United States Department of Labor
Employees' Compensation Appeals Board

E.V., Appellant	)	
and	)	**Docket No. 10-129**
	)	**Issued: July 15, 2010**
DEPARTMENT OF VETERANS AFFAIRS, JOHN D. DINGELL MEDICAL CENTER, Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant, through her representative, filed a timely appeal from the September 24, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration as untimely and failing to demonstrate clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial.

ISSUE

The issue is whether the Office properly denied appellant's June 29, 2009 request for reconsideration, as untimely filed and failing to demonstrate clear evidence of error.

FACTUAL HISTORY

On the prior appeal,[1] the Board found that the Office properly denied appellant's November 9, 2007 request for reconsideration of its most recent merit decision on March 4, 2005. The Board found that her request was untimely and failed to show clear evidence of error in the Office's March 4, 2005 decision, which denied her claim for compensation because she did not meet her burden of proof to establish a compensable factor of employment.[2] T he facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On June 29, 2009 appellant requested reconsideration. As a general matter, she noted that she was providing new material evidence, which she stated was a requirement to reopen a claim. Appellant argued there were "innumerous errors in her record that had to be corrected." She argued that, when she claimed compensation benefits, the employer disregarded Office policy, procedures, rules and regulations, which led to the Office disregarding its policy, procedures, rules and regulations. Appellant requested that the Department of Labor Attorney General Office investigate her case because of a fraudulent document the employer submitted stating that she returned to work in a light-duty capacity and lost no time from work. She explained that she was off work for six months and was never given light duty.

Appellant cited Board precedent for several propositions of law and asked that the Board make an exception to the rule that an appellant may not reargue her case in the guise of a petition for reconsideration. She submitted exhibits A through J. Summarizing each, appellant intended to show that the employer denied her requested work release and disapproved her sick leave for insufficient medical documentation and that she was put in an absent-without-leave status. She submitted the deposition of her psychologist and a summary of her telephonic prehearing conference before the Merit Systems Protection Board, which she stated showed that the employer had full knowledge of her depression and diabetes and had knowledge of her doctor's request for reasonable accommodation to work only one shift. Appellant also submitted a proposed removal, a deposition of a psychiatrist the employer made her see before returning to work, the employer document stating that she returned to work in a light-duty status and lost no time from work, her claim form showing she was disabled for work and her own review of the entire case record.

In a decision dated September 24, 2009, the Office denied appellant's June 29, 2009 request for reconsideration. It found that her request was untimely and failed to present clear evidence of error in the Office's most recent merit decision on March 4, 2005.

[1] Docket No. 08-492 (issued November 5, 2008), *petition for recon. denied*, April 17, 2009.

[2] On February 10, 2004 appellant, then a 42-year-old nursing assistant, filed a claim alleging stress as a result of her federal employment.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretion 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."[3]

The Office, through regulations, has imposed limitations on the exercise of its discretion under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[4]

The term "clear evidence of error" is intended to represent a difficult standard.[5]

ANALYSIS

As the Board noted on the prior appeal, the most recent decision on the merits of appellant's case was the Office's March 4, 2005 decision affirming the denial of her claim. The Office denied her claim because she did not meet her burden of proof to establish a compensable factor of employment. Appellant did not prove her allegations that she was harassed, threatened or treated disparagingly at work.

The appeal rights attached to the Office's March 4, 2005 decision explained that she had one year, or until March 4, 2006, to request reconsideration. The Board finds that appellant's June 29, 2009 request for reconsideration is therefore untimely. Appellant missed the deadline by over three years.

Because her June 29, 2009 request is untimely, appellant faces a difficult burden of proof. It is not enough for her to submit new material evidence. The only way appellant may compel the Office to reopen her case and once again review the merits of her claim is to submit positive, unquestionable proof that she was harassed, threatened or treated disparagingly at work. This cannot be evidence that only raises a question of harassment, or could be interpreted to show threats, or merely tends to support disparaging treatment. The evidence must be so convincing on its face as to put the matter to rest. Evidence such as a final decision from the Merit Systems

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

Protection Board or Equal Employment Opportunity Commission finding that appellant was in fact harassed or threatened in the workplace could establish a compensable factor of employment and show clear evidence of error in the Office's March 4, 2005 decision. However, the evidence she submitted to support her untimely request for reconsideration falls far short of that standard.

Appellant's June 29, 2009 request for reconsideration is largely repetitious of her previous requests and her petition for reconsideration of the Board's prior decision. She focused on what she described as innumerous errors in her case record, many of which relate to how the employer and the Office have handled her claim for compensation. This misses the point. Appellant's focus should be on the reason the Office denied her claim on March 4, 2005 and on the need to submit documented proof of harassment, threats or disparaging treatment.

Evidence that the employer denied sick leave for insufficient medical documentation and continued appellant in an absent-without-leave status does not prove administrative error. The employer explained to appellant what medical documentation was necessary.

The testimony of appellant's psychologist does not prove harassment or threats or disparaging treatment. Asked whether the truth or falsity of the stressor matters when a person is dealing with her perception of what is going on, the psychologist explained that, if the person believes she is being harassed, "that's going to be a significant stressor," whether appellant is being harassed or not. This goes to the heart of the problem with appellant's untimely request for reconsideration. She cannot meet her burden to show clear evidence of error by submitting perception-based evidence. The harassment or threats must be independently documented, an indisputable and established fact. The history appellant related to her psychologist no doubt reflects her perception of what happened at work, but it does not establish that harassment or threats occurred as a matter of fact.

The summary of appellant's telephonic prehearing conference before the Merit Systems Protection Board stipulated that two people at the employing establishment were aware of her depression and diabetes. Without more, this does not prove administrative error in denying her request to be assigned to a single workshift without a variation of work hours, nor does it prove disability discrimination.

Appellant submitted a proposed removal for her inability to maintain a regular work schedule, or for being absent from duty approximately 22.5 percent of the time from 2001 to 2004, which had a negative impact on the efficiency of her work unit. However, she did not submit proof that the proposed removal was in error.

As for the deposition of the psychiatrist, no history that appellant related to him can establish as factual her perception of harassment at work, nor does his testimony on holding her off work establish administrative error by the employer. As the Board mentioned earlier, the employer explained to appellant what medical documentation was needed to support disability for work.

Appellant's disability status -- whether she returned to work in a light-duty status and lost no time from work or whether her claim form indicated she was disabled for work -- is immaterial. It has no bearing on whether harassment or threats or disparaging treatment or any

other compensable factor of employment actually occurred as a matter of fact. Appellant's own synopsis and review of the case record does not supply the documentation necessary to establish a compensable factor of employment and the Board precedent appellant cited to support several propositions of law are the same citations she made in her previous petition for reconsideration. They do not discharge her burden of showing clear evidence of error.

Because appellant's untimely request for reconsideration fails to show clear evidence of error in the Office's March 4, 2005 decision, the Board will affirm the Office's September 24, 2009 decision denying that request.

CONCLUSION

The Board finds that the Office properly denied appellant's June 29, 2009 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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