United States Department of Labor
Employees' Compensation Appeals Board

S.F., Appellant	)	
and	)	**Docket No. 09-270**
	)	**Issued: August 26, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 24 and October 21, 2008 nonmerit decisions denying her request for merit review of an April 27, 2006 Office decision denying her emotional condition claim. Because more than one year has elapsed between the Office's last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of her emotional condition claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's October 26, 2007 request for merit review; and (2) whether the Office properly denied appellant's June 8, 2008 request for merit review on the grounds that the request was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated November 1, 2006, the Board affirmed the Office's April 27, 2006 merit decision denying appellant's claim for an emotional condition.[1] The facts contained in that decision are incorporated herein by reference.

On October 26, 2007 appellant requested reconsideration of the Office's April 27, 2006 decision. She referenced the Board's decision which noted that it was unable to review the employing establishment's comments to a hearing transcript and her response to such comments as such evidence was received after the issuance of the hearing representative's April 27, 2006 decision that was appealed. Appellant asserted that the employing establishment's comments and her response to such comments was the basis of her reconsideration request.

The record reveals that on April 28, 2006, the Office received an April 24, 2006 letter from Arlette Elicerio, an injury compensation specialist at the employing establishment, who responded to appellant's allegations. Ms. Elicerio also submitted evidence previously of record from managers and supervisors. In an April 24, 2006 letter, the employing establishment reiterated its controversion to the claim and submitted duplicative evidence to dispute appellant's allegations about her request for annual leave. It also discussed Supervisor Robert Bronder's alleged behavior in front of union steward Monica Lipscomb, appellant's assertion of falsified time records on May 14 through 29, 2004 and Supervisor Joe Buckley's signing of a Form 1723 to assign her to a higher level detail position and input her time to reflect a higher level pay while she was not working to comply with an Equal Employment Opportunity (EEO) decision.

Regarding appellant's allegation that Mr. Bronder became upset in front of Ms. Lipscomb about appellant's leave status, Ms. Elicerio advised that the employing establishment was not provided a copy of any statement provided by Ms. Lipscomb. Ms. Elicerio noted that such a statement was allegedly referenced in a previously denied stress claim in case file number xxxxxx052. Regarding the alleged records falsification on May 14 and 29, 2004, she reiterated that appellant's supervisors denied this and resubmitted copies of such statements that were previously of record.[2] Ms. Elicerio stated that an investigative interview found that, when Mr. Buckley had input appellant at a higher level in November 2003 and completed the Form 1723, he was not aware that her doctor had provided documentation indicating that appellant would not be able to work until January 2004. Supervisor Bonnie Pascoe and Mr. Buckley subsequently had to fix the erroneous entries or "clock rings," in the TACS system.

In an April 25, 2005 e-mail, Mr. Bronder reviewed appellant's clock rings for May 14 through 29, 2004 and did not identify any falsification of time. He stated that all of appellant's work-hour rings were done through her time card. On May 14, 2004 her time was corrected from 3.99 hours of work to 4.01 hours to have her time add up to exactly 8 hours and none of the

[1] Docket No. 06-1258 (issued November 1, 2006).

[2] Two supervisors indicated that appellant was not assigned to them at the time in question. Another supervisor, Roy Tapp, advised that appellant was scheduled for higher level training but did not report to work and her time was put into the timekeeping system, TACS, in anticipation that she would report. When she did not report for work, the time needed to be adjusted. Mr. Bronder indicated that he verified the situation and deleted the erroneous time entries as appropriate to avoid a pay adjustment.

TACS reports showed any leave that was entered and then deleted. Mr. Bronder stated that if appellant was claiming that someone used her time card for two weeks, it would have been obvious to other clerks who were using the clock that someone was punching in using two different time cards. He explained supervisors on "auto rings" normally do not use the time clock. Mr. Bronder indicated that appellant was given supervisory training for 90 days in late August through November 2004 and that she was given supervisory duties and received "EAS-17 pay."

On May 2, 2006 the Office received appellant's April 27, 2006 response. Appellant contended that the employing establishment's letter was inaccurate or not responsive to the issues in question. She reiterated her allegation that Mr. Bronder yelled at her and made various remarks regarding her annual leave balance when she inquired about her leave request. Appellant alleged that on February 6 and 26, 2004 Ms. Lipscomb witnessed Mr. Bronder yell and make inappropriate statements about her annual leave balance and leave request. She contended that her time records were falsified as she was not working on November 29 through December 24, 2003, not the May 14 and 29, 2004 dates the employing establishment claimed. On May 14, 2004 appellant became aware of the higher level time keeping entries. She argued that the investigative report and the e-mails supported that from November 29 through December 24, 2004, false time keeping records were erroneously created, entered and computer generated.

In an April 23, 2004 statement, Ms. Lipscomb stated that on February 26, 2004 appellant requested to have a steward meet with her regarding a problem with her annual leave status. She indicated that Mr. Bronder talked loudly questioning why appellant was so concerned about this when she hardly had a leave balance because of her limited-duty status. Ms. Lipscomb indicated that Mr. Bronder loudly told appellant to file an EEO complaint. She indicated at least five other people could hear the conversation.

