

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FURMAN C. EDWARDS and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION NORTH ISLAND, San Diego, CA

*Docket No. 03-2071; Submitted on the Record;
Issued November 3, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs 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.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision¹ on January 7, 2002, which affirmed the Office's November 1, 2000 decision on the grounds that appellant did not meet his burden of proof to establish that he sustained an emotional condition causally related to factors of his federal employment. The Board found that appellant provided no supporting documentation to show that he was harassed in the course of his federal employment, that he was threatened by a coworker or that his rash was caused by working in a contaminated area at the employing establishment. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On May 21, 2003 appellant requested reconsideration on the denial of his claim. In support of his request, appellant submitted letters dated June 5 and 10, 2000 stating that he had a thyroid problem, an April 11, 2002 letter from the employing establishment regarding appellant's reporting an unsafe work environment, an acknowledgement letter from the California Unemployment Insurance Appeals Board, progress notes for the period July 3, 1994 to February 12, 2003, progress notes regarding his rash dated January 28, 2003 by Dr. Bobby Korn, an attending physician, a February 13, 2003 report by Dr. Timothy R. Dresselhuas, an attending Board-certified internist, regarding appellant's Graves disease, a March 3, 2003 report by Dr. Janet Yazdi, an attending physician, on treatment of his Graves disease and a cover letter from the California Unemployment Insurance Board stating that a final decision had been issued in his claim and informing him that he had 20 days to appeal.

¹ Docket No. 01-1277 (issued January 7, 2002).

By decision dated July 7, 2003, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The Board finds that 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.

The only decision before the Board on this appeal is the July 7, 2003 decision, denying appellant's requests for review on the merits of his claim. Because more than one year has elapsed between the issuance of the Board's merit decision of January 7, 2002, which affirmed the last merit decision of the Office dated November 1, 2000 and August 19, 2003, the date appellant filed his appeal with the Board, the only decision before the Board on this appeal is the July 7, 2003 decision denying appellant's requests for review of the merits of his claim.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁵ Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

In its November 1, 2000 decision, the Office determined that appellant failed to establish that his emotional condition was causally related to factors of his employment. The last merit

² See 20 C.F.R. § 501.3(d)(2); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

³ 5 U.S.C. § 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.608(b); see *James A. Castagno*, 53 ECAB ____ (Docket No. 02-975, issued September 19, 2002).

⁷ *Angel M. Lebron, Jr.*, 51 ECAB 488 (2000).

decision of record is the Board's January 7, 2002 decision and appellant's request for reconsideration was dated May 21, 2003, more than one year after January 7, 2002.⁸

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁹ Office procedures provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹² Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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 decision.¹⁶ 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.¹⁷

⁸ According to Office procedure, the one-year period for requesting reconsideration, established by 20 C.F.R. § 10.607(a), begins on the date of the original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board; see 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

⁹ *Ronald P. Morgan*, 53 ECAB ____ (Docket No. 01-1053, issued February 14, 2002).

¹⁰ *Cleopatra McDougal-Saddler*, 53 ECAB ____ (Docket No. 00-2462, issued August 20, 2002).

¹¹ *Jadine Jackson*, 53 ECAB ____ (Docket No. 01-1473, issued February 20, 2002).

¹² *Steven J. Gundersen*, 53 ECAB ____ (Docket No. 00-625, issued December 5, 2001).

¹³ *Shakeer Davis*, 52 ECAB 448 (2001).

¹⁴ *Linda K. Cela*, 52 ECAB 288 (2001).

¹⁵ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁶ *Linda K. Cela*, *supra* note 14.

¹⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's applications for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that, it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's prior merit decisions and is insufficient to demonstrate clear evidence of error.

In support of his May 21, 2003 reconsideration request, appellant argued that the Office improperly determined that he did not sustain an emotional condition in the performance of duty. He submitted a number of reports relating to his treatment for a rash and Graves disease. Appellant argued that these documents showed that the Office had erred in its prior merit decisions. However, the Board has performed a limited review of these documents and notes that they do not address the issue of whether appellant established a compensable factor of employment. These reports do not show that the Office erred in its prior decisions.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated July 7, 2003 is hereby affirmed.¹⁸

Dated, Washington, DC
November 3, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹⁸ Accompanying his request for appeal, appellant submitted new medical and factual evidence that he had not previously submitted to the Office. However, the Board may not consider this new evidence for the first time on appeal, because it was not before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).