United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 11-600**
	)	**Issued: January 27, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Herman D. Palmieri, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 31, 2010 appellant, through her representative, filed a timely appeal from the July 6, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for reconsideration.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's April 9, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

[1] As the date of receipt, January 10, 2011, would render the appeal untimely, the date of filing is considered to be the date of postmark, December 31, 2010. 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In the first appeal,[3] the Board affirmed OWCP's April 22, 1991 denial of appellant's claim for workers' compensation benefits. Appellant filed an occupational disease claim alleging that her emotional stress and depression were caused by harassment by officials and supervisors. She alleged that on February 23, 1988 she was required to punch a time clock when the other scheme examiner was not required to do the same. Appellant also alleged that from May 6, 1988 to March 17, 1989 she was given the special assignment of being responsible for paperwork generated by two shifts. She submitted an April 2, 1990 report from Dr. Arnold Freedman, her attending psychologist, who addressed these and other factors of employment. The Board reviewed appellant's allegations and found that she failed to establish any compensable work factor in support of her claim. The Board's April 21, 1992 decision is the most recent merit decision in her case.

On October 17, 2000 the Board affirmed OWCP's denial of reconsideration on the grounds that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error in OWCP's most recent merit decision.[4] The Board issued similar decisions in 2002[5] and 2004.[6] The facts of this case as set out in previous Board decisions are hereby incorporated by reference.

On April 9, 2010 appellant again requested reconsideration of OWCP's April 22, 1991 decision. She offered two arguments, an addendum and 19 exhibits. Appellant contended that her day-to-day workload had increased from May 6 to December 31, 1988, which she attempted to quantify based on a statement made by her immediate supervisor during an arbitration proceeding. She concluded that, although the workload of scheme examiners had decreased from prior years,[7] her workload during the period identified was 114 percent higher than that of the Tour 1 Scheme Examiner. It was Dr. Freedman's opinion that an increased workload was a deliberate attempt by the supervisor to harass appellant and cause an emotional breakdown or to cause her further humiliation.

Appellant also contended that in mid-June 1987 her supervisor required her to punch a time clock instead of entering her clock ring data on a PS Form 1261. She stated that this was unnecessary and it was clear that the supervisor's intent in administering this disparate treatment was a means to demean her and lower her self-esteem and respect. Appellant argued that the new evidence and advancement of legal argument regarding disparate treatment was of sufficient probative value to *prima facie* shift the weight of the evidence of record in her favor and raised a substantial question as to the correctness of OWCP's decision.

---

[3] Docket No. 91-1640 (issued April 21, 1992).

[4] Docket No. 99-268 (issued October 17, 2000).

[5] Docket No. 02-1919 (issued December 2, 2002).

[6] Docket No. 04-1668 (issued December 13, 2004), *petition for recon., denied* (issued May 2, 2005).

[7] From 655 bids requiring schemes in 1985 to 346 bids in 1988.

Appellant submitted a February 8, 1989 arbitration decision relating to management's decision to revert the Tour 2 Scheme Examiner position to a technician assignment in mid 1988 because of insufficient work. The arbitrator denied her grievance. Appellant also submitted an April 2, 1990 and October 13, 2009 report from Dr. Freedman. The Board reviewed the earlier report in 1992. In the 2009 report, Dr. Freedman stated that appellant suffered great emotional stress in carrying out her regular assignment and her special-duty assignment, but he could not disassociate this anxiety from her unsupported belief that management deliberately harassed her or had committed error in an administrative or personnel matter.

In a decision dated July 6, 2010, OWCP denied appellant's April 9, 2010 request for reconsideration. It found the request untimely and that it did not establish clear evidence of error in its most recent merit decision. OWCP found that Dr. Freedman's opinion was irrelevant as no compensable work factor had been established. It found that appellant failed to demonstrate that the employer acted erroneously or abusively and that no substantive factual evidence established the heavy workload alleged.

