United States Department of Labor
Employees' Compensation Appeals Board

Y.K., Appellant	)	
and	)	**Docket No. 12-1282**
	)	**Issued: March 12, 2013**
DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF INFORMATION & TECHNOLOGY, Austin, TX, Employer	)	

Appearances:
Vanessa Sanders, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2012 appellant filed a timely appeal from a December 7, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year elapsed from the last merit decision dated October 7, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 11, 2010 appellant, a 65-year-old information and technology (IT) security officer, filed a Form CA-2 claim for benefits alleging an emotional condition causally related to employment factors. She stated that she had been performing the workload of two to three people without assistance for several years and worked more than 40 hours almost every week without breaks or lunch. The excessive workload resulted in stress.

In an accompanying statement, appellant asserted that as the facility information security officer she was responsible for overseeing 3,000 computer users without assistance. She had unsuccessfully requested assistance from management despite the fact that other departments hired employees to help with the information security workload. Appellant asserted that the department hired interns but declined to assign them to help her with her tasks, despite the fact that she informed management that she needed help. She submitted numerous e-mails during 2009 and 2010 in support of her allegation of overwork, understaffing and being assigned to excessive work duties.

In an e-mail dated April 30, 2009, Armando Diaz de Leon, a supervisor, responded to appellant's allegations that she was having difficulty meeting her work responsibilities. He noted that she had contacted management regarding these issues and stated:

> "Why did you not seek guidance from me? I [a]m your frontline supervisor and could have helped with your issue regarding all the projects on your plate. I [a]m trying to work with you and help out as best I can. I was in the office during that … week and it was just last week that I was off traveling, so I was around but I do n[o]t have an e[-]mail from you asking for my guidance. In the future come to me first and if I [a]m not able to help you then we can go up the chain for further guidance, but how can I help you when you do n[o]t even come to me? Please do not add other high level managers to this e[-]mail thread, let's work this out amongst us. It [i]s a local issue and we can resolve this."

In a report dated March 18, 2010, Dr. David Nichol, a psychiatrist, obtained a history that appellant had been experiencing extreme anxiety and depression for five years, which became worse in August 2009. At that time, appellant was allegedly subjected to increasing harassment by her supervisor and had developed a rash, shortness of breath, sleeplessness, headaches, nausea and abdominal pain. She related an excellent work experience until 2005, when she began having fears that her supervisor would fire her because she was not completing her work. Dr. Nichol stated that appellant's work situation deteriorated because she was unable to satisfy the demands of her supervisor, despite being overworked. He diagnosed acute stress disorder, panic disorder with agoraphobia, major depressive disorder and irritable bowel syndrome, which he attributed to extreme overwork and discord with her supervisor.

In a May 10, 2010 report, Dr. Nichol reiterated his findings and conclusions. He opined that virtually all of appellant's symptoms were due to work-related stress and he strongly recommended that she acquire a new supervisor and an assistant.

Appellant submitted a copy of an Equal Employment Opportunity (EEO) claim dated October 19, 2009. She alleged that management discriminated against her due to her ethnic background, that she was overburdened with work responsibilities and was subjected to a hostile work environment.

By decision dated October 7, 2010, OWCP denied appellant's claim for an emotional condition, finding that she failed to establish a compensable factor of employment. It listed her allegations that she was performing the workload of two to three people without assistance for several years, working more than 40 hours a week without breaks or lunch, and that she had unsuccessfully requested assistance from management. OWCP noted that the employing establishment had rebutted appellant's allegations and that she had failed to provided sufficient evidence to establish administrative error or abuse.

By letter dated October 24, 2011, appellant, through her attorney, requested reconsideration. Counsel argued that appellant provided sufficient factual and medical evidence to establish that she sustained an emotional condition causally related to employment factors. She reiterated appellant's contentions that she was overburdened by an excessive workload and received insufficient staffing or support from her supervisor to complete her tasks. Counsel reiterated that she was the only information security officer at the worksite tasked with overseeing more than 3,000 computer users, that other departments had hired more than one information security officer to handle similar responsibilities and that her supervisor had repeatedly ignored her requests for assistance.

Appellant submitted a copy of a position description form and various e-mails. An e-mail dated September 30, 2008 from her to management noted that her department had just hired two interns, January 15, 2009 e-mails between appellant and management noted that an intern had been hired and discussed the work responsibilities with which he would be tasked. A March 15, 2009 e-mail from appellant to management stated that she had recently received instructions which seemed to conflict with her primary duties, that she was being tasked with overlapping responsibilities, that she had been instructed to cancel a meeting, and that management had failed to provide her with interns who could assist her in her work duties. In e-mails dated November 24, 2009, appellant stated that she was unable to attend a meeting because she was busy with other duties.

Appellant submitted a copy of a three-page memorandum from July 2009 to her supervisor which noted that she had experienced difficulty training one of the interns that management had hired. She expressed concern that the intern was underperforming and not being held to the same standards for which she was responsible as an information security officer.

By decision dated December 7, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding the request had untimely requested reconsideration and that appellant had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA[2] does not entitle an employee to a review of an OWCP decision as a matter of right.[3] This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, it has stated that it 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.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.[8]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.[9] The evidence must be positive, precise and explicit and

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[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by (1) showing that OWCP erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by OWCP, or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.607(b).

[6] *See* cases cited *supra* note 2.

[7] *Rex L. Weaver*, 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[9] *See Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifested on its face that it committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by OWCP 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 OWCP.[13] 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.[14] The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[15]

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on October 7, 2010. Appellant's request for reconsideration was dated October 24, 2011; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's request for reconsideration failed to establish clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. Appellant submitted a copy of the position description for an IT security officer, which does not constitute evidence relevant to the issue of whether she established a compensable employment factor. She also submitted e-mails that noted her complaints to management pertaining to her work assignments and staffing levels. Appellant alleged being treated in a discriminatory manner. Although these e-mails constitute new evidence in support of her claim for an emotional condition, they are cumulative of the e-mails which were considered by OWCP. They are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of OWCP's decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

[10] *See Leona N. Travis*, 43 ECAB 227 (1991).

[11] *See Jesus D. Sanchez, supra* note 2.

[12] *See Leona N. Travis, supra* note 10.

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

[14] *Leon D. Faidley, Jr., supra* note 2.

[15] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated October 28, 2011 and OWCP properly denied further review.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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