

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

A.C., Appellant)	
)	
and)	Docket No. 09-2176
)	Issued: June 3, 2010
U.S. POSTAL SERVICE, POSTAL)	
INSPECTION SERVICE, Los Angeles, CA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 27, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated March 2, 2009, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated October 17, 2007 and the filing of this appeal on August 27, 2009, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, 46-year-old postal police officer, filed a Form CA-2 claim for benefits on April 6, 2007, alleging that she sustained a stress-related condition and post-traumatic stress

disorder, on March 11, 2007. This date marked the one-month anniversary of an incident in which she witnessed her partner being struck and seriously injured by a drunk driver. On the form and in an April 13, 2007 response to the claim, the employing establishment noted that appellant had been placed on administrative leave for disciplinary reasons pending an investigation into alleged misconduct in which she engaged on March 12, 2007. On April 30, 2007 the employing establishment controverted the claim.

Appellant submitted a March 12, 2007 work restriction note from her insurance company indicating that she would be unable to work for three days, beginning March 13, 2007; a March 13, 2007 work restriction note from her insurance company indicating that she could return to work on March 26, 2007; and treatment notes from her treating psychiatrist, Dr. Faye I. Mandell, dated March 13 and 21 and April 4, 2007.

On May 11, 2007 the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. It asked her to describe in detail the employment-related conditions or incidents which she believed contributed to her emotional condition and to provide specific descriptions of all practices, incidents, etc., which she believed affected her condition. The Office asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether her claimed condition was causally related to her federal employment. It requested that she submit the additional evidence within 30 days. Appellant did not submit any additional medical evidence.

In a memorandum dated March 12, 2007, received by the Office on July 9, 2007, the employing establishment noted that appellant had been involved in an incident on March 12, 2007 in which she allegedly removed her service weapon from her holster without just cause during a dispute with a customer. The employing establishment submitted a March 12, 2007 memorandum, received by the Office on July 24, 2007, in which it placed her on administrative leave pending an investigation into the alleged unauthorized display of her government-issued weapon while in the performance of her duties as a postal police officer.

By decision dated October 17, 2007, the Office denied the claim for an emotional condition. It accepted that the February 11, 2007 incident had occurred and that appellant had established a compensable factor of employment; *i.e.*, the witnessing her partner being struck by a vehicle. The Office found, however, that she failed to submit medical evidence showing that her claimed stress-related condition was causally related to the implicated employment factor.

On December 28, 2007 appellant requested reconsideration. She submitted a November 21, 2007 report from Dr. Mandell who stated that she began treating appellant in March 2007 after being involved in a serious car accident with a coworker. Dr. Mandell advised that appellant had developed post-traumatic stress disorder and depression as a result of the accident. She noted that appellant had symptoms of reliving the event, fearfulness, memory loss and intense stress.

By decision dated April 1, 2008, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.¹

By letter dated November 24, 2008, appellant requested reconsideration. She submitted progress reports from Dr. Mandell dated March 12, 2007 through April 23, 2008, which generally indicated that appellant had developed post-traumatic stress disorder, anxiety, anhedonia and depression after witnessing her colleague being struck by a drunk driver. The March 12, 2007 report stated that appellant had been experiencing insomnia due to anxiety caused after her colleague was hit by a car. Dr. Mandell's March 13, 2007 report noted that appellant had been placed on leave after allegedly pulling a gun on a postal customer. It also noted that she had been experiencing headaches, anxiety, hypertension, nightmares and low self-esteem.

In Dr. Mandell's April 19, 2007 report, she stated that appellant had reported for treatment on March 13, 2007 after an incident at work in which she felt threatened and pulled her gun and was placed on leave for possibly overreacting. Appellant attributed her response to being traumatized on February 11, 2007 when she witnessed a speeding car crash into the vehicle she had just exited and saw her partner seriously injured and trapped in the vehicle. Dr. Mandell stated that appellant was dealing with this trauma and accumulated traumas including the suicide of a coworker the previous year. In her subsequent progress reports, Dr. Mandell essentially reiterated these findings and conclusions.

Appellant submitted a May 1, 2008 treatment note from the Kaiser Permanente Psychiatry Department, which indicated that she was being treated for anger management.

By decision dated March 2, 2009, the Office denied appellant's request for reconsideration without a merit review, finding the request was untimely and that she had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office

¹ The Office noted that the appellant had alleged in her CA-2 form that she sustained post-traumatic stress disorder due to the March 11, 2007 anniversary of her partner's accident; it subsequently accepted fact of injury based on the occurrence of this anniversary. It therefore found that the medical evidence she submitted with her request for reconsideration, which pertained to the February 11, 2007 incident, was not relevant to the issue of whether her claimed condition was causally related to the accepted March 11, 2007 employment factor.

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, it has stated that it 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 by the Office under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that 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.⁷ Office procedures state that the Office will reopen an appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the her application for review shows “clear evidence of error” on the part of the Office.⁸

To establish clear evidence of error, an appellant 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 manifested 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

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by the Office; and (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ *See* cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹¹ *See Jesus D. Sanchez*, *supra* note 3.

construed 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 makes an independent determination of whether an appellant 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

The Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on October 17, 2007. Appellant requested reconsideration on November 24, 2008; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's request for reconsideration failed to show clear evidence of error. Appellant submitted reports from Dr. Mandell from March 2007 through April 2008 which generally indicated that appellant had developed post-traumatic stress disorder and stress-related symptoms such as headaches, anxiety, hypertension, nightmares and insomnia on the one-month anniversary of the incident in which she witnessed her partner being struck by a drunk driver. These reports, however, did not provide a reasoned medical opinion as to whether appellant sustained an emotional condition as of March 11, 2007, causally related to factors of her federal employment, but were merely cumulative and repetitive of reports and arguments previously considered. As such, these reports do not raise a substantial question as to the correctness of the Office's decision denying benefits.

The May 1, 2008 treatment note from Kaiser Permanente Psychiatry Department indicating that appellant was being treated for anger management contains no opinion on the work relatedness of her stress-related condition. None of the reports appellant submitted with her request are 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. Therefore, she has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence

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

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

¹⁴ *Faidley*, *supra*, note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated November 24, 2008. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on March 2, 2009.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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