United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 08-519**
	)	**Issued: July 23, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 11, 2007 appellant, through her representative, filed a timely appeal from a September 6, 2007 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 March 12, 2002 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.

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 was untimely and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal in this case before the Board. By decision dated March 12, 2002, the Board affirmed the Office's September 13, 1999 denial of her emotional condition

claim, on the grounds that the medical evidence was insufficient to support her claim. The Board also affirmed the Office's denial of appellant's request for reconsideration.[1]

The Board modified the Office's decision to reflect that the evidence established a compensable factor of employment: that appellant had been harassed by her supervisor, Ms. Hutchinson, who called her a whore. However, the medical opinion evidence submitted by appellant was not sufficiently rationalized to meet her burden of proof. The factual background of the case as set forth in the Board's prior decision is incorporated herein by reference.

The record contains a form dated November 20, 2005, whereby appellant designated Sally F. LaMacchia, Esq., as her representative. On June 4, 2007 appellant, through her representative, submitted a request for reconsideration. Counsel acknowledged that appellant's request was submitted more than a year after the most recent merit decision, but contended that the time limitation should be tolled under 5 U.S.C. § 8122, due to her mental incapacity and lack of representation. She argued that appellant had established compensable factors of employment with regard to her claims of harassment, verbal abuse, and difficulties with coworkers and that her emotional reaction to these factors was not self-generated. Counsel cited as error the Office's refusal to accept audiotapes due to their lack of authenticity. Noting that the tapes had since been authenticated, she alleged that, but for the error, findings of fact would have been made eight years ago. Claiming that the Board had no jurisdiction to address the medical evidence in its 2002 decision, counsel contended that the medical evidence of record established that appellant's emotional condition was caused by factors of her federal employment.

Appellant submitted numerous notes and medical reports from Dr. Anspach for the period January 21, 1999 through April 30, 2007, in which he reiterated his opinion that appellant's acute depression, stress and anxiety were work related. On January 21, 1999 Dr. Anspach diagnosed chronic underlying depression with acute situational crisis involving work, and, what appeared to be, harassment by the union. Notes dated February 4, 1999 indicated that appellant was treated for acute situational depression. In an August 12, 1999 report, Dr. Anspach stated that appellant's condition was deteriorating and that her work situation was the "crux of the matter." On May 5, 2000 he stated that appellant suffered from stress due to emotional events that occurred at work. On June 2, 2000 Dr. Anspach diagnosed chronic depression. On August 4, 2003 he diagnosed chronic, severe depression and post-traumatic syndrome. On August 31, 2005 and September 29, 2006 Dr. Anspach diagnosed severe, intractable depression associated with post-traumatic syndrome, and stated that appellant was often unable to function.

On December 20, 2006 Dr. Anspach stated that appellant had severe, intractable, paralyzing depression, and that she had become withdrawn, reclusive and catatonic at times. He indicated that, on many days, she was unable to leave home, shop or interact with people. On

[1] Docket No. 01-30 (issued March 12, 2002). On February 1, 1999 appellant, then a 40-year-old carrier, filed an occupational disease claim alleging that she experienced stress and anxiety as a result of harassment, verbal abuse, pressure from fellow employees to join the union and other conditions of her employment. She submitted a variety of medical reports, including a May 25, 1999 report from her treating physician, Dr. Royal B. Anspach, Board-certified in the field of emergency medicine, who treated her for depression, anxiety and panic attacks. Dr. Anspach opined that appellant's symptoms were a direct result of work-related stress, specifically pressure from coworkers who were pressuring her to join the union.

March 8, 2007 Dr. Anspach opined that appellant's depression was directly related to her adversarial work relationships, which, in turn, was related to her refusal to join the union and subsequent harassment from union members. In a report dated April 30, 2007, he opined that a series of high-stress events, which appellant felt were personal attacks by her coworkers over the union issue, constituted a repeated psychological assault, which may have resulted in a permanent chemical imbalance. Dr. Anspach stated that, since appellant had never experienced any degree of depression even remotely close to her current state, the series of events described appeared to have a clear cause and effect relationship with her depression.

Other medical evidence submitted in support of appellant's request for reconsideration includes: January 16, 1999 notes from D. Lipinski, a registered nurse; a report of a January 16, 1999 electrocardiogram (EKG); a January 21, 1999 disability slip; February 1, 1999 emergency room notes signed by Dr. Joseph Flanagan, Board-certified in the field of emergency medicine, who diagnosed acute stress/anxiety reaction to alleged harassment by supervisors; a February 1, 1999 note from Dr. Eric Mann, a Board-certified osteopath, specializing in the field of emergency medicine, who diagnosed depression; notes for the period February 3, 1999 through September 7, 2000 from Dr. Emerson Bueno, a Board-certified psychiatrist, who diagnosed major depression; and a September 11, 2000 emergency room patient care record, signed by a registered nurse. On May 17, 2007 Dr. Bueno stated that appellant met the criterion for major depression and opined that her work "may have impacted on her mental status."

Appellant submitted a May 16, 2007 statement from her sister, Melanie Francis, who indicated that appellant had been depressed since 1999. In a May 21, 2007 statement, appellant's mother alleged that appellant had a "breakdown" in 1999 as a result of job harassment. The record also contains an undated statement of facts, prepared by appellant's representative for review by her physicians. The statement reiterates appellant's claims of harassment and acknowledges that she suffered from preexisting chronic depression.

