.⁵ Appellant provided additional details about the factors which she believed caused her to develop an emotional condition. She claimed that she

² On the claim form, appellant’s supervisor since February 2003 stated that appellant had expressed concerns about “unfair treatment” from supervisors, particularly with regard to work assignments and performance evaluations. He indicated that in July 2003 appellant told him that she was having problems with union members.

³ Appellant also stated, “I made some requests that were accepted by the supervisors in Memphis, without taking in consideration the negative effect over my son and family. The Department of Defense did not sustain the reasons used to make the determinations.”

⁴ On January 12, 2005 a copy of an envelope which was addressed to the Office and postmarked November 9, 2004 was added to the record. On March 1, 2005 a domestic return receipt listing the Office’s address and stamped November 10, 2004 was added to the record. Neither document lists the name of the sender or was accompanied by any other documents.

⁵ In a May 10, 2005 letter, appellant asserted that she sent this letter to the Office in November 2004.

sustained stress because she had to travel a great deal and had to perform exhausting work in hurricane areas “under hard weather, physical distress and rough conditions.” Appellant asserted that in 1998 and 2000 she was discriminated against because she did not receive performance-based awards which she deserved. She developed stress due to her union activities which included attending meetings and preparing grievances. Appellant claimed that she was subjected to a hostile work environment because she felt that other staff members did not accept her presence in the office. She was unfairly excluded from meetings and parties and in October 2000 her work division was improperly terminated. Her requests concerning her son’s education were unfairly denied and that she received unfair performance evaluations. Appellant asserted that in 1998 a supervisor shouted at her and insulted her regarding a letter she had prepared.

Appellant submitted documents concerning matters such as leave requests, work assignments, job transfers, training programs, housing grants and travel expenses. A number of these documents were email transmissions that were sent or received by her. Some of the documents related to appellant’s activities as a union official, including an undated document in which she asserted that the employing establishment gave her a lower performance rating in retaliation for her union activities. Several documents related to appellant’s concerns that, due to the classification of her job title, her son was denied the ability to matriculate at a Department of Defense school. Another document mentioned that appellant had not been accepted to participate in a leadership course. She submitted claim forms from several prior compensation claims and records of a grievance filed against the employing establishment concerning her performance evaluations.⁶

By decision dated August 31, 2005, the Office denied appellant’s request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate 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 her application for review within one year of the date of that decision.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees’ Compensation Act.⁸

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application

⁶ Appellant also submitted additional medical reports detailing her emotional and physical problems, including a number of reports detailing her cardiac condition.

⁷ 20 C.F.R. § 10.607(a).

⁸ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

establishes “clear evidence of error.”⁹ 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 review 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 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 decision.¹⁶

ANALYSIS

In its August 31, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration of the denial of her emotional condition claim. She claimed that she filed a reconsideration request in November 2004, but the evidence of record does not support such an assertion.¹⁷ Appellant’s reconsideration request was filed on May 25, 2005,

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ 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.

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁷ On January 12, 2005 a copy of an envelope which was addressed to the Office and postmarked November 9, 2004 was added to the record. On March 1, 2005 a domestic return receipt listing the Office’s address and stamped November 10, 2004 was added to the record. Neither document lists the name of the sender or was accompanied by any other documents. The Office did not receive appellant’s November 11, 2004 letter requesting reconsideration and detailing her claimed employment factors until May 25, 2005.

more than one year after the Office's December 31, 2003 decision and, therefore, she must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its December 31, 2003 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In support of her untimely reconsideration request, appellant submitted a November 11, 2004 letter in which she provided additional details about the factors which she believed caused her to develop an emotional condition. She claimed that she had to engage in exhausting and difficult travel for work and claimed that she was subjected to harassment, discrimination and improper employing establishment decisions. For example, appellant asserted that she was discriminated against because she did not receive performance-based awards which she deserved, that other employees did not accept her presence in the workplace and excluded her from meetings and parties, that her work division was improperly terminated, that her requests concerning her son's education were unfairly denied, that she received unfair performance evaluations and that a supervisor shouted at her and insulted her. She also alleged stress due to performing her union activities.

The Board notes that the submission of this argument would not show clear error in the Office's prior decision, because such arguments are of little relevance in the absence of evidence which would establish the incidents occurred as alleged. The Office denied appellant's claim on the grounds that she had not established any compensable employment factors and appellant's mere assertions regarding these claimed factors are not sufficient to establish their existence.¹⁸

Appellant submitted numerous documents concerning various matters, but these documents are not relevant to the main issue of the present case because they provide no support for appellant's assertions regarding her claimed employment factors. For example, she submitted records of a grievance filed against the employing establishment concerning her performance evaluations, but the records provide no indication that she received a favorable decision which would establish error or abuse by the employing establishment in this administrative matter.¹⁹ Appellant submitted letters in which she expressed concerns that, due to the classification of her job title, her son was denied the ability to matriculate at a Department of Defense school, but she did not submit any evidence showing that this action was improper. In other documents, she suggested that she was subjected to harassment, discrimination and improper employing establishment decisions, but she did not submit any documents to support these apparent allegations.

¹⁸ The Board has noted that, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). Moreover, an administrative or personnel matter, such as an action concerning performance evaluations, transfers, leave requests or work assignments, will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment. *See Richard J. Dube*, 42 ECAB 916, 920 (1991). In addition to establishing an employment factor, a claimant must submit medical evidence showing that the claimed condition was related to an employment factor. *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁹ *See supra* note 18.

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's December 31, 2003 decision and the Office properly determined that she did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 31, 2005 decision is affirmed.

Issued: May 11, 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