

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

J.T., Appellant

and

**DEPARTMENT OF THE ARMY, ANNISTON
ARMY DEPOT, Anniston, AL, Employer**

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**Docket No. 10-1404
Issued: January 24, 2011**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2010 appellant filed a timely appeal from a January 15, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her untimely request for reconsideration and finding that it failed to establish clear evidence of error. As over 180 days have passed between the last merit decision in this case, dated January 6, 2009, and the filing of this appeal, dated April 27, 2010, the Board lacks jurisdiction over the merits of this case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On January 23, 2008 appellant, then a term 44-year-old painter, filed an occupational disease claim alleging that on April 21, 2007 she first realized that her depression was due to

sexual harassment and reprisal. She related that on November 26, 2006 she filed a sexual harassment claim with the Equal Employment Opportunity (EEO) Commission and experienced reprisal from the employing establishment as a result of filing her claim.

In support of her claim, appellant submitted progress reports for the period May 22 to October 15, 2007.

In a letter dated August 8, 2008, the Office informed appellant that the evidence was insufficient to support her claim. It advised her as to the type of medical and factual evidence required to support her claim.

In response to the Office's request, appellant submitted evidence from her EEO claim including statements, portions of deposition testimony, her formal complaint alleging sexual harassment and discrimination; a June 11, 2008 attending physician's report from Dr. Elena A. Herndon, a treating Board-certified psychiatrist; a March 13, 2008 settlement agreement and evidence pertaining to withdrawing acceptance of the settlement agreement due to alleged duress and improper conduct.

By decision dated January 6, 2009, the Office denied appellant's emotional condition claim. It found she had failed to establish any compensable factor of employment.

On January 7, 2010 the Office received appellant's undated request for reconsideration and evidence submitted with her request. An attached envelope contained the postmark of January 4, 2010.

In a decision dated January 15, 2010, the Office found that appellant's undated request for reconsideration, which was received on January 7, 2009, was dated more than one year after the January 6, 2008 decision and was untimely. It further found that she did not submit any evidence establishing clear evidence of error in the Office's denial of her emotional condition claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act¹ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 10.605.

³ *Id.* at § 10.607(a).

does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁴

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁵ 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁶ 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.⁷

ANALYSIS

The Office issued a decision on January 15, 2010 which denied appellant’s request for reconsideration of its January 6, 2009 decision on the grounds that the request was untimely filed and failed to establish clear evidence of error. The Board finds that the Office improperly refused to reopen appellant’s claim for further consideration of the merits under section 8128 of the Act on the grounds that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

Appellant’s request for reconsideration was undated, but the postmark on the attached envelope contained a date of January 4, 2010. The one-year time limitation begins to toll the day the Office issued its January 6, 2009 decision, as this was the last merit decision in the case.⁸ Therefore, the Board finds that appellant had until January 6, 2009 to file her request for reconsideration. A right to reconsideration within one year accompanies any merit decision on

⁴ 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). See *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *James R. Mirra*, 56 ECAB 738 (2005).

⁷ See *W.G.*, 60 ECAB ____ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

⁸ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.3(a) (January 2004). See *A.F.*, 59 ECAB 714 (2008); *V.B.*, 58 ECAB 725 (2007); *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

the issues.⁹ The Board notes that the Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.¹⁰ The procedure manual provides that timeliness is determined by the postmark on the envelope, if available.

The Board notes that while the undated reconsideration request was received by the Office on January 7, 2010, the envelope containing the reconsideration request was postmarked January 4, 2010. For this reason, the Board finds that the reconsideration request was timely. Appellant timely filed her request for reconsideration within one year of the January 6, 2009 merit decision. The Board finds that the Office improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.¹¹

CONCLUSION

The Board finds that appellant's request for reconsideration was timely filed.

⁹ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.3(b) (January 2004). See *E.R.*, 61 ECAB ___ (Docket No. 09-1655, issued March 18, 2010); *Larry J. Lilton*, 44 ECAB 243 (1992).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.3(b)(1) (January 2004). See 20 C.F.R. § 10.607(a).

¹¹ See *Jack D. Johnson*, 57 ECAB 593 (2006); *Donna M. Campbell*, 55 ECAB 241 (2004) (Office procedures provide that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 15, 2010 is set aside and the case remanded for further consideration consistent with this decision of the Board.

Issued: January 24, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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