United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 11-1470**
	)	**Issued: February 1, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Northridge, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2011 appellant filed a timely appeal from the December 7, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied reconsideration. As the most recent merit decision of OWCP was issued on July 30, 2008, more than one year from the date of appeal, the Board has no jurisdiction over the merits of the claim.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's September 17, 2010 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

[1] For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 2, 2009 the Board found that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on or about July 25, 2000.[3] Appellant filed an injury claim on January 12, 2002 alleging that she had worked at the employing establishment from December 30, 1989 until July 25, 2000, "when I had this overwhelming need to leave in the middle of my workday." The Board noted that OWCP initially adjudicated this claim as a recurrence of disability because appellant did not implicate any new or intervening factors of employment.[4] Appellant made clear, however, that she sustained a new injury. She would advise that on July 25, 2000 she got into an argument with her direct supervisor over a misplaced memorandum, that she became emotionally upset and started screaming, contending that her supervisor was treating her as if she were stupid. Appellant left work and did not return. The Board found that there were such inconsistencies in her account of an injury on July 25, 2000 as to cast serious doubt on the validity of her claim. The Board affirmed OWCP's July 30, 2008 decision to deny the benefits claimed. The facts of this case as set forth in the Board's previous decision are hereby incorporated by reference.

Appellant had one calendar year from the Board's decision or until April 2, 2010, to request reconsideration of OWCP's July 30, 2008 decision. She requested reconsideration on September 17, 2010. Appellant stated that she had submitted new evidence in support of her recurrence of disability claim, namely, testimony from her EEOC case in which two people mentioned the July 25, 2000 argument. "My OWCP case file contains an accepted diagnosis, accepted work factors and all of ECAB's questions have been answered."

Appellant submitted, among other things, part of her former supervisor's October 11, 2001 testimony before the EEOC. The supervisor recollection was fuzzy, but he remembered questioning her about something on the last day he saw her, which upset her and caused her to ask why he was questioning her: "you know I know what I'm doing" or something to that effect. He responded that he was not going to discuss it with appellant, that as a manager it was his job to question her. The supervisor then testified that when he came back from lunch she was apparently crying and stated that she was going home because she was upset with what happened. Appellant also submitted the October 10, 2001 testimony of her psychiatrist, Dr. Arthur M. Zackler, who noted that she ultimately walked off the job in July 2000 "after a conflict with a supervisor."

In a decision dated December 7, 2010, OWCP denied appellant's September 17, 2010 request for reconsideration. It found that her request was untimely and failed to present clear evidence of error in OWCP's most recent merit decision on July 30, 2008.

[3] Docket No. 08-2537 (issued April 2, 2009).

[4] In 1996, appellant, a 31-year-old letter carrier, filed a claim alleging that she sustained an emotional condition in the performance of duty. After the Equal Employment Opportunity Commission (EEOC) found harassment commencing March 1996, OWCP accepted her claim for adjustment disorder with mixed emotional features and paid compensation for periods of disability through April 25, 1997.

On appeal, appellant states that her September 17, 2010 letter was not a request for reconsideration of OWCP's July 30, 2008 decision: "The new evidence that I had submitted had absolutely nothing to do with the decision dates 7/30/2008." Instead, "It was a request for reconsideration by the district office, of my claim as a whole … based on new evidence that I submitted on 8/6/10 and my contention that the OWCP staff has been negligent in the handling of my claim. *** If I were appealing the denial of 'my request for reconsideration of an OWCP decision dated 7/30/08', I guess that would be that. However that is not the case."

Appellant noted that the Board had no issue on the prior appeal with Dr. Zackler's report, or with another physician's report, which resulted in her accepted work factors. She stated that the only concern the Board had was whether or not she had an argument with her supervisor on what became her last day of work and, if she did, why she did not mentioned it. Appellant argued that just because Dr. Zackler did not refer to it in his report did not mean that she did not mention it to him. She argued his testimony documented the argument and that she mentioned it to him.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP 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."[5]

OWCP, 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 OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[6]

The term "clear evidence of error" is intended to represent a difficult standard.[7] If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[8]

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.607.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

[8] *Id*. at Chapter 2.1602.3.d(1).

ANALYSIS

OWCP conducted its most recent merit review of appellant's case on July 30, 2008. The decision came with appeal rights explaining that she had one calendar year to request reconsideration of that decision. The Board's April 2, 2009 merit review of that decision extended the reconsideration period. By rule, appellant had one year from the date of the Board's merit review or until April 2, 2010, to submit to OWCP a written request for reconsideration of the July 30, 2008 decision denying her claim for compensation.[9]

Appellant's September 17, 2010 request for reconsideration is therefore untimely by half a year. The question for determination is whether that request showed clear evidence of error in OWCP's denial of compensation.

The Board affirmed the denial of appellant's claim that she sustained an injury in the performance of duty on or about July 25, 2000 because there were such inconsistencies in her account of an injury as to cast serious doubt on the validity of her claim. The Board found that her depiction of an argument with her supervisor on July 25, 2000 was not supported by the contemporary evidence in the record. When appellant walked into the employing establishment that afternoon to quit her job, she did not mention an argument to the customer service supervisor. She stated only that she had skills she could use outside the postal service to gain employment. Appellant had spoken of quitting before.

Appellant saw a psychiatrist on August 28, 2000 but did not mention that an argument took place only one month earlier that made her scream and run from her workplace, never to return. If such a significant incident had recently taken place, it was reasonable that she would have mentioned such history to her psychiatrist, Dr. Zackler and that he would have related the history his patient provided. Dr. Zackler did not. Appellant also did not mention an argument when she saw Dr. Zackler on December 3, 2001.

