U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON F. PALMIERI and U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA

Docket No. 99-268; Submitted on the Record;
Issued October 17, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

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.

This case has previously been on appeal before the Board. By decision dated April 21, 1992, the Board found that appellant had not established that her emotional condition was sustained in the performance of duty.[1] In particular, the Board found that appellant's failure to obtain a desired promotion and changes in her work environment did not constitute compensable factors of employment and that appellant's "disputes with her supervisors … due to leave requests, denials and usage and due to tardiness, mandatory time clock punch in and a warning letter together with restricted sick leave usage by the employing establishment and mandatory remedial training" were personnel matters in which appellant had not shown that the employing establishment erred or acted abusively. The Board further found that appellant's mere perception and feeling of overwork and work in excess of her bid were not compensable and that appellant had not provided sufficient detail of any specific verbal altercations or difficulties in her relationships with her supervisors. The Board affirmed a decision of the Office dated April 22, 1991. The Board subsequently denied appellant's petition for reconsideration.

By letter dated March 20, 1998, appellant requested reconsideration and submitted additional evidence. Appellant contended that the statements of appellant's supervisors should not have been considered, that the employing establishment's March 30, 1998 letter requesting a discussion of appellant's use of 104 hours of sick leave during the previous year constituted harassment and discrimination, that the employing establishment's citation of appellant's sick leave balance of 16 hours as a reason not to fully recommend appellant for a position in August 1988 constituted harassment and discrimination, that the employing establishment erred in

[1] Docket No. 91-1640.

applying the five-minute leeway rule in a letter of warning to appellant, that a witness statement established that a September 11, 1987 incident occurred as alleged by appellant and showed that appellant's supervisor had submitted false statements regarding this incident and that newly submitted evidence showed that appellant was required to work above and beyond her bid assignment by being required to do paperwork for another tour of duty. By decision dated July 6, 1998, the Office found that appellant's March 20, 1998 request for reconsideration was not timely and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act 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 --
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> (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). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application 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).[2]

In the present case, the most recent merit decision by the Office was issued on April 22, 1991 and the Board issued a decision affirming this decision on April 21, 1992. Appellant had one year from the date of the Board's decision to request reconsideration and did not do so until March 20, 1998. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[3] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20

[2] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] 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 and raise a substantial question as to the correctness of the Office decision.[10] 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.[11]

The Board finds that appellant's March 20, 1998 request for reconsideration and the evidence submitted with this request do not show clear evidence of error.

Appellant's contention that the statements of her supervisors should not have been accepted by the Office is contrary to 20 C.F.R. § 10.130, which requires the Office to "apply the law to the facts as reported, received, or obtained upon investigation" and to consider "the report by his or her immediate official superior." Appellant's contentions that the employing establishment's March 30, 1998 letter requesting a discussion of appellant's use of 104 hours of

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996), 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 OWCP made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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."

[5] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[6] *See Leona N. Travis*, 43 ECAB 227 (1991).

[7] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[8] *See Leona N. Travis*, *supra* note 6.

[9] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[10] *Leon D. Faidley, Jr.*, *supra* note 2.

[11] *Gregory Griffin*, *supra* note 3.

sick leave during the previous year constituted harassment and discrimination and, that the employing establishment's citation of appellant's sick leave balance of 16 hours as a reason not to fully recommend appellant for a position in August 1988 constituted harassment and discrimination are merely contentions of harassment and discrimination without any substantiation. Appellant's contention that the employing establishment erred in applying the five-minute leeway rule regarding the time appellant clocked in asks that the Board construe the evidence so as to produce a contrary conclusion, in a situation were the employing establishment's rule appears to allow discretion by the supervisor. The witness statement regarding a September 11, 1997 incident between appellant and her supervisor, even though it is dated 10 years after this incident, might well be sufficient to require further development of the evidence if it had been timely submitted. This evidence, however, is not sufficient to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the Office's decision. The newly submitted evidence does show that appellant was required to do paperwork for another shift, but this in itself does not establish overwork or error by the employing establishment, in light of the elimination of one of the three scheme examiner positions as unnecessary. None of appellant's contentions or the evidence submitted in support of them shows clear evidence of error in the Office's April 22, 1991 decision.

The decision of the Office of Workers' Compensation Programs dated July 6, 1998 is hereby affirmed.

Dated, Washington, DC
October 17, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member