

**United States Department of Labor
Employees' Compensation Appeals Board**

D.N., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
East Hartford, CT, Employer)

**Docket No. 07-105
Issued: April 5, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 16, 2006 appellant filed a timely appeal from the Office of Workers Compensation Programs nonmerit decision dated September 26, 2006 denying her request for further merit review of her claim. Because more than one year has elapsed between the most recent merit decision of the Office dated December 6, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this appeal pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.¹ In a decision dated March 15, 2002, the Board found that the case was not in posture for decision with regard to whether appellant sustained an emotional condition in the performance of duty. The Board noted that the Office, in its April 20, 2001 decision, denied appellant's claim on the basis that no factors of employment were established as compensable. The Board determined that the Office had not addressed all of the relevant evidence submitted prior to the issuance of its April 20, 2001 decision and remanded the claim for further review. In a May 15, 2006 decision, the Board affirmed an October 14, 2005 Office decision finding that the evidence was insufficient to warrant a merit review of the prior decision.² The facts and the history contained in the prior appeals are incorporated by reference.

By letters dated May 28³ and June 20, 2006, appellant requested reconsideration. She alleged that the December 12, 2005 report from Dr. Jerome M. Schnitt, a Board-certified psychiatrist, constituted relevant and pertinent new medical evidence not previously considered by the Office. Appellant reiterated her previous allegations that she was harassed and intimidated by her postmaster to the point that he made it impossible for her to function at her job. She alleged that the "facts of this case speak for themselves."

In a report dated December 12, 2005, Dr. Schnitt noted appellant's history of injury and treatment which included ongoing criticism, intrusiveness and intimidation tactics by her postmaster, Sean Ford. He noted that appellant related that she began to have problems sleeping, and experienced anxieties severe enough that her "whole insides were shaking." Dr. Schnitt related that she was diagnosed with hypertension and an abnormal heart rhythm which were attributed to the work-related stress. He advised that appellant had increasing difficulties with emerging panic attacks and depression and that she related that she often felt faint, had difficulty responding to simple questions and had focusing on tasks. Dr. Schnitt noted that appellant related that once Mr. Ford left the employing establishment, her symptoms began to diminish and she was able to "do her job well again." He advised that appellant did not previously have these symptoms. Dr. Schnitt conducted a mental examination and opined that appellant continued to experience anxiety and dysthymia related to the work-related incidents, which he opined occurred in the interactions with Mr. Ford, when he was postmaster. He opined that appellant had "some elements of a post-traumatic picture, though does not meet full criteria for a post-traumatic stress disorder." Dr. Schnitt advised that she may have been qualified for an acute stress disorder at the time the events were taking place and concluded that appellant's medical and mental health problems were associated with her work at the time she applied for medical time off.

¹ Docket No. 01-1630 (issued March 15, 2002).

² Docket No. 06-521 (issued May 15, 2006).

³ The record reflects that appellant's May 28, 2006 letter was received by the Board. In a June 12, 2006 letter, she was advised by the Board that it appeared that she was requesting reconsideration and appellant's correspondence was being returned.

By decision dated September 26, 2006, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁵

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁶ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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

⁴ 5 U.S.C. §§ 8101-93.

⁵ 5 U.S.C. § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

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 the 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.¹⁰

ANALYSIS

In its September 26, 2006 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on December 6, 2004. Appellant's May 28 and June 20, 2006 letters requesting reconsideration were submitted more than one year after the December 6, 2004 merit decision and were, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly establish that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. Appellant's underlying emotional condition claim was denied because the medical evidence did not show that her emotional condition was due to the established work factors. The underlying issue in this case is whether appellant's emotional condition was caused or related to a compensable factor of employment. In this case, the only accepted compensable factor was that Mr. Ford retaliated against appellant for filing a grievance over bargaining unit work.

With her requests for reconsideration, appellant submitted the December 12, 2005 report of Dr. Schnitt. While Dr. Schnitt generally noted that Mr. Ford engaged in ongoing criticism, intimidation and various tactics and advised that appellant's symptoms subsided after he left the employing establishment, he did identify the compensable factor which was accepted by the Office and relate that factor to her condition. He also concluded that appellant's medical and mental health problems were associated with her work, despite the fact that she was no longer interacting with Mr. Ford. However, Dr. Schnitt did not explain how he arrived at this conclusion. The Board finds this report insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Office procedures provide that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

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.¹¹ Therefore, this evidence is insufficient to show that the Office erred in denying appellant's claim on the grounds that she failed to meet her burden of proof to establish an emotional condition due to the claimed employment factors.

Appellant also reiterated her arguments that she was harassed and victimized by her postmaster, Mr. Ford. However, these arguments duplicate previous arguments and are insufficient to establish clear evidence of error.¹²

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in denying her emotional condition claim.¹³ Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004). See *D.D.*, 58 ECAB ____ (Docket No. 06-1148, issued November 30, 2006).

¹² *George C. Vernon*, 54 ECAB 319 (2003).

¹³ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2006 is affirmed.

Issued: April 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board