

FACTUAL HISTORY

This case has previously been before the Board. On January 10, 2002 appellant, then a 46-year-old clerk, alleged that she developed an emotional condition due to stress in her federal employment. The Office denied her claim on June 30, 2003. By decision dated August 26, 2003, the Board found that appellant had not established discrimination, harassment or retaliation by her supervisor, as compensable employment factors.¹ The Board noted that she did not substantiate discrimination as she failed to submit witness statements or other evidence in support of her allegations. The Board found that appellant's allegations regarding her light-duty position related to the assignment of work, an administrative or personnel matter for which there was no evidence to establish error or abuse on the part of the employer. The facts and circumstances of the case as set out in the Board's prior decision are incorporated herein by reference.

In a letter dated March 5, 2009, appellant's representative requested reconsideration of appellant's claim based on a September 16, 2005 decision of the EEOC. The EEOC administrative judge conducted a hearing on December 14, 2004 and found that appellant was a qualified individual with a disability as she had developed post-traumatic stress disorder in 2000 when robbed at gunpoint at the employing establishment. The judge determined that appellant's supervisor was not a credible witness and that she belittled appellant, yelled at her and retaliated against her. He found that the supervisor deliberately engaged in underhanded and deceitful methods of denying a job assignment within appellant's restrictions and terminating her which constituted proof of unlawful motive. The EEOC judge ordered appellant reinstated with back pay at a location separate from that of the supervisor and awarded monetary damages.

Appellant's representative also submitted additional medical evidence regarding appellant's current work restrictions. Appellant submitted an arbitration decision dated June 13, 2004.

By decision dated February 17, 2010, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not establish clear evidence of error by the Office. It stated:

"The claimant's original claim was in regards to the alleged discriminatory actions of her supervisor.... The hearing decision of the EEOC mentions hearing date of December 14, 2004 and makes reference to the claimant's allegation that her major depression, post-traumatic stress disorder in realization for engaging in protected activities when she was denied an assignment within medical restrictions and after being ordered not to report to the Clayton Street, the claimant was terminated for being [absent without leave].

"Furthermore, at the time of the merit decisions of June 30, 2003 and August 26, 2003, there was no evidence that the employing agency had abused their discretion. The EEOC decisions submitted with the reconsideration requests do not make any mention that the employing agency had abused their discretion.

¹ Docket No. 03-1813 (issued August 26, 2003).

Therefore, there is no evidence that the employing agency had abused their discretion.”

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees’ Compensation Act² 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.”³

In *Leon D. Faidley, Jr.*,⁴ 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.

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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ To show clear

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ 41 ECAB 104, 111 (1989).

⁵ *Supra* note 3; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, *supra* note 5.

⁹ *See Leona N. Travis*, *supra* note 7.

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹¹ 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.¹²

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the August 26, 2003 merit decision. In implementing the one-year-time limitation, the Office's procedures provide that the one-year limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³

The most recent merit decision was issued by the Board on August 26, 2003. It found that appellant had not met her burden of proof in establishing an emotional condition due to factors of her federal employment. As her March 5, 2009 letter requesting reconsideration was made more than one year after the August 26, 2003 merit decision, the Board finds that her request was untimely filed.

The Board finds, however, that the February 17, 2010 determination by the Office that appellant failed to establish clear evidence of error was improper.

The underlying claim in this case is for an emotional condition due to appellant being improperly removed from her job and exposed to retaliation and discrimination because of her disability. The initial question presented in an emotional condition claim is whether she has alleged and substantiated compensable factors of employment as contributing to her condition. Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.¹⁴

¹¹ *Leon N. Faidley*, *supra* note 4.

¹² *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹³ *D.E.*, 59 ECAB 438 (2008); *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

Appellant attributed her emotional condition to actions by her supervisor regarding her light-duty position. The assignment of work constitutes a personnel matter and the general standard for an allegation involving administrative or personnel matters is that although these are related to employment, they are primarily duties of the employer rather than regular duties of the employee. In order to establish a compensable factor, there must be evidence of error or abuse by the employing establishment.¹⁵ Appellant has submitted probative evidence of abuse, the form of discrimination and retaliation, on the part of the employing establishment sufficient to require the Office to reopen appellant's claim for merit review.

The September 16, 2005 EEOC decision, submitted by appellant in support of her untimely request for reconsideration, raises a substantial question as to the correctness of the Office's decision which denied her claim finding that she failed to establish a compensable factor of employment. In the EEOC decision, the administrative judge found that appellant's supervisor retaliated against her due to her accepted emotional condition and deliberately engaged in underhanded and deceitful methods for terminating appellant. Under the circumstances of this case, the Board finds that the September 16, 2005 EEOC decision, is of sufficient probative value to shift the weight of the evidence in this case in favor of appellant. The determination of EEOC judge supports her allegations of error or abuse and raises a substantial question as to whether the supervisor committed error or abuse in the handling of appellant's personnel matters.

Appellant's March 5, 2009 reconsideration request, albeit untimely in that it was not filed with one year of the most recent merit decision of August 26, 2003. The evidence submitted satisfies the requirements for obtaining further merit review under section 8128 of the Act and section 10.607 of the Office's regulations. Appellant's application for review forwarded the September 16, 2005 EEOC decision and presented argument that the employer committed error or abuse which resulted in her emotional condition. The EEOC decision is new evidence which supports her allegations. The Board finds that appellant has raised a substantial question as to the correctness of the August 26, 2003 merit decision. Thus, the Office abused its discretion in failing to reopen her claim for further merit review.

CONCLUSION

The Board finds that appellant has established clear evidence of error on the part of the Office and that the case must be remanded for consideration of the merits.

¹⁵ See *Donald E. Ewals*, 45 ECAB 111 (1993).

ORDER

IT IS HEREBY ORDERED THAT February 17, 2010 decision of the Office of Workers' Compensation Programs is reversed and remanded for additional development consistent with this decision of the Board.

Issued: March 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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