In a January 24, 2008 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review as it was cumulative and repetitive.

By letter dated June 8, 2008, appellant again requested reconsideration. She asserted that the additional statements and documents she forwarded in response to the Office's request for additional comment were new to the file, never before considered and warranted further review. Appellant also resubmitted an EEO Commission decision regarding her claim for disability discrimination against the employing establishment and records of a September 21, 2008 hospitalization.

By decision dated October 21, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] It, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[5]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[9]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[10] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[11] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[12]

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[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8128(a).

[5] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[6] Under section 8128(a) of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application. 5 U.S.C § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2).

[8] *Id.* at § 10.607(a).

[9] *Id.* at § 10.608(b).

[10] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[11] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[12] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ANALYSIS -- ISSUE 1

By decision dated November 1, 2006, the Board affirmed the April 27, 2006 decision of the Office denying appellant's claim for an emotional condition on the grounds that no compensable employment factors were established.

Appellant's October 26, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Instead, appellant referenced evidence from herself and the employing establishment that was received into the record after the Office's April 27, 2006 decision.

Appellant contended the employing establishment's April 24, 2006 letter contained inaccuracies and was not responsive to the issues in her claim. She contended that Ms. Lipscomb intervened on her behalf on February 6 and 26, 2004 and submitted an April 23, 2004 statement from her attesting to Mr. Bronder talking loudly on February 26, 2004. Ms. Lipscomb stated that Mr. Bronder spoke loudly while questioning appellant about her annual leave status noted that she barely had a leave balance and that she could file an EEO complaint on the matter. The Office previously found that the February 26, 2004 conversation between appellant and Mr. Bronder pertained to an administrative matter for which she had not established error or abuse on the part of the employing establishment. While Ms. Lipscomb's statement indicates that Mr. Bronder may have spoken loudly during the February 26, 2004 conversation, this evidence is cumulative in nature as it pertains to contentions that were previously considered.[13] While her statement was new to the record, it does not constitute a basis for reopening appellant's case.

Appellant stated that Ms. Elicerio referenced the wrong dates for the period she claimed time records were falsified. The record supports that she was not working from November 19 through December 23, 2003, not the May 14 through 29, 2004 dates Ms. Elicerio noted. However, this discrepancy is irrelevant with regard to administrative matters pertaining to time records and training during a time when appellant was out of work due to another injury. Appellant's contentions regarding the investigative report and the supervisor's reports do not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. She also did not articulate how Mr. Bronder's April 25, 2005 e-mail met one of the three criteria for reopening a claim for merit review.

The remainder of the evidence to which appellant bases her reconsideration request is either repetitive of her prior arguments duplicative of documents already of record. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[14]

[13] *See supra* note 10. Evidence that a supervisor spoke loudly or raised his or her voice is not sufficient to establish verbal abuse. *See Joe M. Hagewood*, 56 ECAB 479 (2005); *Karen K. Levene*, 54 ECAB 671 (2003).

[14] *Id*.

Appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or a fact not previously considered by the Office, nor did she submit relevant and pertinent evidence not previously considered by it. As her October 26, 2007 request for reconsideration did not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office properly denied her request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

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.[15] 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 Act.[16]

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 establishes clear evidence of error.[17] 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.[18]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[19] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[20] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[21] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[22] 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.[23] To show clear

[15] 20 C.F.R. § 10.607(a).

[16] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[18] 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.

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

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

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

[22] *See Leona N. Travis*, *supra* note 20.

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

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.[24]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant filed an untimely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[25] Appellant's reconsideration request was filed June 8, 2008, more than one year after the Board's November 1, 2006 merit decision.

The Board finds that appellant has not established clear evidence of error on the part of the Office in its January 24, 2008 decision. Appellant did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. She contended that the additional statements and documents she submitted in response to the Office's request for additional comment were new to the file and warranted further merit review. Appellant also resubmitted a copy of her final EEO Commission decision. However, her contention made reference to evidence previously of record and already considered. It does not raise a substantial question concerning the correctness of the Office's decision. Appellant also submitted a partial copy of a final EEOC decision that was previously considered by the Office and the Board. She did not explain how this decision raised a substantial question as to the correctness of the Office's April 27, 2006 decision. Appellant did not address how the records pertaining to her September 12, 2008 hospitalization showed clear evidence of error by the Office.

For these reasons, the Office properly denied appellant's request for reconsideration. On appeal, appellant asserts that it improperly denied her claim. However, for the reasons noted, she has not established a basis for the Office to reopen her claim for merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for reconsideration in its January 24, 2008 decision and her subsequent request for reconsideration was untimely filed and failed to show clear evidence of error on the part of the Office.

[24] *Leon D. Faidley, Jr., supra* note 16.

[25] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (October 2005).

ORDER

IT IS HEREBY ORDERED THAT the October 21 and January 24, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 26, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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