United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
	)	**Docket No. 09-2139**
and	)	**Issued: May 11, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 10, 2009 appellant filed a timely appeal from a February 20, 2009 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. There is no merit decision within one year of the last merit decision dated March 19, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's December 31, 2008 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

On appeal, appellant asserts that she submitted clear evidence of error.

FACTUAL HISTORY

On March 17, 2006 appellant, then a 56-year-old modified mail processor detailed to the injury compensation office, filed a notice of occupational disease (Form CA-2) claiming anxiety attacks while in the performance of duty on or before February 17, 2005. She stopped work on November 3, 2005 and returned on March 7, 2006. In an April 26, 2006 letter, the Office advised appellant of the additional evidence needed to establish her claim, including a description of work factors alleged to have caused her claimed emotional condition.

Appellant submitted a statement attributing her condition to the following incidents: on February 12, 2005 a supervisor stated that appellant signed a letter without authority; on March 17, 2005 a supervisor excluded her from a conversation; on April 5, 2005 supervisors stated that appellant should not work in injury compensation; on July 6, 2005 a supervisor stated that appellant had no common sense; on July 12, 2005 a supervisor criticized her handling of files; on July 13, 2005 she was accused of having a conversation with a supervisor that did not occur; a July 14, 2005 meeting regarding her work limitations; an October 12, 2005 panic attack upon entering the employing establishment; on October 31, 2005 appellant was asked to case mail but did not do so, causing a supervisor to yell at her; a November 5, 2005 job offer; November 21 and December 2, 2005 communications regarding leave use. Appellant also submitted reports dated from March 20 to June 19, 2006 from Paul J. Neal, Ph.D., an attending licensed clinical psychologist.

The employing establishment submitted March 2007 supervisory and witness statements denying that appellant was harassed, intimidated or verbally abused. The supervisors denied that the February 12 and April 5, 2005 incidents occurred, as alleged.

By decision dated March 19, 2007, the Office denied appellant's claim, finding that the claimed emotional condition did not arise in the performance of duty. It found that the February 12 and April 5, 2005 incidents were not established as factual. The Office found the remaining incidents were administrative actions for which appellant did not establish administrative error or abuse.

In a letter dated and postmarked April 26, 2007, appellant requested an oral hearing.

By decision dated May 31, 2007, the Office denied appellant's hearing request under 5 U.S.C. § 8124(b) on the grounds it was not timely filed within 30 days of the March 19, 2007 decision. It exercised its discretion and further denied appellant's hearing request on the grounds that the issues involved could be addressed equally well by submitting new, relevant evidence accompanying a valid request for reconsideration.

On January 10 and February 11, 2008 appellant submitted additional reports from Dr. Neal. She telephoned the Office on March 24, 2008 and was advised to submit a request for reconsideration. Appellant telephoned again on December 1, 2008 and was advised that a request for reconsideration must be submitted in writing. On December 8, 2008 she submitted a new report from Dr. Neal and a September 30, 2008 timekeeping form.

In a December 31, 2008 letter, appellant's attorney requested reconsideration. He asserted that appellant expressed her desire for reconsideration by telephoning the Office and submitting medical reports from Dr. Neal. The attorney noted that appellant was initially misdiagnosed, exacerbating her stress and physical problems.

By decision dated February 20, 2009, the Office denied reconsideration on the grounds that appellant's request was not timely filed and failed to establish clear evidence of error. The Office found that the December 31, 2008 request was not filed within one year of the March 19, 2007 merit decision, the most recent merit decision of record. The evidence and argument submitted following the March 19, 2007 decision was not relevant as it did not address the critical issue of performance of duty. Therefore, it was not sufficient to establish clear error in the March 19, 2007 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] 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.[4] 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).[5]

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.[6] 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.[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

[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[3] *Thankamma Mathews*, *supra* note 2; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[4] 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).

[5] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 2; *Jesus D. Sanchez*, *supra* note 3.

[6] *Thankamma Mathews*, *supra* note 2.

[7] 20 C.F.R. § 10.607(b).

[8] *Thankamma Mathews*, *supra* note 2.

be 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]

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 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.[13] 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.[14]

ANALYSIS

In its February 20, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on March 19, 2007. Appellant requested reconsideration on December 31, 2008, more than one year after March 19, 2007. Accordingly, her request for reconsideration was not timely filed.

The Board finds that appellant's December 31, 2008 letter does not raise a substantial question as to whether the Office's March 19, 2007 decision was in error or shift the weight of the evidence in her favor. In that letter, and on appeal, appellant contends that she indicated that she wanted reconsideration by submitting additional medical reports and a timekeeping form after the March 19, 2007 merit decision. She also asserts that these additional documents established clear evidence of error. These documents do not address performance of duty, the critical issue in the March 19, 2007 decision. Irrelevant evidence is insufficient to demonstrate clear evidence of error.[15] Therefore, it is insufficient to raise a substantial question as to the correctness of the Office's March 19, 2007 decision. Similarly, the attorney's remarks regarding appellant's misdiagnosis are irrelevant to the performance of duty issue.

Appellant contends that she telephoned the Office, advising that she wanted reconsideration. The record contains March 24 and December 1, 2008 telephone memoranda,

[9] *Leona N. Travis*, 43 ECAB 227 (1991).

[10] *Jesus D. Sanchez, supra* note 3.

[11] *Leona N. Travis*, *supra* note 9.

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

[13] *James R. Mirra*, 56 ECAB 738 (2005).

[14] *Gregory Griffin*, *supra* note 4

[15] *Thankamma Mathews*, *supra* note 2.

showing that appellant was asked to submit a written request for reconsideration. These calls, however, do not constitute a valid request for reconsideration. Under the Act's implementing regulations, a request for reconsideration must "be submitted in writing."[16]

Appellant has not otherwise provided any 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 decision. Consequently, the Office properly denied her reconsideration request as her request does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's December 31, 2008 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 20, 2009 is affirmed.

Issued: May 11, 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

[16] Section 20 C.F.R. § 10.606(a)(1) of the Act's implementing regulations provides, in pertinent part, that an application for reconsideration must "be submitted in writing."