In a decision dated September 6, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, 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] In implementing the one-year time limitation, the Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[4]

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

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.[5] 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.[6] 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.[7]

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.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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's decision.[9] 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.[10]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[11] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[12] As appellant's June 4, 2007 request for reconsideration was submitted more than one year after March 12, 2002,

[5] *Id.*

[6] *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).

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

[8] *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[9] *Id.*

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

[11] 20 C.F.R. § 10.607(a).

[12] *Robert F. Stone*, 57 ECAB 292 (2005).

the date of the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her emotional condition claim.[13]

In support of her request for reconsideration, appellant submitted numerous notes and medical reports from Dr. Anspach for the period January 21, 1999 through April 30, 2007, in which he merely reiterated his opinion that appellant's acute depression, stress and anxiety were directly related to her adversarial work relationships, which, in turn, were related to her refusal to join the union and subsequent harassment from union members. Dr. Bueno stated that appellant met the criterion for major depression and opined that her work might have impacted her mental status. Dr. Mann diagnosed depression. Appellant also submitted various nursing notes, disability slips and emergency room notes. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.[14] The evidence must *prima facie* shift the weight of the evidence in favor of appellant.[15] None of the medical reports submitted manifests on its face that the Office committed an error in denying appellant's occupational disease claim.[16] Rather, they are cumulative in nature, and merely repeat Dr. Anspach's May 25, 1999 opinion that appellant's symptoms were a direct result of work-related stress. Thus, the reports are insufficient to establish clear evidence of error.

Appellant submitted a personal statement, statements from her sister and mother, and a statement of facts prepared by her representative, reiterating her claims of harassment while at the employing establishment. These statements are not medical evidence and merely repeat evidence previously of record. They lack 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.[17]

Appellant's representative contended that appellant established additional compensable factors of employment with regard to her claims of harassment, verbal abuse, and difficulties with coworkers, and that her emotional reaction to these factors was not self-generated. She cited as error the Office's refusal to accept audiotapes due to their lack of authenticity. Noting that the tapes had since been authenticated, counsel contends that, but for the error, findings of fact would have been made eight years ago. However, this argument does not establish clear evidence of error. Counsel's contention is not supported by positive, precise and explicit evidence, which manifests on its face that the Office committed an error. She has simply

[13] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[14] *Joseph R. Santos*, 57 ECAB 554 (2006).

[15] *See Darletha Coleman*, *supra* note 8.

[16] The Board notes that, in its March 12, 2002 decision, the Board modified the Office's September 13, 1999 decision to reflect that the evidence of record was sufficient to establish a compensable factor of employment, namely that appellant had been harassed by her supervisor. However, the Board determined that the medical opinion evidence submitted by appellant was not sufficiently rationalized to meet her burden of proof. Accordingly, the Board affirmed the Office's decision denying the claim, as modified.

[17] *Id.*

reargued contentions previously advanced and considered by the Board and the Office. Counsel did not show how the above-referenced audiotapes would raise a substantial question as to the correctness of the Office's decision.

Appellant's representative acknowledged that appellant's request was submitted more than a year following the last merit decision, but contended that the time limitation should be tolled under 5 U.S.C. § 8122, due to appellant's mental incapacity and lack of representation.[18] The Board finds this argument to be without merit. There is no medical evidence of record that establishes that appellant was mentally incompetent during the period in question. Appellant's physicians stated that she suffered from chronic, severe depression and post-traumatic syndrome. Although Dr. Anspach stated that appellant was withdrawn and catatonic at times, he did not indicate that her condition rendered her mentally incompetent. Moreover, although appellant was represented by counsel, effective November 20, 2005, she did not submit a request for reconsideration until June 4, 2007, well over a year after she obtained legal representation.[19] Moreover, counsel does not address why the waiver provision of section 8122(d)(2) for filing a claim for compensation should be made applicable to the requirement under section 8128 that a request for reconsideration be submitted within one year.

Appellant's representative contended that the Board improperly assumed jurisdiction over the medical evidence in its March 12, 2002 decision. Section 501.2(c) provides that the Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act. The Board may review all relevant questions of law, fact and discretion in such cases.[20] Therefore, once the Board found that appellant had established a compensable factor of employment, it reviewed the medical evidence of record to determine whether there was a causal relationship between the established factor and appellant's claimed condition. This argument does not establish clear evidence of error in the Office's denial of her claim.

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant or raise a substantial question as to the correctness of the Office's last merit decision, she has not established clear evidence of error.[21]

[18] Time limitations for filing claims for compensation under the Act do not run against an incompetent individual while she is incompetent and has no duly appointed legal representative. 5 U.S.C. § 8122(d)(2).

[19] Office regulations provide that the one-year time limit to file a reconsideration request does not include any time following the decision that the claimant can establish (through medical evidence) an inability to communicate and that her testimony would be necessary. *See* 20 C.F.R. § 10.607(c). The Board notes that appellant has not provided any probative medical evidence establishing that appellant was able to communicate, or any evidence that her testimony would be necessary.

[20] 20 C.F.R. § 501.2(c).

[21] *See Veletta C. Coleman, supra* note 4.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board