

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FELIPE RODRIGUEZ and U.S. POSTAL SERVICE,  
POST OFFICE, Aguadilla, PR

*Docket No. 99-935; Submitted on the Record;  
Issued September 26, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On June 7, 1993 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim alleging that he sustained an anxiety disorder as a result of being yelled at by a coworker. Appellant was off work for two days. The Office accepted the claim for an anxiety reaction to the June 7, 1993 employment incident. Appellant subsequently filed two claims for a recurrence of disability on February 7, 1994, following a threat of disciplinary action and March 3, 1994, following a suspension, issued to appellant on March 2, 1994 for being absent without leave. The record reveals that the employing establishment subsequently rescinded that suspension.

In a decision dated May 26, 1994, the Office denied appellant's claim for a recurrence of disability on the grounds that the incidents on February 17 and March 2, 1994 were new employment incidents and not related to the accepted June 7, 1993 employment injury.

In a July 7, 1994 letter, appellant requested reconsideration and submitted additional evidence.

In a decision dated August 1, 1994, the Office denied modification following a merit review.

By letter dated October 3, 1994, appellant requested an appeal with the Board, which was assigned docket no. 95-502.

The Board issued a decision on July 15, 1997, which affirmed the Office's August 1 and May 26, 1994 decisions. The Board specifically found that appellant failed to allege a

compensable factor of employment and was, therefore, unable to establish that he sustained an emotional injury on either February 17 or March 2, 1994.

By letter dated October 21, 1998, appellant requested reconsideration with the Office and submitted a sworn statement with regard to the March 2, 1994 incident, a copy of a PS Form 3996 requesting one hour of assistance or overtime, a copy of a PS Form 3971 requesting a notification of absence, a copy of the March 2, 1994 suspension letter and a copy of the letter dated March 9, 1994 rescinding the suspension.

In a November 4, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that the evidence submitted was insufficient to establish clear evidence of error.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

Section 8128(a) of the Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>4</sup> As one such limitation, the Office 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.<sup>5</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

In this case, appellant's request for reconsideration was dated October 21, 1998. Since this is more than one year after the Board's July 15, 1997 decision, the request was properly deemed by the Office to be untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>4</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *See Leon D. Faidley, Jr.*, *supra* note 2.

whether there is clear evidence of error pursuant to the untimely request.<sup>7</sup> In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

In the instant case, the Board found that appellant failed to allege a compensable factor of employment to establish that he sustained an emotional injury on either February 17 or March 2, 1994. The Board previously determined that although the disciplinary actions were factual, the actions of the employing establishment in conducting its administrative matters did not constitute error or abuse. In support of his reconsideration request, appellant submitted duplicative sworn statements and evidence regarding both the alleged employment incidents. Because appellant's evidence on reconsideration is repetitive, it fails to establish clear evidence of error with respect to the denial of appellant's claim for compensation.

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<sup>7</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, *supra* note 2.

<sup>12</sup> *See Leona N. Travis*, *supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 2.

<sup>15</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

The evidence submitted by appellant in support of his reconsideration does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision. It is, therefore, of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Inasmuch as appellant did not submit evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.

The decision of the Office of Workers' Compensation Programs dated November 4, 1998 is hereby affirmed.

Dated, Washington, DC  
September 26, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member