

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN CRAWFORD and U.S. POSTAL SERVICE,  
POSTAL INSPECTION SERVICE, Philadelphia, PA

*Docket No. 99-2105; Submitted on the Record;  
Issued June 14, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128 on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On January 23, 1996 appellant, then a 48-year-old postal inspector, filed an occupational disease claim alleging that he sustained an acute stress disorder causally related to factors of his federal employment. Appellant stopped work on January 23, 1996.

By decision dated April 24, 1996, the Office denied appellant's claim for an emotional condition on the grounds that he had not established an injury in the performance of duty.

In a letter dated May 9, 1996, appellant, through his representative, requested a hearing before an Office hearing representative. By decision dated March 18, 1997, a hearing representative affirmed the Office's April 24, 1996 decision. The hearing representative found that appellant had not established any compensable factors of employment.

By letter dated July 7, 1997, appellant requested reconsideration of his claim. In a decision dated February 13, 1998, the Office denied modification of its prior decision.

In a letter dated March 15, 1999, appellant, through his representative, requested reconsideration. Appellant argued that his request for reconsideration was delayed due to his mental state and litigation connected with his claim before the Merit Systems Protection Board (MSBP).

By decision dated April 5, 1999, 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 did not abuse its discretion by refusing to reopen appellant's case for merit review.

The only decision before the Board on this appeal is the Office's April 5, 1999 decision, denying appellant's request for a review on the merits of its February 13, 1998 decision. Because more than one year has elapsed between the issuance of the Office's February 13, 1998 decision and June 9, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 13, 1998 Office decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; or (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>5</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>6</sup>

In its April 5, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on February 13, 1998 and appellant requested reconsideration by letter dated March 15, 1999, which was more than one year after February 13, 1998.

Appellant contends that he was unable to timely request reconsideration due to his emotional condition. The Board has recognized, however, that the Office's federal regulations do not provide that the late filing of a request for reconsideration must be excused for extenuating circumstances, including incompetency.<sup>7</sup> The Office's regulations do provide that the time to file a request for reconsideration shall not include any periods subsequent to the decision for which the claimant can establish through probative medical evidence that he was unable to communicate in any way and that his testimony is necessary to obtain modification.<sup>8</sup>

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> See *Donald Booker-Jones*, 47 ECAB 785 (1996); see also 20 C.F.R. § 10.607(c).

<sup>8</sup> 20 C.F.R. § 10.607(c).

Appellant failed to submit any evidence to establish his inability to communicate in any way or that his testimony would be necessary to obtain modification of the Office's decision. His allegation of incompetency, is not supported by the record.

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."<sup>9</sup> 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.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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>15</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>16</sup> The Board makes an independent determination as to 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>17</sup>

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<sup>9</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>10</sup> *Anthony Lucszynski*, 43 ECAB 1129 (1992).

<sup>11</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>14</sup> *See Leona N. Travis*, *supra* note 10.

<sup>15</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *See Leon D. Faidley, Jr.*, *supra* note 6.

<sup>17</sup> *Thankamma Matthews*, 44 ECAB 765 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

The Board notes that the Office denied appellant's claim on the grounds that he failed to establish error or abuse by the employing establishment in issuing him a letter of warning for failing to fully disclose information relevant to an investigation. In a statement accompanying his request for reconsideration, appellant contended that the employing establishment erred in failing to allow him to take a polygraph test. However, the Office previously addressed and rejected appellant's argument, finding that the evidence established that the employing establishment issued appellant a letter of warning, not because it did not accept appellant's version of events but because he was not completely forthcoming during its investigation of the incident. As appellant has not advanced a legal argument not previously considered by the Office, he had not raised a substantial question concerning the correctness of the Office's prior merit decision.

Appellant further argued that he had strongly inferred that an investigator from the Federal Bureau of Investigation (FBI) had made the statement, which was the subject of the employing establishment's inquiry. He related that his supervisor "questioned me directly on the issue of whether I made a statement to coerce a Russian suspect to give us information. When I was asked the question, I told him that there were three people in the room and that I had not made the statement. He did not ask me who made the statement. Obviously, the Russian individual did not make the statement, so that would infer that the FBI Agent had done so." Again, the Office previously addressed and rejected appellant's argument. The hearing representative found that while appellant "clearly implied" that the Agent rather than himself made the coercive statement, he did not actually state until later that the Agent made the remark. The Office concluded that appellant had not submitted evidence showing error or abuse by the employing establishment in issuing him a letter of warning for failing to disclose information. The Office had previously considered and rejected appellant's argument, it does not constitute a basis for reopening his case for merit review.

Appellant further contended that the employing establishment erred in failing to fully investigate the matter to determine who actually made the statement. Appellant noted that the agency removed him from the Russian investigation without indicating to the U.S. Attorney's Office that he had denied making the coercive statement. He further questioned the dates set forth by the employing establishment to show when he was removed from the Russian investigation and the dates of meetings. He also argued that the employing establishment told him that he was removed from a task force investigation for violating a verbal agreement of silence when he had "never agreed to keep quiet." Appellant noted that subsequent allegations against him by the FBI Agent were investigated and disproved. The additional arguments set forth by appellant, however, are repetitive of those previously raised and insufficient to establish error or abuse by the employing establishment in an administrative action. Therefore, appellant's allegations are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a fundamental question as to the correctness of the Office's decision that appellant had not established an emotional condition due to factors of his federal employment.

In his request for reconsideration filed on March 15, 1999, appellant raised for the first time the claim that the employing establishment erred by placing him on enforced leave effective August 2, 1996 as a result of a fitness-for-duty examination. Appellant submitted the opinion of an MSPB administrative judge which found that due process had been violated by not furnishing

appellant with a copy of materials forming the basis for the fitness-for-duty decision. This allegation of error was not before the Office in its last merit decision of February 13, 1998 and is irrelevant to matters resolved in that decision. Therefore, appellant has failed to show clear evidence of error on the part of the Office in denying his claim.

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 April 5, 1999 is hereby affirmed.

Dated, Washington, DC  
June 14, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member