

**United States Department of Labor
Employees' Compensation Appeals Board**

BRENDA L. STUART, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, WILKES-BARRE, PA, Employer**

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**Docket No. 05-1668
Issued: November 2, 2005**

Appearances:
Brenda L. Stuart, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 8, 2005 appellant filed a timely appeal from a June 22, 2005 nonmerit decision of the Office of Workers Compensation Programs, denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated August 13, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the June 22, 2005 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence.

FACTUAL HISTORY

On December 27, 2001 appellant, then a 40-year-old licensed practical nurse, filed a traumatic injury claim alleging that she was sexually harassed on December 13, 2001 while she was on a “smoke break.” She claimed that she experienced “great mental anguish” as a result of the harassment.

In support of her claim, appellant submitted a note written on a prescription pad dated December 17, 2001 from Dr. Mark Puffenberger, a Board-certified family practitioner, containing the words “no work until further notice.” She also submitted notes bearing an illegible signature reflecting her contention that she had been grabbed by the arm and kissed against her will on December 13, 2001 and that, as a result, she felt extremely anxious.

By letter dated January 3, 2002, the employing establishment controverted appellant’s claim on the grounds that she had not provided sufficient medical documentation to substantiate her claim.

By letter dated January 7, 2002, the Office advised appellant that the evidence submitted was insufficient to establish her claim and requested additional information, including a specific diagnosis and an opinion from a physician as to the cause of her diagnosed condition.

In a note dated February 12, 2002, Dr. James F. McAndrew, Ph.D., a clinical psychologist,¹ related appellant’s assertions that her spirit and dignity had been broken when she was grabbed and kissed against her will on December 13, 2001. She experienced a panic attack the following day and did not want to be a nurse anymore. Dr. McAndrew’s note included the phrase “acute distress disorder.”

In a narrative dated February 20, 2002, appellant stated that on December 13, 2001 at 2:30 p.m., Dr. Joshi approached her and began a conversation with her. She alleged that after chatting casually, he asked for her telephone number so that he could “call [her] and for happy hour.” She reportedly then returned to the building and proceeded up the stairway to her unit, when Dr. Joshi grabbed her arm and kissed her on the mouth. Appellant claimed that upon reaching her unit, she told a coworker, Dean Stone, that Dr. Joshi was a “fucking pervert” because he asked for her telephone number.

Appellant submitted physician’s notes bearing an illegible signature and dated January 8 through February 25, 2002. The January 11, 2002 notes listed phrases “severe anxiety;” “chronic anxiety;” “crying frequently and panic;” and “depression.” February 25, 2002 notes included “patient has no income;” husband has not had any sexual relations with patient since incident happened;” and “extremely stressed out.”

By letter dated February 28, 2002, Stephen M. Lucas, Chief Executive Officer at the employing establishment, reported that an Administrative Board of Investigation had

¹ Dr. McAndrew’s credentials cannot be verified.

concluded that appellant's sexual harassment allegations on December 13, 2001 were unsubstantiated. At the Office's request, the employing establishment provided a complete copy of the investigative report, including a witness statement from Mr. Stone. In a statement dated December 18, 2001, he indicated that between 9:30 a.m. and 11:30 a.m., on December 13, 2001, appellant told him that Dr. Joshi had asked her to go to happy hour and had stared at her breasts. In testimony taken on February 5, 2002, appellant reiterated her allegation that sexual harassment had occurred at 2:30 p.m. on December 13, 2001.

By letter dated March 1, 2002, the Office provided appellant with an opportunity to respond to the employing establishment's report. No response was received by the Office.

By decision dated April 16, 2002, the Office denied appellant's claim, finding that she failed to establish a fact of injury due to inconsistencies in the record and her failure to substantiate her allegations.

Appellant requested an oral hearing, which was held on January 6, 2003. At the hearing, she testified that at 2:30 p.m. on December 13, 2001 Dr. Joshi grabbed her hand in the stairway and kissed her on the mouth. She indicated that she did not file a formal complaint with the union and that she did not tell her coworker about the kiss because she did not know him well. Appellant resigned from the employing establishment because she was traumatized by the alleged events.

By decision dated April 7, 2003, an Office hearing representative affirmed the April 16, 2002 decision, finding that appellant had failed to establish that she sustained an emotional condition in the performance of duty.

On July 10, 2003 the Office received a request for reconsideration. In support of her request, appellant resubmitted the December 17, 2001 medical report and reports dated April 8 and May 8, 2002, bearing an illegible signature. These records reflect appellant's complaints that she felt "awful;" that her marriage was "going down the tube;" and that she was very depressed.

In a merit decision dated August 13, 2003, the Office denied modification of the April 7, 2003 decision.

By letter dated June 3, 2005, appellant again requested reconsideration, contending that the Office had disregarded relevant information. She alleged that the decision was prejudiced because she was being discriminated against with full disregard for her civil rights and that the Office's decision was biased.

In a nonmerit decision dated June 22, 2005, the Office denied appellant's request for reconsideration, finding that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees Compensation Act.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 The 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 C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.⁵ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's decision.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.607. See *Alan G. Williams*, 52 ECAB 180 (2000).

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁵ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ See *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005). See also *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

⁸ *Id.*

the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁹

ANALYSIS

The Board finds that appellant's request for reconsideration was untimely and failed to establish clear evidence of error.

The Board notes that appellant failed to file a timely application for review. The last merit decision in this case was the Office's August 13, 2003 decision, affirming the denial of her claim on the grounds that she had not established fact of injury. As appellant's June 3, 2005 letter requesting reconsideration was submitted more than one year after this decision, it was untimely. Consequently, she must establish clear evidence of error on the part of the Office in denying her claim for compensation.¹⁰ The Board finds that the evidence submitted on reconsideration fails to meet this standard.

Appellant submitted a statement contending that the Office had disregarded relevant information; that the decision to deny her claim was prejudice, that she was being discriminated against with disregard for her civil rights; and that the decision was biased. However, she submitted no additional factual or medical evidence in support of her claim. To show clear evidence of error, appellant is required to submit evidence that is relevant to the issues that were decided by the Office.¹¹ In the instant case, the Office denied appellant's claim on the grounds that she failed to establish the alleged incident of sexual harassment on December 13, 2001. In support of her request for reconsideration, appellant did not provide any new evidence to resolve inconsistencies in the record or to substantiate her allegations. Rather, she merely reiterated her allegation of harassment. The Board finds that appellant has failed to raise a substantial question concerning the correctness of the Office's decision. Her unsupported allegations of prejudice, bias and discrimination are insufficient to establish clear evidence of error by the Office in the denial of her claim for compensation.¹²

⁹ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁰ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹¹ *See Deen D. Beets*, 43 ECAB 1153 (1992).

¹² *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004). 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 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.”

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's reconsideration request showed clear evidence of error, which would warrant reopening her case for merit review. The Office reviewed the evidence submitted by appellant in support of her application for review, but found that her arguments did not establish that its prior decisions were in error. The Board finds that the arguments and evidence submitted by appellant in support of her application for review, do not raise a substantial question as to the correctness of the Office's decision and thus, are insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review on June 22, 2005. The Board further finds that her reconsideration request was untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers Compensation Programs dated June 22, 2005 is affirmed.

Issued: November 2, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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