

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

A.F., Appellant and DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Baton Rouge, LA, Employer)))))))))))	Docket No. 09-2333 Issued: June 9, 2010
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<i>Appearances:</i> <i>Appellant, pro se</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 23, 2009 appellant filed a timely appeal from the July 1, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for merit review. The last merit decision was the Office's September 13, 2006 decision denying her claim that she sustained physical and emotional conditions in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the nonmerit decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on September 23, 2009, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits on the grounds that her request was untimely filed and failed to establish clear evidence of error.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(e).

FACTUAL HISTORY

This is the second appeal in this case. In an August 13, 2008 decision, the Board affirmed an October 12, 2007 nonmerit Office decision finding that it properly denied appellant's request for reconsideration.² The Board found that the evidence and arguments submitted by appellant were not relevant to the issue of whether she had established a physical or emotional condition due to the accepted events of September 2001.³ The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.

In a June 18, 2009 letter, appellant requested reconsideration before the Office, contending it was her understanding that the only thing holding up the acceptance of her claim was the fact that the diagnosis of her post-traumatic stress disorder was made by a clinical psychologist rather than a psychiatrist. She also asserted that the events of September 2001 aggravated her preexisting back injuries. Appellant submitted a May 8, 2009 report from Dr. Sandra R. Weitz, an attending anesthesiologist, who stated that, in Louisiana testing, diagnosis and counseling for a condition such as post-traumatic stress disorder would be provided by a clinical psychologist and that medication would be provided by a psychiatrist. Dr. Weitz advised that appellant's post-traumatic stress disorder was appropriately diagnosed by her clinical psychologist.

In a July 1, 2009 decision, the Office denied appellant's request for further review of the merits of her claim as it was untimely filed and failed to demonstrate clear evidence of error. It determined that she filed an untimely request for reconsideration because her reconsideration request was filed on June 18, 2009, more than one year after the Office's most recent merit decision of September 13, 2006. The Office found that the argument and evidence submitted in support of the request did not show clear evidence of error in the Office's decisions denying her claim.

LEGAL PRECEDENT

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.⁴ The

² Docket No. 08-707 (issued August 13, 2008). On December 11, 2001 appellant, then a 52-year-old industrial hygienist, filed a claim alleging that she sustained injury to her neck and back while she was on a mandatory travel assignment to attend training classes in Washington, DC. She was in the Frances Perkins Building of the Department of Labor on September 11, 2001 and was directed to leave the building due to the terrorist attacks on that date. Regarding the cause of her injury, appellant stated, "I walked down 5 flights, walked 2.5 hours to my hotel, drove 17 hours to get to Memphis airport and waited 9 hours for delayed flight to get home." She claimed that employing establishment officials advised her and a coworker to make alternate plans to return home earlier than originally scheduled. Appellant also claimed that the events of September 2001 caused her to sustain post-traumatic stress disorder.

³ In a July 7, 2005 decision, the Office accepted that appellant had established employment factors with respect to her efforts to leave Washington, DC and return home, but found that she did not submit sufficient medical evidence to establish a physical or emotional condition due to those factors. In a September 13, 2006 decision, it affirmed its July 7, 2005 decision and, in an October 12, 2007 decision, it denied appellant's request for merit review.

⁴ 20 C.F.R. § 10.607(a).

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 Federal Employees' Compensation Act.⁵

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."⁶ 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

ANALYSIS

Appellant claimed that she sustained physical and emotional injuries due to events surrounding the terrorist attacks of September 11, 2001. In July 7, 2005 and September 13, 2006 decisions, the Office accepted that she had established employment factors with respect to her efforts to leave Washington, DC and return home on September 11, 2001. It denied appellant's claim because she did not submit sufficient medical evidence to establish that she sustained a physical or emotional condition due to the accepted factors.

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

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 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.

⁸ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ *See Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

In a July 1, 2009 decision, the Office refused to reopen appellant's case for further review of the merits finding that her request was untimely filed and failed to demonstrate clear evidence of error. It properly determined that she filed an untimely request for reconsideration. Appellant's reconsideration request was filed on June 18, 2009, more than one year after the Office's last merit decision dated September 13, 2006. Therefore, she must demonstrate clear evidence of error on the part of the Office in its decisions denying her claim.

Appellant has not demonstrated clear evidence of error on the part of the Office in the July 5, 2005 or September 13, 2006 decision. She did not submit positive, precise and explicit evidence which manifests on its face that the Office committed an error in the denial of her claim.

Appellant contended that it was her understanding that the only thing holding up the acceptance of her claim was the fact that the diagnosis of her post-traumatic stress disorder was made by a clinical psychologist rather than a psychiatrist. She submitted a May 8, 2009 report of Dr. Weitz, an attending anesthesiologist, who indicated that in Louisiana testing, diagnosis and counseling for a condition such as post-traumatic stress disorder would be provided by a clinical psychologist and that medication would be provided by a psychiatrist.¹³

The Board notes that appellant's claim for a work-related emotional condition was not denied on the basis that her post-traumatic stress disorder had been diagnosed by a clinical psychologist. The Office accepted that she established employment factors with respect to her efforts to leave Washington, DC and return home after the terrorist attacks of September 11, 2001, but found that she did not submit sufficient medical evidence to establish her claim. It weighed the reports of appellant's clinical psychologist as medical evidence but found that he did not provide sufficient medical opinion to establish the causal relationship of her diagnosed condition to the accepted factors. Therefore, appellant's argument and evidence has no bearing on the reason for the denial of her claim for a work-related emotional condition. She has not established clear evidence of error in the Office's denial of her claim.

Appellant also asserted that the events of September 2001 aggravated her preexisting back injuries.¹⁴ However, the underlying issue of the present case is medical in nature. Appellant's opinion as to the cause of her back condition would not have any probative medical value. She has not shown clear evidence of error in the Office's denial of her claim for a work-related back condition.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's July 5, 2005 or September 13, 2006 decision. The Office properly determined that appellant did not show clear evidence of error in the denial of her claim for compensation.

¹³ Dr. Weitz also indicated that appellant's post-traumatic stress disorder was appropriately diagnosed by her clinical psychologist. On appeal, to the Board, appellant again argued that her claim for a work-related emotional condition should be accepted because her post-traumatic stress disorder had appropriately been diagnosed by a clinical psychologist.

¹⁴ On appeal, to the Board, appellant again argued that her physical condition had been aggravated by the events of September 2001.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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