

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

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**R.Y., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY  
NATIONAL GUARD, Milford, MA, Employer**

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**Docket No. 10-1416  
Issued: January 14, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 28, 2010 appellant filed a timely appeal from an April 8, 2010 decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year elapsed from the last merit decision of September 21, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

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<sup>1</sup> For final adverse decisions of the Office issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions of the Office issued on and after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On December 29, 2004 appellant, then a 25-year-old budget technician, filed an occupational disease claim alleging that she was sexually harassed in the performance of her federal job duties. Her supervisor, Lieutenant Cornel Thomas W. Desmond, submitted a January 10, 2005 statement advising that she was terminated on January 9, 2004 due to tardiness and poor performance. He noted that appellant was restored to duty on May 30, 2004 as the result of an internal investigation. Lt. Col. Desmond stated that she attributed her difficulties to the death of a friend. Appellant thereafter submitted medical evidence diagnosing anxiety and mentioning sexual harassment while at the employing establishment.

By decision dated June 13, 2005, the Office denied appellant's claim for an emotional condition on the grounds that she failed to provide sufficient evidence to support her allegations.

Appellant requested an oral hearing on November 29, 2005. The Branch of Hearings and Review denied this request as untimely by decision dated January 5, 2006.

In a letter dated January 5, 2006, appellant reiterated alleged that she was the victim of sexual harassment by a male senior ranking officer who was her supervisor. She contended that she filed a sexual harassment claim and was unlawfully terminated within a week. Following an investigation, appellant was offered her position again, but declined. She attributed post-traumatic stress disorder, eating disorder and depression as well as multiple panic attacks, to her former employment. Appellant detailed the events that she considered as sexual harassment, including an order to transfer locations so as to report to the alleged perpetrator, orders to stay in a hotel room while attending a financial review conference held 10 miles from her home and a request for a single room to share with the alleged perpetrator as well as other sexual advances. She alleged that her time cards were altered to reflect absences during time which she worked.

Appellant requested reconsideration on February 28, 2006. She submitted an April 18, 2006 factual statement alleging that her supervisor asked her out to dinner and when she refused he called her fat. The supervisor stated that he wanted to "nail her" and based on this appellant requested that a female provide a promotion pin, but she was not promoted for two months. Appellant alleged that her supervisor made offensive sexual jokes and comments in front of other employees.

By decision dated September 21, 2006, the Office denied modification of the June 13, 2005 decision, finding that the evidence of the record did not establish a compensable work factor.

Appellant requested reconsideration on March 2, 2009 and submitted a document entitled, "Findings." She alleged that her time and attendance had been inappropriately annotated retroactively, her termination was not within sound personnel procedures and an undisciplined, unhealthy and unprofessional workplace environment in general. A memorandum dated September 21, 2004, stated that the investigation had been completed and that the allegations of sexual harassment were unsubstantiated although appellant's termination was not done in accordance with sound personnel procedures. On August 2, 2009 appellant reiterated

that she was writing in connection with her appeal and resubmitted the findings and memorandum.

Appellant disagreed with the findings of the investigation and on March 1, 2010 again alleged sexual harassment. In a report dated January 26, 2006, R. Elizabeth Roebuck Ph.D., a clinical psychologist, diagnosed post-traumatic stress disorder as a result of sexual harassment.

In a letter dated March 11, 2010, the Office asked that appellant specify the appeal she wished to pursue. Appellant indicated with a checkmark that she sought reconsideration and resubmitted the above documentation.

By decision dated April 8, 2010, the Office denied reconsideration on the grounds that appellant's request was not timely nor established clear evidence of error.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought."<sup>3</sup> In *Leon D. Faidley, Jr.*,<sup>4</sup> the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. The Office is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of the Office thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of the Office.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence which does not raise a

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> 41 ECAB 104, 111 (1989).

<sup>5</sup> 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>6</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> 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.<sup>10</sup> 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 fundamental question as to the correctness of the Office decision.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

On appeal, appellant alleged that there was substantial evidence to support her claim of sexual harassment and that she developed post-traumatic stress disorder.

The only decision before the Board on this appeal is the Office April 8, 2010 decision that found appellant's request was not timely filed and did not show clear evidence of error. Since more than one year elapsed from issuance of the Office's September 21, 2006 merit decision to the date of her March 2, 2009 and March 15, 2010 requests for reconsideration, the Board lacks jurisdiction to review that decision.<sup>13</sup>

The Board finds that the April 8, 2010 denial by the Office to reopen appellant's claim for further reconsideration on the merits was proper as it was untimely and did not establish clear evidence of error.

Appellant submitted additional documentation concerning the employing establishment's investigation into her complaint of sexual harassment and termination. This evidence does not support a finding of sexual harassment. As this evidence does not support appellant's allegations, it does not raise a substantial question concerning the correctness of the Office's decision denying her claim. It is not sufficient to require the Office to reopen her claim for reconsideration of the merits, as it does not establish that the Office clearly erred in finding no compensable employment factors pertaining to her allegations of harassment.

Appellant also submitted a report dated January 26, 2006 from Dr. Roebuck. The Board notes that, in emotional condition cases, when a claimant has not established a compensable

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<sup>8</sup> See *Jesus D. Sanchez*, *supra* note 5.

<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

<sup>10</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Supra* note 4.

<sup>12</sup> *Gregory Griffin*, 41 ECAB 186 (1986), *petition for recon., denied*, 41 ECAB 458, 466 (1990).

<sup>13</sup> See 20 C.F.R. § 501.3(d)(2).

employment factor, the Office need not consider the medical evidence of record.<sup>14</sup> As noted, the Office denied the claim as appellant failed to establish a compensable factor of employment. The additional medical evidence is not relevant to this factual finding or sufficient to establish clear evidence of error on the part of the Office.

On appeal, appellant disagreed with the Office's decision and reiterated that she was sexually harassed. In order to establish a compensable factor of employment appellant must substantiate her allegation of harassment with probative and reliable evidence.<sup>15</sup> The evidence submitted does raise a substantial question as to the correctness of the Office's 2006 decision denying her claim.

### **CONCLUSION**

The Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely and did not establish clear evidence of error.

### **ORDER**

**IT S HEREBY ORDERED THAT** the April 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2011  
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

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<sup>14</sup> C.S., 58 ECAB 137 (2006).

<sup>15</sup> *Id.*