When she filed her injury claim on January 12, 2002, appellant did not report the history. Asked to explain the relationship of her disease or illness to employment, she did not allege that she stopped work on July 25, 2000 because an argument with her supervisor had left her screaming. Appellant simply noted that she had clocked off and let her supervisor know that she did not know if or when she would be returning. She stated that a physician had excused her from work due to stress. Appellant explained that, since returning to work in April 1997, she never felt "quite right" at work. She stated that she had an overwhelming need to run from her workplace, an overwhelming need that finally won out on July 25, 2000 in the middle of her workday. Appellant submitted a narrative statement to support her injury claim, but she made no mention of an argument on July 25, 2000. Again, if that was the reason she stopped work, if that was the reason she was claiming an emotional injury on July 25, 2000, it stands to reason that she would have mentioned it on her claim form or in her supporting narrative. Instead, the Board noted that the first recorded mention of an argument or disagreement came more than two years after the fact, on September 17, 2002, when appellant spoke to a third psychiatrist.

[9] *Id*., Chapter 2.1602.3.b(1). OWCP has no jurisdiction to review a Board decision, but it may reopen a case to reconsider its own. 5 U.S.C. § 8128(a).

The issue was one of inconsistency, unresolved inconsistencies involving the crux of appellant's injury claim, namely, that she sustained a disabling emotional injury in the performance of duty on July 25, 2000 as a result of a heated argument with her supervisor. To support her untimely request for reconsideration, appellant submitted portions of transcripts from her EEOC case. Dr. Zackler stated that she continued to perceive her work environment as hostile "and ultimately walked off in July 2000 after a conflict with a supervisor." This vague description is not inconsistent with the picture he painted one paragraph earlier: Appellant returned to work in April 1997 to find a new postmaster but the same immediate supervisors and while the treatment she continued to perceive was not as egregious as before, the labeling that occurred under her supervisor continued to follow her and she did not feel that she was being treated the same as her coworkers. Dr. Zackler's statement does not directly support her injury claim that she had an argument over a missing memorandum on July 25, 2000 that left her screaming and disabled for work. It does not resolve the basic inconsistencies the Board noted in the prior appeal. At most, Dr. Zackler's testimony shows that he was aware, some 14 months after the work stoppage, that appellant had given him a history of conflict with a supervisor. That fact does not show clear evidence of error in the denial of her claim that she sustained an emotional injury in the performance of duty on July 25, 2000.

The supervisor testified that when he last saw appellant, presumably on July 25, 2000, he questioned her about something and that she became upset, causing her to ask, "Why are you questioning me? Why are you – you know I know what I'm doing." He told her that he was a manager and that it was his job to question her and that he was not going to discuss it with her. When the supervisor returned from lunch, appellant told him she was going home because she was upset with what had happened. This testimony does not explain why she did not mention the incident to the customer service supervisor when she quit work that same afternoon. It does not explain why appellant did not initially mention the incident to psychiatrists or why they did not report it. It certainly does not explain why she failed to mention the incident when she filed a claim on January 12, 2002 alleging an emotional injury on July 25, 2000. Although this evidence does support that the supervisor questioned her about something, a conversation appellant described as no different from a hundred others, it does little to resolve the inconsistencies noted in the prior appeal. If this was the reason appellant stopped work on July 25, 2000, she should have mentioned it much sooner than she did, certainly by the time she claimed compensation for an emotional injury occurring on that date. The testimony is relevant to whether an incident occurred on July 25, 2000, but it does not, on its face, show clear evidence of error in the denial of her injury claim.

The Board has held that being spoken to in a raised or harsh voice does not in itself constitute verbal abuse or harassment.[10] Appellant did not establish error or abuse by the supervisor in the specific conversation at issue. She incorrectly asserts that the Board had no issue with the medical evidence in the prior appeal. In point of fact, the Board never reached the medical evidence on causal relationship because a fatal deficiency stopped her claim at a much earlier stage of the adjudication process. To be clear, with respect to the claim of an emotional injury on July 25, 2000, there are no accepted factors of employment. Appellant's claim for compensation is not one of recurrence; it is one of injury occurring on July 25, 2000. OWCP's

[10] *Beverly R. Jones*, 55 ECAB 411, 418 (2004).

November 27, 2002 acceptance of her 1996 injury claim, together with the employment factors OWCP accepted in that claim, are immaterial to her claim that she sustained an emotional injury in the performance of duty on July 25, 2000.

The Board has reviewed appellant's September 17, 2010 request for reconsideration and has conducted a limited review of all the evidence in the record since the prior appeal, including letters written, arguments made and medical evidence submitted. The Board finds that she has not demonstrated clear evidence of error in the denial of her claim that she sustained an emotional injury in the performance of duty on July 25, 2000. The Board will therefore affirm OWCP's December 7, 2010 decision denying her untimely request for reconsideration.

Appellant argues that her September 17, 2010 letter was not a request for reconsideration of OWCP's July 30, 2008 decision, that the new evidence she submitted had absolutely nothing to do with OWCP's July 30, 2008 decision. The Board notes that appeal rights attach to each OWCP decision and periods of limitation begin to run upon issuance of the decision. If appellant disagreed with any decision OWCP issued, she could follow the appeal rights attached to that particular decision. The right to request reconsideration arises from the decision issued. OWCP's July 30, 2008 decision is the most recent merit decision issued in appellant's case and the most recent decision providing her the right to request reconsideration within one calendar year. It correctly found that her September 17, 2010 request for reconsideration was untimely and correctly found that her request did not present clear evidence of error in the denial of her claim. Appellant's appeal to review OWCP's December 7, 2010 decision is an appeal of the denial of her request for reconsideration of OWCP's most recent merit decision on July 30, 2008, which this Board reviewed and affirmed on April 2, 2009.

CONCLUSION

The Board finds that OWCP properly denied appellant's September 17, 2010 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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