

FACTUAL HISTORY

On October 13, 2002 appellant, then a 54-year-old medical supply technician, filed an occupational disease claim (Form CA-2) alleging she sustained anxiety with consequential hypertension, chronic atrial fibrillation and bronchitis on or before October 26, 1999 due to incidents of sexual harassment by a coworker. She submitted medical reports from October 1999 through November 2001 discussing cardiac treatment. In a November 6, 2002 letter, the Office advised appellant of the additional evidence needed to establish her claim, including a detailed description of the alleged incidents and rationalized medical evidence supporting a causal relationship between those incidents and the claimed conditions. Appellant submitted an additional cardiology report and employing establishment investigative memoranda regarding her allegations.

By decision dated December 10, 2002, the Office denied appellant's claim on the grounds that fact of injury was not established. It found that she failed to establish any incident of harassment. Appellant then requested an oral hearing, held October 28, 2004.¹ She submitted additional investigative memoranda and witness statements.

By decision dated and finalized February 15, 2005, an Office hearing representative affirmed the December 10, 2002 decision as modified. He found that appellant established several incidents of sexual harassment by a coworker as factual. The hearing representative further found, however, that appellant did not submit sufficient rationalized medical evidence to establish that those incidents caused the claimed emotional condition or consequential heart and lung problems.

In a February 21, 2005 letter, appellant requested reconsideration. She stated that she would submit additional evidence but did not do so. By decision dated June 7, 2005, the Office denied reconsideration on the grounds that the February 21, 2005 letter did not raise substantive legal questions or include new, relevant evidence.

In a June 29, 2006 letter, appellant requested reconsideration. She asserted that the employing establishment accepted her complaints of discrimination. Appellant submitted letters from a union official, a January 24, 2006 certified mail receipt and an October 30, 2006 settlement agreement. She also submitted a January 23, 2006 statement alleging a conspiracy to subvert her claim.

By decision dated July 25, 2006, the Office denied appellant's June 29, 2006 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. It found that the June 29, 2006 request was untimely as it was filed more than one year after the February 15, 2005 decision. The Board found that appellant's letters and the accompanying evidence did not establish that the Office erred in denying her claim.

In an August 27, 2008 letter, appellant requested reconsideration. She submitted a copy of a settlement agreement previously considered by the Office prior to issuing the February 15, 2005 decision.

¹ Scheduling of the oral hearing was delayed due to an apparent discrepancy in appellant's mailing address.

By decision dated September 10, 2008, the Office denied appellant's August 27, 2008 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. It found that appellant's August 27, 2008 request was untimely as it was filed more than one year after the February 15, 2005 decision. The Office found that appellant's August 27, 2008 letter and the accompanying evidence did not establish that it erred in denying her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.⁵ 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).⁶

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 regulations.⁷ Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Thankamma Mathews*, *supra* note 3; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 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).

⁶ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 4.

⁷ *Thankamma Mathews*, *supra* note 3.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 3.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4.

so as to produce a contrary conclusion.¹² 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.¹³

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.¹⁴ The Board must 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.¹⁵

ANALYSIS

In its September 10, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on February 15, 2005. Appellant's request for reconsideration was dated August 27, 2008 and received on September 2, 2008, more than one year after February 15, 2005. Accordingly, her request for reconsideration was not timely filed.

The Board finds that appellant's August 27, 2008 letter does not raise a substantial question as to whether the Office's February 15, 2005 decision was in error or *prima facie* shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. The settlement agreement submitted in support of appellant's request for reconsideration is also insufficient to establish error by the Office. The Office denied the claim on February 15, 2005 based on a lack of rationalized medical evidence. The settlement agreement is not medical evidence and is therefore irrelevant to the critical issue in the case as of February 15, 2005. The settlement agreement is insufficient to raise a substantial question as to the correctness of the Office's February 15, 2005 decision.

Appellant has not otherwise provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's February 15, 2005 decision. Consequently, the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Therefore, the Office's September 10, 2008 decision denying

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *James R. Mirra*, 56 ECAB 738 (2005).

¹⁵ *Gregory Griffin*, *supra* note 5.

appellant's August 27, 2008 request for reconsideration was proper under the law and the facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2008 is affirmed.

Issued: August 6, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board