

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENT M. SINGLETON and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Cleveland, OH

*Docket No. 00-715; Submitted on the Record;  
Issued February 6, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On July 2, 1988 appellant, then a 44-year-old mailhandler, filed a claim for an occupational disease (Form CA-2) alleging that he sustained post-traumatic stress disorder that was exacerbated by his employment.

By decision dated February 1, 1989, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. In a February 21, 1989 letter, appellant requested an oral hearing before an Office representative.

In a January 16, 1990 decision, the hearing representative affirmed the Office's decision. In a January 14, 1991 letter, appellant requested reconsideration of the hearing representative's decision.

By decision dated January 25, 1991, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was irrelevant and immaterial and thus, insufficient to warrant review of the prior decision. On January 10, 1992 appellant appealed the Office's decision to the Board.

By decision dated October 26, 1992, the Board affirmed the Office's decision. Appellant requested reconsideration of the Board's decision by the Office in a letter dated November 19, 1998.

In an April 14, 1999 decision, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> Inasmuch as appellant filed his appeal with the Board on December 6, 1999 the only decision properly before the Board is the Office's April 14, 1999 decision.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>6</sup>

The last merit decision in this case was issued by the Office's hearing representative on January 16, 1990 wherein it affirmed the Office's February 1, 1989 decision denying appellant's claim for an emotional condition. Inasmuch as appellant's November 19, 1998 request for reconsideration was made outside the one-year time limitation, the Board finds that it was 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 whether there is clear evidence of error pursuant to the untimely request.<sup>7</sup> Office procedures

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> See cases cited *supra* note 3.

<sup>6</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>7</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

state 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.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which 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>

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the hearing representative's determination that appellant did not sustain an emotional condition in the performance of duty.

In support of his request for reconsideration, appellant submitted a copy of an excerpt from a court case regarding veterans preference, two pay stubs for the period October and November 1995, a July 10, 1996 letter from the Social Security Administration approving his application for disability retirement, an undated special notice from the Office of Personnel Management regarding his receipt of disability retirement and the last page of the Board's October 26, 1992 decision. This evidence did not present any information that would show that

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d) (May 1996); *see also*, 20 C.F.R. § 10.607(b).

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

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

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 3.

<sup>12</sup> *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 3.

<sup>15</sup> *Gregory Griffin*, *supra* note 7.

the hearing representative's decision to affirm the Office's denial of appellant's claim for an emotional condition was in error.

In further support of his request for reconsideration, appellant submitted a statement alleging that he worked out of his schedule and classification for over two years without premium pay. Appellant also alleged that he was demoted to a lesser classification in October 1982 under the guise of a reassignment notwithstanding his reservations that were in writing regarding this action. In addition, appellant alleged that other employees were promoted over him. Appellant further alleged that he was finally given a promotion, but that newly hired employees were given an earlier start time while he was given a later start time. Appellant contended that in 1995 the employing establishment wrongfully denied him a position. Appellant also contended that he was harassed by a 1991 letter proposing to remove him for his failure to maintain a regular work schedule. Finally, appellant contended that the employing establishment disregarded his medical certifications and physical limitations.

Appellant previously raised these contentions before the Office and the Office hearing representative considered these contentions prior to its January 16, 1990 decision. Inasmuch as appellant's contentions are duplicative, they cannot serve as a basis for reopening the claim.<sup>16</sup> Therefore, appellant's contentions are insufficient to establish clear evidence of error on the part of the hearing representative.

Inasmuch as appellant has not submitted any evidence raising a substantial question as to the correctness of the hearing representative's January 16, 1990 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

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<sup>16</sup> *Richard L. Ballard*, 44 ECAB 146 (1992).

The April 19, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 6, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member