

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

M.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 09-956
Issued: April 15, 2010**

Appearances:
Mark Coby, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 27, 2009 appellant, through her attorney, filed a timely appeal of November 21, 2008 and February 3, 2009 nonmerit decisions of the Office of Workers' Compensation Programs denying her request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 13, 2007 and the filing of the appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On June 9, 2006 appellant, then a 40-year-old modified letter carrier, filed an emotional condition claim alleging that her postmaster, Michael Guerrero, treated her unfairly and she was

exposed to a hostile work environment because of her disability. In an October 10, 2006 statement, she stated that she had worked in a modified job for over 10 years. Appellant indicated that Mr. Guerrero, by letter dated May 18, 2005, told her she was no longer considered a limited-duty employee but a full-time duty employee. She stated that she was removed from her modified job and forced into a full-time vacant carrier's job despite her permanent physical conditions. Since May 18, 2005, appellant alleged that she was threatened with a reduction of work hours to less than 40 hours per week, she was constantly monitored by management and she was sent home without pay on July 19 and 20, 2005 even though there was work to be done and many other injured workers were allowed to continue working. She noted that she filed her claim when she was removed from her 10-year modified job. Appellant stated that she was routinely followed by Areen Dhami, a supervisor, and she was the only injured carrier required to report express mail deliveries. She further alleged that she was reprimanded by Jerry Phillips, a supervisor, on August 8, 2005 for sitting down while she was assigned to watch Carrier Mercado case mail, although the union contract allows carriers to use a stool. Evidence included a consultation report from Jan Christian Stribolt, M.S., who opined that appellant's reported symptoms were consistent with an anxiety disorder due to chronic pain from her orthopedic condition.

By decision dated February 13, 2007, the Office denied appellant's claim on the grounds that no compensable employment factor had been established. It noted that appellant had filed a grievance on the matter of whether or not the removal of her permanent modified job offer was an error on the part of the employing establishment, but no final decision had been rendered.

Counsel requested reconsideration on October 22, 2008. He noted the reconsideration of the claim was based on a July 25, 2008 Equal Employment Opportunity (EEO) Commission decision, wherein an EEO administrative judge found that appellant had been made to work outside of her physician's restrictions beginning in August 2005 and the employing establishment subjected appellant to discrimination from July 2005 based on her disability. Counsel noted that the administrative judge further found that appellant had proven disparate treatment because of her disability and established harassment creating a discriminatorily hostile work environment and stated: "I also find that she (claimant) met the objective standard namely, that a reasonable person in her position would have found the environment to be 'permeated with discriminatory intimidation, ridicule, and [insult]' that [wa]s 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment.'" The evidence submitted with the reconsideration request included: a March 7, 2007 report from Dr. Masami Hattori, a Board-certified anesthesiologist, pertaining to her orthopedic conditions; a January 8, 2008 statement regarding Federal Employees' Group Life Insurance (FEGLI) coverage; and September 12, 2008 hospital notes. A copy of the July 25, 2008 EEO decision was not submitted to the record.

By decision dated November 21, 2008, the Office denied appellant's request for reconsideration on the grounds that her request was untimely filed and she did not show clear evidence of error. The decision read: "The basis for this decision is that your attorney referenced new evidence from an EEO decision dated July 25, 2008; however, this Office has no record of receiving the new evidence referenced and even if this evidence had been received it would not alter the February 13, 2007 decision."

In a November 25, 2008 submission, counsel requested reconsideration and submitted a copy of the July 25, 2008 EEO decision. Additional evidence included: a December 13, 2008 letter from appellant to the employing establishment requesting reemployment; an inpatient/outpatient registration form from St. Rose Hospital; a September 12, 2008 medical prescription for Norco; an October 22, 2008 medical note from Dr. Hattori; copies of leave requests; a December 23, 2008 return to duty notice from the employing establishment; and a December 18, 2008 job offer.

By decision dated February 3, 2009, the Office denied appellant's request for reconsideration on the grounds that her request was untimely filed and she did not show clear evidence of error. After acknowledging receipt of the documents submitted by appellant, it found: "Your attorney, Mark Coby, noted in the reconsideration request he enclosed a copy of an EEO decision which found that the findings in the denial decision had been in error and that actions set forth in appellant's claim were not administrative functions or issues but were error or abuse. However, the hearing from the EEO did not prove that the Office erred when we issued our decision. Therefore, the evidence submitted failed to demonstrate clear evidence of error."

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 8128(a). 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.² 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.³

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁴ 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

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

The Board finds that, as more than one year has elapsed from the date of issuance of the last merit decision in this case, and the February 13, 2007 decision of the Office, appellant's original request for reconsideration dated October 22, 2008 and subsequent request dated November 25, 2008 were untimely filed. Consequently, appellant must demonstrate clear evidence of error by the Office in denying her claim for compensation.¹²

The underlying claim in this case is for an emotional condition due to being improperly removed from her modified job and exposed to a hostile work environment because of her disability. The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment as contributing to her condition. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or

⁵ *Id.* at § 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.

