

FACTUAL HISTORY

This case was previously before the Board.² Appellant, a 58-year-old former tool and parts attendant, filed a claim (Form CA-2) for job-related stress, anxiety and depression, which allegedly arose on or about August 11, 2003.³ She attributed her emotional condition, diagnosed as severe major depression and acute stress disorder, to alleged verbal and physical abuse from coworkers. Appellant also claimed that a hostile work environment and improper supervision contributed to her condition. Another alleged incident involved her being duct taped to an office chair and pushed through the aisles of the shop while coworkers watched and laughed. She claimed that one coworker in particular repeatedly kicked the chair as she rolled up and down the aisle.

The Office issued merit decisions on August 31, 2004 and September 16, 2005, both of which denied the claim for failure to establish a compensable employment factor. It also issued a November 17, 2006 nonmerit decision denying appellant's September 13, 2006 request for reconsideration. When the case was previously on appeal, the Board found that appellant submitted relevant and pertinent new evidence with her September 13, 2006 request for reconsideration, thereby warranting further merit review. The evidence in question pertained to the alleged duct tape incident. The Board set aside the Office's November 17, 2006 decision and remanded the case for further consideration of the merits of the claim. The Board's August 3, 2007 decision is incorporated herein by reference.

On remand, the Office reviewed the merits of the claim and issued the November 13, 2007 decision, finding that appellant failed to establish a compensable employment factor. With respect to the alleged duct tape incident, it found that it had not been factually established. The Office, therefore, denied modification of the hearing representative's September 16, 2005 decision.

On April 29, 2009 appellant requested reconsideration. She utilized the appeal request form that accompanied the Office's November 13, 2007 decision.⁴ The Office received appellant's request for reconsideration on May 11, 2009. Apart from submitting the appeal request form, appellant did not provide any additional evidence or argument relevant to the issue upon which her claim had been denied.

In an August 5, 2009 decision, the Office denied appellant's reconsideration request without further merit review. It found the request untimely filed and did not establish clear evidence of error.

² Docket No. 07-936 (issued August 3, 2007).

³ Appellant last worked on August 12, 2003. She received a disability retirement annuity from the Office of Personnel Management effective December 9, 2003.

⁴ On April 3, 2009 the Office provided appellant an electronic copy of her imaged case record pursuant to a March 18, 2009 written request. Appellant reportedly had not received the original November 13, 2007 Office decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.⁶ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷ When a request for reconsideration is untimely, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."⁸

ANALYSIS

Appellant's request for reconsideration was dated April 29, 2009, which is more than a year after the Office's November 13, 2007 merit decision. However, appellant claimed not to have received the decision when it was initially issued. The record establishes that the Office sent copies of the November 13, 2007 decision to both appellant and her representative of record. Appellant's representative had previously represented her at the May 25, 2005 oral hearing before the Branch of Hearings and Review. However, when the Office issued the November 13, 2007 decision, she was reportedly no longer employed.

In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.⁹ This presumption is commonly referred to as the "mailbox rule."¹⁰ It arises when the record reflects that the notice was properly addressed and duly mailed.¹¹ In this instance, the record reflects that the Office sent a copy of the November 13, 2007 decision to appellant's address of record, which is the same address she identified with respect to the current appeal. There is no evidence that the November 13, 2007 decision was returned to the Office as undeliverable. Accordingly, it is presumed that appellant received the Office's November 13, 2007 decision in due course. Appellant's request for reconsideration postdated the November 13, 2007 merit decision by more

⁵ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a) (2006).

⁶ 20 C.F.R. § 10.607 (2009).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.607(b).

⁹ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹⁰ *Id.*

¹¹ *Id.*

than a year. Because her April 29, 2009 request was untimely she must demonstrate “clear evidence of error” on the part of the Office in denying her claim for job-related stress, anxiety and depression.¹²

The Office denied appellant’s claim because she did not establish a compensable employment factor as the reputed cause of her diagnosed emotional condition. The April 29, 2009 request for reconsideration was merely an appeal request form that accompanied the November 13, 2007 decision. Appellant did not submit any additional evidence or argument relevant to the issue upon which her claim had been denied. In particular, she did not submit additional evidence to substantiate any of the previously alleged employment incidents. The Board finds that appellant has not demonstrated clear evidence of error. As such, there is no justification for further merit review. Accordingly, the Office properly declined to reopen appellant’s case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant’s April 29, 2009 request was untimely and she failed to demonstrate clear evidence of error. Therefore, she is not entitled to further merit review.

¹² 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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