

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSELLE TEEL and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Houston, Tex.

*Docket No. 96-921; Submitted on the Record;
Issued May 26, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On September 1, 1993 appellant, then a 61-year-old secretary, filed a notice of occupational disease alleging that her stomach ulcer was caused by factors of her employment beginning prior to June 14, 1991. She generally contended that a former supervisor harassed her and discriminated against her. Appellant stopped work on August 18, 1993, returned on August 31, 1993 and again stopped work on September 2, 1993.

In a report of November 19, 1993, Dr. Michael W. Stavinoha, a Board-certified gastroenterologist, stated that he had been treating appellant since July 1991 for chronic gastritis, an irritable bowel syndrome and a probable depression. Dr. Stavinoha stated that appellant's gastrointestinal problems were difficult to control and that increasing stress at work has worsened her symptoms.

By decision dated January 26, 1994, the Office denied appellant's claim on the grounds that she had not established an injury in the performance of duty. The Office indicated that the medical evidence failed to contain a reasoned opinion as to how employment caused or aggravated appellant's stomach ulcer.

On February 1, 1994 appellant requested reconsideration. With her request for reconsideration, appellant submitted additional medical and factual evidence. In a report dated June 3, 1994, Dr. Willerd H. Spankus, a Board-certified internist, stated that he was not presently treating appellant for intestinal problems. Dr. Spankus indicated that his current diagnosis was anxiety state and hypothyroidism and that appellant had a history of hypertensive vascular disease controlled by medication. He stated that appellant feels that her problems were related to employment harassment and losing her position. Dr. Spankus opined that appellant's alleged

employment problems were related to claims that she was harrassed by her supervisor which could cause anxiety and elevate her blood pressure. He further opined that appellant would be capable of returning to her job as a secretary under the proper job conditions and that it was very difficult to evaluate appellant's problems.

In a report dated June 24, 1994, Dr. Stavinoha stated that appellant's current gastrointestinal disorder included but was not limited to gastritis, diverticulosis and possible gallbladder disease. He indicated that appellant's condition should be considered to be related to the employment factors described in the statement of accepted facts and that gastrointestinal complaints were worsened by stress. No medical rationale was provided. Dr. Stavinoha further opined that even though appellant had not worked since September 1993, her current condition was still related to employment. According to him, it was obvious that appellant continued to undergo stress via the Office. Dr. Stavinoha further opined that appellant was capable of returning to a job as a secretary but only in a less stressful situation and clearly under a different manager.

By merit decision dated August 18, 1994, the Office denied appellant's request for reconsideration as it found that the medical evidence submitted was insufficient to explain how and in what manner appellant's employment factors inflicted injury. The Office also found that certain incidents claimed to have caused appellant's condition were not compensable work factors. Appeal rights accompanying the decision advised appellant of the time limit for filing a reconsideration request and to file any reconsideration request with the "*District office at the address which appears on the accompanying letter.*" (Emphasis in original).

By letter dated August 7, 1995, appellant requested reconsideration of the August 18, 1994 decision. This letter was addressed by appellant to the employing establishment. The Office received the request on September 18, 1995. In support of her request, appellant stated that she was submitting other letters to substantiate what was previously submitted. This included evidence previously of record, further statements about her work environment, some coworker statements, and a November 7, 1994 report from Dr. Stavinoha.

In a report dated November 7, 1994, Dr. Stavinoha clarified his previous opinion of why appellant's condition should be considered causally linked to her employment. He stated that it was common knowledge that stress creates excess acid and enzyme activity that causes gastrointestinal disorders such as gastritis, erosions, ulcers and bleeding, as in appellant's case. Dr. Stavinoha stated that stress aggravates and worsens appellant's gastrointestinal disorder by increasing the acid and enzyme activity that eats at the lining of her stomach. He stated that the filing of complaints and harassment, discrimination and retaliation through her union, Equal Employment Opportunity (EEO) Commission and the Merit System Protection Board (MSPB) established that appellant endured much stress in her workplace. Dr. Stavinoha additionally stated that appellant undergoes stress from the Office as her embroilment in the reconsideration and appeal process brings back memories associated with the pain of her job related experiences of discrimination and retaliation. He stated that with the last denial of appellant's claim, appellant revealed her suffering through a case of shingles because of financial problems, illness and leave without pay overwhelmed her. Dr. Stavinoha stated that there was no reason for him

to doubt appellant's divulgence for while working her response to medication was unremarkable and her condition grew progressively worse.

In a letter dated August 30, 1994, a coworker stated that appellant brought the SETTS program disk to her because it was locking her computer and no one in her group would take the time to show her how to unlock the program. The coworker stated that appellant's disk also locked her computer. The coworker stated that the SETTS program disk is a very important program which is done monthly and that this created a great deal of stress for appellant.

In a letter dated September 3, 1994, another coworker, Herbert C. Whalley, stated that he was a member of a work group appellant was group secretary for and that Doug Pierre was both appellant's and his supervisor. Mr. Whalley stated that while appellant was his group secretary, he participated on a project to develop an automatic system to generate record retention letters, of which appellant was the primary user. He stated appellant told him that Mr. Pierre had complained that the letters she had prepared were not correct. Mr. Whalley stated that appellant was not familiar with how the system worked and would not have been able to change the content of the letters. He stated that he never found out how that happened, but that he was certain appellant did not change them. Mr. Whalley also wrote about another situation whereby the formulas on appellant's spreadsheets would change. He stated that appellant always denied having changed the formulas and that he would need to go in and either reenter or correct the formulas. Mr. Whalley stated that he did not know how this would happen.

