

On appeal, appellant contends that the employing establishment failed to investigate her allegation of harassment and stalking by a male employee and failed to follow its guidelines regarding sexual harassment and inappropriate conduct. She contends that she was victimized and the accused male employee stalked another female employee.

FACTUAL HISTORY

This case has previously been before the Board. In the September 7, 2005 decision, the Board affirmed the Office's June 17, 2004 and March 25, 2005 decisions which found that appellant did not sustain an emotional condition while in the performance of duty.² The Board found that she failed to establish any compensable employment factors. The facts of the case as set forth in the prior decision are incorporated herein by reference. The facts relevant to the present issue are set forth.³

By letter dated March 12, 2009, appellant requested reconsideration of the denial of her emotional condition claim. She attributed her emotional condition to being stalked and harassed by Mr. Herbst. Appellant described several incidents involving Mr. Herbst and other employees. In March 2008 he stalked and wrote several rambling letters to a female employee. On several occasions, Mr. Herbst followed the employee as she delivered mail on her route. He physically prevented the employee from leaving her postal vehicle. Mr. Herbst was warned to stop visiting the facility where she worked, but failed to do so and continuously violated stay away orders issued against him. He was arrested by local police for stalking the employee and was required to stay away from her for five years based on a court-issued protection order. In 2008 Mr. Herbst sustained a head injury as a result of throwing himself onto a metal cabinet at work after he received a notice of suspension from management. On Christmas Eve 2008 he was taken to a psychiatric facility following a threat he made against two postal inspection officers who questioned him about continually stalking a female employee after being repeatedly warned to refrain from such behavior. In April 2008 postal inspectors investigated an incident where Mr. Herbst swung a metal pipe in a menacing manner at a male employee for which he was suspended. In August 2008 Mr. Herbst was suspended for 14 days for improper conduct/false accusation. His allegation that a supervisor struck him was investigated and determined to be without merit. In August 2008 Mr. Herbst flipped over a brake parts washer which caused loose parts to be scattered. He was put on emergency off-duty status because he created an unsafe working condition and damaged postal property. Appellant stated that, as a result of his actions, Mr. Herbst's employment was being terminated by the employing establishment effective April 2009.

Appellant submitted court documents related to Mr. Herbst's arrest on January 12, 2009 on a charge of stalking that occurred on December 22, 2008. On January 13, 2009 Mr. Herbst was arraigned and a court issued a temporary order of protection against him. He was scheduled for additional court appearances on February 20 and April 10, 2009.

² *Id.*

³ On May 4, 2004 appellant, then a 45-year-old clerk, filed a traumatic injury claim alleging that on April 29, 2004 she developed an emotional condition as a result of being videotaped by Kenneth J. Herbst, an employee, while she returned to work from a break.

In a July 8, 2009 decision, the Office denied appellant's March 12, 2009 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that her request was not timely filed within one year of the most recent merit decision in the case. The Office also found that the evidence submitted failed to establish clear evidence of error.⁴

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide, that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷

Section 10.607(b) states, that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant 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 manifest on its face that the Office committed an error.¹⁰ Evidence that 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 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

⁴ On appeal, appellant submitted new evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit this new evidence with a formal, written request for reconsideration to the Office under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

⁹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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

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 decision.¹⁴ The Board makes 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.¹⁵

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁶ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷

The most recent merit decision in this case was the Board's September 7, 2005 decision. As appellant's March 12, 2009 letter requesting reconsideration of the merits of her claim by the Office was made more than one year after the September 7, 2005 merit decision,¹⁸ the Board finds that it was not timely filed.

The Board further finds that appellant's March 12, 2009 letter does not raise a substantial question as to whether the decision finding that she did not sustain an emotional condition while in the performance of duty was in error or shift the weight of the evidence in her favor. Appellant's contention that she was harassed and stalked by Mr. Herbst is substantially the same argument previously considered and rejected on the prior appeal. While she contended that Mr. Herbst's stalking of another female employee and the disciplinary actions taken against him by the employer for such behavior and threatening postal inspectors, making a false accusation, causing an unsafe working condition and damaging postal property established her allegation of harassment and stalking, the Board notes that the evidence does not establish that Mr. Herbst's actions were directed towards appellant. The Board finds that appellant's contentions do not establish clear evidence of error in the denial of her emotional condition claim.

The court documents accompanying appellant's March 12, 2009 letter do not identify her as a person who was stalked by Mr. Herbst. The Board notes that determinations made by other courts or government agencies are not dispositive with regard to questions arising under the Act.¹⁹ The Board finds that the court documents of record are insufficient to raise a substantial

¹⁴ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁷ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ Appellant had one year to request reconsideration by the Office of the Board's September 7, 2005 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁹ *Ernest J. Malagrida*, 51 ECAB 287, 291 (2000).

question as to the correctness of the denial of appellant's emotional condition claim. They do not pertain to appellant's case.

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 Board's decision and order. Consequently, the Office properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

Appellant's contention on appeal that the employing establishment's failure to investigate her allegation of harassment and stalking by Mr. Herbst constituted a compensable employment factor was previously considered and deemed nonmeritorious on the prior appeal. The Board finds, therefore, that it does not establish that the Office committed clear evidence of error in denying her emotional condition claim.

CONCLUSION

The Board finds that appellant's March 12, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2010
Washington, DC

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

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

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