

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH M. MUNOZ and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Mare Island, CA

*Docket No. 00-1743; Submitted on the Record;
Issued July 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

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 May 15, 1995 appellant, then a 38-year-old shipfitter, filed a notice of occupational disease alleging that he suffered emotional distress due to harassment at work. He alleged that after filing a workers' compensation claim for a low back injury he had been subjected to retaliation by the employing establishment and had to file additional claims for grievances with the Equal Employment Opportunity Commission (EEOC). Appellant further noted that he was depressed because he felt he had been exposed to chemicals at work, although he acknowledged that there was no factual basis for his fear.¹

In a June 30, 1995 decision, the Office denied compensation on the grounds that appellant failed to allege a compensable factor of employment. The Office noted that there was no factual evidence to corroborate appellant's allegations of harassment and disparate treatment by the employing establishment in retaliation for work compensation claims or EEOC grievances filed by appellant. The Office also considered appellant's fear that his job was endangering his health to be unsubstantiated. Therefore, appellant's emotional condition was deemed to be self-generated.

Appellant requested a hearing that was held on August 13, 1997.

¹ Appellant had previously filed a claim for an alleged chemical burn and exposure to toxic chemicals, however, the Office denied the claim based on insufficient evidence.

In a decision dated December 8, 1997, an Office hearing representative affirmed the Office's June 30, 1995 decision.

In a letter transmitted by facsimile copy on December 10, 1998, appellant requested reconsideration. Attached were copies of medical reports from Dr. Kent Andrews, appellant's treating physician and a clinical psychologist, dated November 6, 1998, May 21, 1996 and November 18, 1994.²

On December 28, 1998 appellant also submitted the following: (1) a copy of an EEOC grievance decision dated January 12, 1994; (2) copies of the (Form CA-2) May 15, 1995 occupational disease claim and the Office's June 30, 1995 decision; and (3) a letter from the Secretary of the Navy dated September 23, 1997.

In an April 22, 1999 decision, the Office determined that appellant's request for reconsideration was untimely filed with respect to the last merit decision of record issued on December 8, 1997. The Office further found that the evidence submitted by appellant failed to present clear evidence of error.

The Board finds that the Office properly determined that appellant filed an untimely reconsideration request. The new regulations at section 10.607(a) provide that "[a]n application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought."³ The last merit decision of record is dated December 8, 1997, by the Office hearing representative. Appellant did not file his request for reconsideration until December 10, 1998, which is one year and two days after the requisite filing deadline. Thus, appellant's December 10, 1998 reconsideration request is considered to be untimely filed under section 10.607(a).

Notwithstanding, the new regulations at 10.607(b) further provide that "[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision."⁴ To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of

² In his November 6, 1998 report, Dr. Andrews described appellant's course of treatment and complaints of emotional distress. In his May 21, 1996 and November 18, 1994 reports, Dr. Andrews diagnosed adjustment disorder with mixed emotional features. The physician related that appellant described stress at work and that he continued to be concerned over an episode where he thought he was exposed to hazardous materials.

³ 20 C.F.R. § 10.607(a) (1999). The new regulations went into effect on January 4, 1999 and apply to all Office decisions issued on or after that date. Although the Office cited the old regulations at 20 C.F.R. § 10.138(a) and (b), the Board notes that the outcome of this decision would be the same under either set of regulations.

⁴ 20 C.F.R. § 10.607(b) (1999).

⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ 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.¹¹

In this case, the Office properly reviewed appellant's untimely reconsideration request, in accordance with Board case law, to determine whether he submitted evidence to show clear evidence of error on behalf of the Office in denying his claim. Such evidence would have required the Office to conduct a merit review despite the untimely filing of the reconsideration request.

In support of his reconsideration request, appellant submitted medical evidence that is not relevant to the issue in the case, which is whether appellant alleged an emotional condition based on compensable factors of his employment. The reports from Dr. Andrews do not establish as factual appellant's allegations of harassment and exposure to hazardous materials in the performance of duty.

The copy of appellant's CA-2 application and the copy of the June 15, 1995 Office decision is already of record. The January 12, 1994 grievance decision and the letter from the Secretary of the Navy dated September 23, 1997, have likewise been considered by the Office hearing representative and are, therefore, insufficient to establish clear evidence of error.

Because appellant failed to present any evidence to establish clear evidence of error on behalf of the Office with regard to the last merit decision of record, the Office properly denied appellant's request for reconsideration.

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The April 22, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member