United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 08-2464**
	)	**Issued: July 9, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, St. Rose, LA, Employer	)	

Appearances:
Appellant, pro se
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 September 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated July 11, 2008, which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated December 17, 2004 to 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 of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On August 30, 2004 appellant, then a 37-year-old supervisor transportation security screener, filed an occupational disease claim alleging that she sustained work-related stress from constant harassment by management due to a complaint she made. She stopped work on August 23, 2004 and returned to work on October 20, 2004. Appellant resigned from the employing establishment on April 21, 2005. On her claim form, she indicated that all the materials given to her by her counselor and hospital were attached. No documents, however, were attached.

In a November 17, 2004 letter, the Office advised appellant of the factual and medical information needed to establish her emotional condition claim. Appellant was accorded 30 days within which to submit the requested information. No additional information was submitted.

By decision dated December 17, 2004, the Office denied appellant's claim. It found the evidence was insufficient to establish that the harassment occurred as alleged and there was no medical evidence which provided a diagnosis which could be connected to the claimed events.

On June 20, 2008 appellant requested reconsideration of the Office's December 17, 2004 decision. She submitted a handwritten copy of her August 30, 2004 claim form; a duplicate copy of the Office's November 17, 2004 development letter; and letters from Linda K. Nelson, a licensed social worker, dated August 20, 2004 and June 19, 2008. Ms. Nelson advised that appellant had symptoms of work-related extreme stress and depression due to the harassment she experienced at work. She opined that it would be detrimental to appellant's mental and physical health to return to work under those circumstances. In a December 4, 2004 medical report, Dr. Ross A. Gallo, a Board-certified psychiatrist, indicated that he evaluated appellant on November 11, 2004. He conferred with Ms. Nelson, appellant's treating psychotherapist, and concurred with the diagnosis and treatment being provided. Dr. Gallo opined that appellant was not capable of returning to work until the time that he evaluated her.

In a May 16, 2008 letter, the employing establishment indicated that it would investigate appellant's complaint about alleged disparate treatment during a job interview on January 25, 2007. It noted that during the interview appellant became aware that her Notification of Personnel Action Form (SF-50) improperly reflected that she had resigned from the employing establishment due to health reasons whereas another employee's SF-50, properly reflected the reasons for his resignation, though he resigned for similar reasons. A copy of an April 28, 2005 SF-50 form noting appellant's April 21, 2005 resignation was attached. By decision dated July 11, 2008, the Office denied appellant's request for reconsideration on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretion 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 previously awarded; or
>
> (2) award compensation previously refused or discontinued."[1]

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(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[2]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[3]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.[4]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[7] The Board makes an independent

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[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[3] *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[4] *Annie L. Billingsley, supra* note 2.

[5] *Jimmy L. Day*, 48 ECAB 652 (1997).

[6] *Id.*

[7] *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[8]

ANALYSIS

The Office issued a merit decision that denied appellant's emotional condition claim on December 17, 2004. It found that she had not established the factual aspect of her claim. Appellant requested reconsideration on June 20, 2008, more than one year after the Office's December 17, 2004 decision. Therefore, this request was untimely. Appellant must therefore demonstrate clear evidence of error on the part of the Office in issuing the December 17, 2004 decision.

The Board finds that the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the most recent merit decision or shift the weight of the evidence in favor of her claim.

Appellant submitted letters dated August 20, 2004 and June 19, 2008 from Ms. Nelson, a licensed social worker, and a December 4, 2004 medical report from Dr. Gallo, who concurred with Ms. Nelson that appellant had disabling symptoms of work-related extreme stress and depression due to harassment. However, this evidence does not raise a substantial question as to the correctness of the Office's decision as it is not germane to the underlying issue of the present case which is factual in nature, *i.e.*, whether appellant established as factual her allegations of harassment as compensable factors of employment.[9] Appellant also submitted a May 16, 2008 letter from the employing establishment which advised it would investigate her claim concerning disparate treatment during a January 25, 2007 job interview. A copy of the April 28, 2005 SF-50 form, which noted appellant's reasons for resignation, was also submitted. These documents also do not raise a substantial question as to the correctness of the Office's decision. They relate to an incident that occurred after appellant stopped working for the employing establishment and do not pertain to her claim of harassment in 2004. Appellant has not submitted any evidence that raises a substantial question concerning the correctness of the Office's decision. As noted, to establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.

On appeal, appellant asserts that she did not know of any time limitations and that she had provided all the documentation concerning her claim to the employing establishment. The Board notes that the appeal rights attached to the Office's December17, 2004 decision clearly advised her of the one-year time limitation for seeking further review before the Office.[10]

[8] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

[9] When a claimant has not established any compensable employment factors in an emotional condition claim, it is not necessary to consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[10] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein; *see Harold Hendrix*, 1 ECAB 54 (1947). *C.f. Robert E. Kimzey*, 40 ECAB 762 (1989) (ignorance of statutory requirements will not be an excuse for noncompliance with those regulations).

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's December 17, 2004 decision. The Office properly determined that she did not show clear evidence of error in that decision.[11]

CONCLUSION

The Board finds that appellant's untimely request for reconsideration did not establish clear evidence of error on the part of the Office.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2009
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

[11] The Board notes that, following the Office's July 11, 2008 decision, and on appeal, appellant submitted additional evidence. However, the Board cannot review this evidence as its review is limited to the evidence that was before the Office at the time of its decisions. *See* 20 C.F.R. § 501.2(c).