U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA E. WILLIAMS and DEPARTMENT OF THE AIR FORCE, TRAVIS AIR FORCE BASE, CA

Docket No. 99-825; Submitted on the Record;
Issued February 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On June 16, 1995 appellant, then a 34-year-old discharge technician, filed an occupational disease claim alleging that she sustained a stress-related disorder, which she attributed to factors of her federal employment. By decision dated July 31, 1996, the Office denied appellant's claim on the grounds that she did not establish that she sustained an emotional condition in the performance of duty. In a letter dated August 21, 1996, appellant, through her representative, requested a hearing before an Office hearing representative.

In a July 30, 1997 decision, the hearing representative found that appellant attributed her condition to problems resulting from her employment-related carpal tunnel syndrome, harassment and discrimination by her supervisor and overwork. The hearing representative determined that an emotional condition resulting from appellant's carpal tunnel syndrome should be filed as a consequential injury with her carpal tunnel syndrome claim. She further determined that appellant had not established her allegation of overwork.

Regarding appellant's claim of harassment and discrimination by her supervisor in changing her duty shift, evaluating her performance, abolishing her position in a reduction-in-force, delaying her claim and not paying her Sunday premium pay, the hearing representative found that appellant had not established either error or abuse by the employing establishment in an administrative function or that the actions constituted harassment. The hearing representative noted that the employing establishment subsequently found appellant entitled to retroactive Sunday premium pay but determined that she had "submitted no finding to support wrongdoing on the part of the employing establishment." The hearing representative discussed appellant's allegation that her supervisor told racial and sexual jokes but noted that the witnesses did not

provide sufficient specific information to establish these allegations as factual. The hearing representative, therefore, affirmed the Office's July 31, 1996 decision.

By letter dated August 1, 1998, appellant, through her representative, requested reconsideration of her claim. She unsuccessfully attempted to transmit her request to the Office's facsimile machine on Saturday, August 1, 1998. On Monday, August 3, 1998, appellant faxed her request for reconsideration to the Office.

By decision dated August 20, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued no more than one year prior to the filing of the appeal.[1] As appellant filed her appeal on November 25, 1998, the only decision before the Board is the August 20, 1998 decision by the Office denying review of her claim on the basis that her request was not timely filed and did not establish clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[2] The Office 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.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[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

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(2).

[4] *See Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[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.

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 as to 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 Office issued its last merit decision on July 30, 1997. Appellant's one-year time limitation for requesting reconsideration expired on July 30, 1998, a Thursday.[12] Appellant requested reconsideration in a letter dated August 1, 1998 and received by the Office on August 3, 1998. The Office, therefore, properly found appellant's request for reconsideration to be untimely.

On appeal, appellant argues that the Office did not mail its July 30, 1997 decision to her until August 1, 1997, and that she therefore had until August 1, 1998 to request reconsideration. As August 1, 1998 fell on a Saturday, a nonbusiness day, appellant argues that she had until August 3, 1998 to request reconsideration. However, the record contains no evidence establishing that the July 30, 1997 decision of the Office was not mailed to appellant the day the decision is dated. Further, the Office letter accompanying the July 30, 1997 decision states that reconsideration must be requested within one year of the date of the decision, not the date it was mailed. Therefore, even if the decision was mailed on August 1, 1997, appellant has submitted no evidence showing she did not receive the decision in ample time to request reconsideration. Consequently, the Board finds that appellant's request for reconsideration was untimely filed.

The Board further finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of the prior merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In support of her request for reconsideration, appellant resubmitted factual information already of record regarding her request for Sunday premium pay. Evidence previously of record does not constitute a basis for reopening a claim.[13]

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

[10] *Id.*

[11] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[12] *See generally Gary J. Martinez*, 41 ECAB 427 (1990).

[13] *James A. England*, 47 ECAB 115 (1995); *Barbara A. Weber*, 47 ECAB 163 (1995).

Appellant submitted medical reports from Dr. Norman M. Harris, a Board-certified orthopedic surgeon and Dr. Robert A. Kaplan, a psychologist. The Office, however, denied appellant's claim on the grounds that she did not establish a compensable factor of employment. Therefore, the medical evidence does not address the relevant issue, which is factual in nature.

Appellant also provided witness statements from Lorraine Gaines, her union representative, and coworkers Cheryl J. O'Brien and Jody Sutton. In her undated statement, Ms. O'Brien specifically described a racial slur by appellant's supervisor, stated that the supervisor had lied about appellant's Sunday hours and described other incidents, which she believed caused a stressful work environment. In a statement dated August 1, 1998, Ms. Sutton indicated that she had observed appellant work more than eight hours a day and related that she believed that the employing establishment had acted abusively toward appellant regarding her claim for retroactive Sunday premium pay.

In an August 3, 1998 statement, Ms. Gaines noted that appellant's supervisor had initially stated that she occasionally worked Sunday hours when in fact her shift specified that her work began on Sunday.[14] She provided a detailed description of other factors to which appellant attributed her condition, including limitations from her carpal tunnel syndrome and a change in shift.

As stated the clear evidence of error standard is difficult to meet. While appellant submitted witnesses' statements which, with further development, may have clarified the issue of whether she has established a compensable factor of employment, the statements fall short of appellant's burden to establish clear evidence of error with respect to the Office's July 30, 1997 decision.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, acted within its discretion in denying further review of the case.

[14] It appears that appellant began work at 11:45 p.m. on Sunday.

The decision of the Office of Workers' Compensation Programs dated August 20, 1998 is hereby affirmed.

Dated, Washington, DC
February 26, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member