⁶ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ *See Leona N. Travis*, *supra* note 7.

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹² 20 C.F.R. § 10.607(b).

adversely affected by factors of her federal employment.¹³ The Office denied appellant's emotional condition claim because of failure to establish compensable factors of employment.

In the November 21, 2008 decision, the Office denied appellant's untimely request for reconsideration noting that appellant's attorney had referenced an EEO decision but that it was not in the record. The Office noted, however, that even if it had been in the record, "it would not alter the February 13, 2007 decision." On reconsideration, appellant submitted the July 25, 2008 EEO decision which found that the employing establishment failed to accommodate appellant's disability beginning in August 2005 and subjected her to disparate treatment and harassment from July 2005 because of her disability. The Office again denied appellant's claim finding that the "hearing from the EEO did not prove that the Office erred when we issued our decision."

It is an elementary principle of workers' compensation law, however, which the Board has often reiterated, that the Office is required to make findings of fact and a statement of reasons regarding the material facts of the case.¹⁴ In both the November 21, 2008 and the February 3, 2009 decision, the Office failed to state any findings of fact or statement of reasons in finding the requests for reconsideration failed to establish clear evidence of error, nor did the Office address the significance of the EEO decision to the underlying issue in the case.

The EEO decision finding that the employing establishment canceled appellant's modified-duty position because of a discriminatory motive and that she suffered disparate treatment because of her work injury could, if credited, establish compensable factors related to her emotional condition claim. The Board finds that the July 25, 2008 EEO decision, while not binding in its result,¹⁵ could shift the weight of the evidence in this case in favor of appellant as it offers support of her allegations of unfair treatment and hostile work environment and may raise a substantial question as to whether the employing establishment committed error or abuse in the handling of personnel matters related to appellant.¹⁶ The Office's summary findings in rejecting the evidence appellant submitted with her request for reconsideration do not comply with the review requirements under the Act, as the Board held in *Tonja R. Hiebert*.¹⁷

In *Hiebert*,¹⁸ the employee had filed, among other things, an emotional condition claim based on harassment. She had established some compensable factors but had not established harassment. As for the compensable factors, the Office found the medical evidence insufficient to establish causal relationship. In an untimely application for reconsideration, the employee submitted an EEO decision that found she had been subjected to a hostile work environment. The Office denied the request for reconsideration as untimely filed and finding no clear evidence of error. It noted the underlying question was a medical one and the EEO decision was not

¹³ *Pamela R. Rice*, 38 ECAB 838 (1987).

¹⁴ See 20 C.F.R. § 10.126; *Beverly Dukes*, 46 ECAB 1014, 1017 (1995).

¹⁵ See *Daniel Deparini*, 44 ECAB 657 (1993).

¹⁶ See *W.D.*, Docket No. 07-2002 (issued January 14, 2008).

¹⁷ *Tonja R. Hiebert*, 55 ECAB 706 (2004).

¹⁸ *Id.*

medical evidence. The Board found that the underlying issue was not limited to the medical evidence alone. Although the Office had accepted several compensable factors, it had not accepted harassment or discrimination as a compensable factor in the claim. The Board found: “The Office’s brief and incomplete assessment of the evidence submitted did not satisfy its obligation to provide a decision with appropriate findings and clearly stated reasons.” The Board found that the Office had failed to properly adjudicate the clear evidence of error issue.

Similar to *Hiebert*, despite the untimeliness of appellant’s request for reconsideration, the case must be remanded for the Office to describe the evidence appellant submitted and give detailed reasons for accepting or rejecting it.

On appeal, appellant’s representative cites to *Jimmy L. Day*.¹⁹ In that case, the employee had filed a claim alleging an emotional condition as a result of retaliatory actions taken against him at the employing establishment. One of the actions was a disciplinary action claiming that he had engaged in improper conduct while on duty. In an untimely application for reconsideration, he submitted an EEO decision in his favor, which had not been available to the employee in sufficient time to support a timely request for reconsideration. The EEO decision found that he had been victimized and retaliated against at the employing establishment due to a grievance that had been filed by his wife, who was also an employing establishment employee. The Board noted that administrative and personnel matters of the employing establishment can be compensable factors where evidence of error or abuse is established and found that the EEO decision, while not binding in its result, “raised a substantial question as to whether the employing establishment committed error or abuse in the handling of its personnel matters with respect to appellant.” The Board found that the Office abused its discretion in failing to reopen the employee’s claim for further merit review.” Contrary to the case at issue herein, in *Day*, the Office analyzed the evidence presented in the employee’s untimely request for reconsideration and made findings as to whether the EEO decision provided clear evidence of error. Although the Board disagreed with the Office’s determination, the Office properly adjudicated the matter presented.

CONCLUSION

The Board finds that the Office failed to properly adjudicate appellant’s request for reconsideration.

¹⁹ *Jimmy L. Day*, 48 ECAB 654 (1997).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2009 and the November 21, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to the Office for further action consistent with this decision.

Issued: April 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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