

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. LASTER and U.S. POSTAL SERVICE,
POST OFFICE, Albany, GA

*Docket No. 02-638; Submitted on the Record;
Issued August 6, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration.

In the prior appeal of this case,¹ the Board found that appellant, a supervisor, failed to establish that she sustained an emotional condition while in the performance of duty. She submitted no probative and reliable evidence to establish that she was physically attacked and verbally abused by another supervisor on January 25, 1995. The employing establishment investigated the incident and, based on statements from eight eyewitnesses, determined that the supervisor did not subject appellant to verbal abuse or profanity and that the supervisor did not intentionally strike her foot while pushing a piece of equipment. The Board found no evidence of error or abuse by the employing establishment in the disciplinary actions taken against appellant after the January 25, 1995 incident. The Board further found that appellant's complaints about the manner in which the supervisor exercised his supervisory discretion fell, as a general rule, out of the scope of coverage.²

In a decision dated December 16, 1999, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that appellant's reaction over the handling of her Equal Employment Opportunity (EEO) and workers' compensation claims was not compensable. In an attached statement of review rights, the Office notified appellant that any request for reconsideration must be made within one year of the date of the decision.

On July 3, 2000 appellant requested reconsideration.

¹ Docket No. 98-1303 (issued October 27, 1999).

² The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

In a decision dated September 18, 2000, the Office denied appellant's request without reopening the case for a review on the merits. The Office found that most of the evidence submitted with her request was duplicative or repetitious of evidence already in the record and considered in prior decisions. The Office further found that the only new evidence that appellant submitted was irrelevant and immaterial to the issue in her case. In an attached statement of review rights, the Office notified appellant that she could request another reconsideration provided she did so within one year of the December 16, 1999 decision.

On December 12, 2000 appellant again requested reconsideration. In support thereof she argued that the supervisor had sexually harassed her. She also argued that the Postmaster had created a hostile environment by failing to enforce the employing establishment's "zero tolerance" policy and instead taking retaliatory action against her.

In a decision dated January 9, 2001, the Office denied appellant's request without reopening the case for a review on the merits. The Office found that her request neither raised substantive legal questions nor included new and relevant evidence. The Office notified appellant that her only right of appeal was to this Board.

On January 19, 2001 appellant requested reconsideration. In support thereof she briefly outlined the basis of her claim of wrongful discharge and sex discrimination.

In a decision dated April 16, 2001, the Office denied appellant's request without reopening the case for a review on the merits. The Office found that appellant's January 19, 2001 request was untimely because it was dated more than one year after the most recent merit decision, which was the December 16, 1999 decision denying modification of the denial of appellant's claim. The Office further found that appellant submitted no clear evidence of error in the Office's December 16, 1999 decision. The Office notified appellant that her only right of appeal was to this Board.

On June 27, 2001 appellant wrote to her congressman for assistance. She attempted to explain that her January 19, 2001 request for reconsideration was timely. Appellant reargued her case and submitted copies of correspondence between her and the Office. The congressman forwarded these materials to the Office by facsimile on July 16, 2001.

In a decision dated August 21, 2001, the Office denied appellant's request without reopening the case for a review on the merits. The Office found that appellant's June 27, 2001 request was untimely because it was filed more than one year after the most recent merit decision, which was issued on December 16, 1999. The Office further found that appellant presented no clear evidence that the Office's December 16, 1999 decision was in error. She submitted only copies of letters and no new evidence. The Office notified appellant that her only right of appeal was to this Board.

The Board finds that the Office properly denied appellant's requests for reconsideration.

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 --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

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. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

Timeliness is measured from the most recent decision on the merits of the claim. In this case, the most recent decision on the merits is the Office's December 16, 1999 decision denying modification of the denial of appellant's claim. Under section 8128(a) of the Act, the Office's December 16, 1999 decision is “an award for or against payment of compensation.”

Appellant's December 12, 2000 request for reconsideration was filed within one year of the Office's December 16, 1999 decision and is, therefore, timely. In support of her request, appellant merely reargued that the supervisor had sexually harassed her and that the Postmaster had created a hostile environment and took retaliatory action against her. Appellant failed to show that the Office erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument not previously considered by the Office and failed to include relevant and pertinent new evidence not previously considered by the Office.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606 (1999).

⁵ *Id.* at § 10.608.

Because appellant's December 12, 2000 request for reconsideration failed to meet at least one of the standards for obtaining a merit review of her case, the Board finds that the Office acted within its discretion in denying her request without reopening the case for a review on the merits. The Board will affirm the Office's January 9, 2001 decision.

Unlike its December 19, 1999 decision, the Office's January 9, 2001 decision is not a decision on the merits of appellant's case. It is not "an award for or against payment of compensation" under section 8128(a) of the Act. It is, instead, a procedural decision not to reopen appellant's case for a merit review. Because timeliness is measured from the most recent decision on the merits of the claim, the January 9, 2001 decision does not renew the one-year period for making a timely request for reconsideration. Subsequent requests for reconsideration must still be measured from the Office's December 19, 1999 decision denying modification of the denial of appellant's claim.

Appellant's July 16 and January 19, 2001 requests for reconsideration are, therefore, untimely.

The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁷ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

⁶ *Id.* at § 10.607.

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Travis*.

¹¹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹³

Appellant's July 16 and January 19, 2001 requests for reconsideration do not demonstrate clear evidence of error on the part of the Office in its December 19, 1999 decision denying modification of the denial of her claim. By briefly outlining the basis of her claim of wrongful discharge and sex discrimination, rearguing her case and submitting copies of correspondence between her and the Office, appellant offered argument and evidence that is duplicative or repetitious of argument and evidence previously submitted and considered. Her argument concerning the timeliness of her January 19, 2001 request for reconsideration is irrelevant to whether she sustained an emotional condition while in the performance of duty. The argument and evidence submitted to support appellant's July 12 and January 19, 2001 requests for reconsideration does not manifest on its face that she was physically attacked and verbally abused by another supervisor on January 25, 1995 or that the employing establishment committed error or abuse either in the disciplinary actions taken against her or in the exercise of supervisory discretion.

Because appellant's July 16 and January 19, 2001 requests for reconsideration fail to demonstrate clear evidence of error on the part of the Office in its December 19, 1999 decision, the Board finds that the Office acted within its discretion in denying those requests without reopening the case for a review on the merits. The Board will affirm the Office's August 21 and April 16, 2001 decisions.

¹³ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 458, 466 (1990).

The August 21, April 16 and January 9, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 6, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member