By decision dated October 27, 1995, the Office found that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on January 24, 1996, the only decision properly before the Board is the October 27, 1995 Office decision denying appellant's application for review.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to demonstrate clear evidence of error.

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office 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.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

In the present case, appellant submitted a letter dated August 7, 1995 requesting reconsideration of a August 18, 1994 decision. The Office, however, did not receive the reconsideration request until September 18, 1995. This request for reconsideration is outside the one-year time limitation established under 20 C.F.R. § 10.138(b)(2). Appellant contends that her case must have been held over the time limitation at the employing establishment.⁶ The Board notes that within appellant's reconsideration request, a memorandum dated September 15, 1995 from the employing establishment states that they received the evidence in support of appellant's reconsideration request on August 14, 1995, but were unable to forward the request to the Office before the deadline given in the appeal rights. The employing establishment's statement and appellant's assertion do not, however, establish that her request for reconsideration was timely. The appeal rights provided with the August 18, 1994 decision clearly informed appellant that a request for reconsideration and any new evidence must be sent to the district Office address that

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁵ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁶ As proof of her timely filing, appellant submitted a copy of a postal certified receipt dated August 12, 1995, which indicated that the reconsideration request was addressed to the employing establishment and not the Office. Inasmuch as the record before the Office at the time of the October 27, 1995 decision did not contain this, the postal receipt dated August 12, 1995 is outside the Board's scope of review; *see* 20 C.F.R. § 501.2(c).

appeared on her decision. Appellant was notified that she had one year to request reconsideration with the Office and that the grounds for the reconsideration must be clearly stated in her request.⁷ In this case, the reconsideration request was received by the Office September 18, 1995. There is no evidence of record indicating that appellant had submitted a request for reconsideration to the Office in accordance with the provisions of section 10.138(b)(1) prior to that date. Since the request received was outside the one-year period, the Office properly determined that it was untimely.

Although the request was untimely, the Board has held that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁸ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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 *prima facie* shift the weight of the evidence in favor of the claimant

⁷ 20 C.F.R. § 10.138(b)(1) provides that the claimant must make a written request identifying the decision and the specific issues within the decision that the claimant wishes the Office to reconsider.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991). The Office therein states:

"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, a proof of miscalculation in a schedule award). Evidence such as 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 of the case...."

¹⁰ *See Dean R. Beets*, 43 ECAB 1153 (1992).

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *See Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.¹⁵ 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.¹⁶

The Board finds that appellant's September 18, 1995 request for reconsideration fails to show clear evidence of error. In the August 18, 1994 decision, the Office found that appellant had not established an injury causally related to factors of her federal employment as compensable work factors were not established and because the medical evidence was insufficient with regard to the established factors. In her reconsideration request, appellant submitted various medical reports, chart notes, and diagnostic medical tests which the Office had previously considered. These include reports by Drs. Gritz, Stavinoha, Spankus, Zimmerman, Russell and Pederson. However, evidence submitted by appellant that was previously of record is insufficient to require the Office to reopen the claim.¹⁷

The new evidence submitted by appellant also does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is whether appellant submitted sufficient factual and medical evidence establishing an employment-related stomach ulcer. The new factual evidence essentially concerned the generalized speculation of coworkers regarding possible tampering with appellant's computer or unlocking computer programs. These coworkers did not purport to witness any particular management action of an unreasonable or harassing nature.¹⁸ These allegations were previously found by the Office to be noncompensable and, as the coworker statements were general and speculative about the causes of these alleged problems, they are insufficient to *prima facie* shift the weight of the evidence in appellant's favor. To the extent that any of these coworker statements tend to support that appellant had stress due to difficulty in performing the regular duties of her job, there appellant has not submitted rationalized medical evidence explaining how and why specific established employment factors caused or aggravated any emotional condition.¹⁹

Furthermore, Dr. Stavinoha's December 7, 1994 report is insufficient to establish clear evidence of error as he essentially relates appellant's stress to the filing of claims and frustration resulting from administrative matters such as the EEO, MSPB and OWCP claims processes.

¹⁵ *Leon D. Faidley, Jr., supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁷ *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

¹⁸ *See Jose L. Gonzalez-Garced*, 46 ECAB 559, 564-65 (1995) (where the Board found that coworker statements did not establish harassment by a supervisor where the statements were general in nature and did not refer to any specific incidents that would substantiate appellant's allegations of harassment by supervisors).

¹⁹ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

These are not compensable factors of employment.²⁰ Dr. Stavinoha did not provide a rationalized medical opinion²¹ explaining how specific regular or specially assigned job duties, or any employment factors deemed compensable by the Office, caused or aggravated appellant's claimed condition.

For these reasons, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* shift the weight of the evidence in appellant's favor such that appellant has not established clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated October 27, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 26, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

²⁰ See *George A. Ross*, 43 ECAB 346 (1991) (where stress is attributed to the processing of a claim for workers' compensation benefits, such condition does not arise in the performance of duty as the processing of a compensation claim bears no relation to appellant's day-to-day or specially assigned duties).

²¹ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).