

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PETER C. HOLLAND and U.S. POSTAL SERVICE,  
BULK MAIL CENTER, Greensboro, NC

*Docket No. 02-1411; Submitted on the Record;  
Issued December 2, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On November 12, 1999 appellant filed an occupational disease claim (No. 060742361) alleging that his supervisors harassed him at work, starting in October 1999, about his assigned duties as a mailhandler following an on-the-job back injury.

On December 17, 1999 the Office informed appellant that the documents he had submitted in support of his claim were insufficient to determine whether he was entitled to compensation. The Office requested that appellant provide evidence pertaining to allegations that he was constantly monitored by his supervisors and that they adversely affected his job performance. The Office noted that assignment of work and approval of leave were administrative functions, as were disciplinary actions and appellant had provided insufficient evidence of error or abuse on the part of the employing establishment.

On January 24, 2000 the Office denied appellant's claim on the grounds that he had failed to establish a compensable factor of employment. The Office noted that appellant submitted no evidence showing that his emotional condition was caused or aggravated by specific employment incidents. The Office noted that mere perceptions and feelings alone were not compensable work factors.

Appellant requested a hearing, which was scheduled for August 23, 2000. On August 21, 2000 he requested that the hearing be cancelled and the Office complied.

On January 19, 2002 appellant requested reconsideration and provided new evidence and legal arguments regarding the limited-duty offer he signed on October 3, 1999 and his subsequent work history. He also submitted another emotional claim dated February 11, 2002, stating that the date of injury began on October 4, 1999.

On April 23, 2002 the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may –

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."<sup>1</sup>

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).<sup>2</sup> This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>3</sup>

In this case, appellant's letter requesting reconsideration was dated January 19, 2002, almost two years after the Office's January 24, 2000 decision and was, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.<sup>6</sup> Evidence that does not raise a

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>6</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup>

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require a merit review of a case.<sup>8</sup>

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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>9</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>10</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 a merit review in the face of such evidence.<sup>11</sup>

In this case, appellant submitted a June 12, 2001 prearbitration settlement agreement, which stated that two letters of warning issued on January 20, 2000 would be removed from appellant's personnel record. This document does not state that the employing establishment erred or acted abusively in carrying out its disciplinary actions. In fact it provides no information on the circumstances of the grievance. The agreement clearly states that the settlement is mutual and sets no precedent. Thus, it does not represent an admission of error or abuse by the employing establishment such that appellant's reaction to this form of discipline could be compensable.<sup>12</sup> Therefore, this document does not establish that the Office erred in determining that appellant had submitted no evidence of compensable work factors.

Appellant also submitted copies of a notification of absence dated August 18, 1999, requesting seven hours of sick leave for a doctor's appointment and information on mail hampers. Neither of these documents is relevant to the issue on which the Office denied appellant's claim -- that he had failed to establish a compensable work factor.

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<sup>7</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>8</sup> *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c. (May 1996).

<sup>9</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>10</sup> *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>12</sup> See *Constance I. Galbreath*, 49 ECAB 401, 409 (1998) (finding that removal of disciplinary actions against appellant from her personnel record did not establish error or abuse on the part of the employing establishment).

A May 7, 2001 statement by Gregory A. Dowdy recanted his written statements dated September 7 and December 6, 1999 and June 26, 2000 concerning appellant. Mr. Dowdy related that he was compelled by his supervisors to write false statements about appellant in exchange for promotional opportunities and was unaware that these statements would be used to discipline appellant unjustly.

The record contains only Mr. Dowdy's December 6, 1999 letter, which stated that he conducted an official discussion with appellant about leaving his work assignment area without permission. This letter was apparently part of appellant's grievance concerning the letters of warning.

Appellant argues that Mr. Dowdy's recantation establishes error by the employing establishment in disciplining him with the letters of warning. Mr. Dowdy's accusations against the employing establishment are uncorroborated and the grievance appellant filed concerning these disciplinary matters was resolved without assigning blame. Therefore, this letter does not establish that the Office erred in finding no compensable work factors in its January 2000 decision.

Appellant submitted a list of "corrections" to his claim form, alleging that he had an emotional reaction "to being unjustly punished, falsely accused, disciplined and removed" from his employment of 28 years by various supervisors. He stated that he had never been instructed by supervisors to use a mechanical tilting device when processing rewrap mail from hampers, that he was forced to work outside his medical restrictions by supervisors who altered his limited-duty job offer and that his supervisors lied about the various disciplinary actions taken against him.

Appellant's "corrections" letter repeats many of the arguments he provided to the Office with his November 1999 claim. Then as now, his specific allegations of harassment and mistreatment by his supervisors are uncorroborated by any evidence of or witnesses to, the incidents he alleged. Thus, this letter does not establish clear evidence on the part of the Office in denying his claim.

Finally, appellant's January 19, 2002 letter presents similar arguments regarding his supervisors and work assignments. He stated that he had an emotional reaction to one supervisor who ignored his medical restrictions that he have minimal contact with her. Appellant added that he was not out of his assigned area, as alleged by his supervisors and that they acted irrationally and unreasonably in their disciplinary actions against him.

With the exception of Mr. Dowdy's May 7, 2001 letter, all the documents offered by appellant in support of reconsideration were considered by the Office in its January 2000 decision. Appellant has not shown, through new evidence, that the Office erred in considering these documents insufficient to establish a compensable factor of employment.

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office.<sup>13</sup> Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The April 23, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
December 2, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>13</sup> See *Fidel E. Perez*, 48 ECAB 663, 665 (1997) (finding that medical evidence sufficient to create a conflict of opinion on whether appellant's work-related disc disease had resolved was insufficient to establish clear evidence of error).