On appeal, appellant argued that the arbitration decision gave an accurate assessment of her daily workload and the uncovering of false, half-truth and misleading statements by her supervisors. She also argued that OWCP denied her procedural due process by initially adjudicating her claim before the full 30-day period for submitted evidence had expired. OWCP also denied appellant's procedural due process when it attempted telephone contact with her on July 7, 1989 two days after it received notice that she had authorized a representative. Appellant reiterated that her supervisors had targeted her for harassment and to discredit her by making statements that were, for the most part, deliberate, false and misleading. She took issue from the Board's April 21, 1992 decision regarding the realignment of tours. Appellant repeated the workload and time clock arguments, in her latest request for reconsideration and discussed Dr. Freedman's opinion. She argued that OWCP and the Board must accept Dr. Freedman's March 20, 2003 and October 13, 2009 reports.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[8]

OWCP, through regulations, has imposed limitation on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for

[8] 5 U.S.C. § 8128(a).

which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[9]

The term "clear evidence of error" is intended to represent a difficult standard.[10] If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[11]

ANALYSIS

The one-year period for requesting reconsideration begins on the date of the original OWCP decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.[12]

The last merit decision in this case was the Board's April 21, 1992 decision affirming OWCP's April 22, 1991 denial of appellant's claim for benefits. Appellant had one year from the date of the Board's decision or until April 21, 1993, to make a timely request for reconsideration of OWCP's denial.[13] Her April 9, 2010 request for reconsideration is therefore untimely.

Because the request is untimely, OWCP will reopen appellant's case only if the request meets a difficult standard. Appellant's April 9, 2010 request for reconsideration must show, on its face, that OWCP's April 22, 1991 decision was clearly erroneous.[14]

OWCP denied appellant's claim for workers' compensation benefits and the Board affirmed the denial, as she failed to establish a compensable factor of employment. Appellant's untimely request reiterates arguments previously raised in prior appeals that she experienced an increased workload and that her supervisor treated her disparately by requiring her to hit a time clock. The Board first ruled on these arguments in 1992. The Board reviewed the evidence

[9] 20 C.F.R. § 10.607.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

[11] *Id*., Chapter 2.1602.3.d(1).

[12] *Id*., Chapter 2.1602.3.b(1).

[13] Appellant had 30 days or until May 21, 1992, to file a petition for reconsideration with the Board specifying any matters she believed the Board erroneously decided. 20 C.F.R. § 501.7.

[14] Note that appellant's request must present clear evidence of error in OWCP's April 22, 1991 decision, not in the Board's April 21, 1992 decision affirming. The decisions and orders of the Board are final upon the expiration of 30 days from the date of issuance unless the Board has fixed a different period of time therein. Following the expiration of that time, the Board no longer retains jurisdiction of the appeal unless a timely petition for reconsideration is submitted and granted. 20 C.F.R. § 501.6.

submitted, including statements from supervisors responding to appellant's allegations and found that her perceptions were not compensable.[15] The Board further found that the time clock issue was an administrative matter and that the evidence failed to establish error or abuse by management.

The Board finds that the evidence submitted with appellant's most recent reconsideration request does not establish error in OWCP's April 22, 1991 decision. The arbitrator's decision establishes no compensable factor of employment. It denied the grievance and made no adverse finding against management with respect to treatment of appellant.

Because appellant's April 9, 2010 request for reconsideration is untimely and fails to show clear evidence of error in OWCP's April 22, 1991 merit decision, the Board finds that the OWCP properly denied her request. The Board will affirm OWCP's July 6, 2010 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's April 9, 2010 request for reconsideration.

[15] In its October 17, 2000 nonmerit decision, the Board found that evidence showing that appellant was required to do paperwork from another shift did not, in itself, establish overwork or error by the employer, in light of the elimination of one of the scheme examiner positions as unnecessary. If appellant disagreed with that finding, she had 30 days to petition the Board to reconsider.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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