

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LARRY R. CUMMINGS and U.S. POSTAL SERVICE,  
BULK MAIL CENTER, Greensboro, NC

*Docket No. 02-2388; Submitted on the Record;  
Issued June 5, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration received on August 14, 2002 under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

This case is on appeal before the Board for the third time.<sup>1</sup> In the first appeal, the Board affirmed the Office's March 8, 2000 decision which found appellant had failed to establish any compensable factors and, therefore, failed to establish that he sustained an emotional condition causally related to factors of his employment. The Board also affirmed the Office's April 11, 2000 decision denying appellant's application for review of his claim on the merits. In the second appeal, the Board affirmed the Office's October 3, 2001 denial of appellant's request for a merit review on the basis that it was untimely filed and failed to demonstrate clear evidence of error.<sup>2</sup> The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

Appellant requested reconsideration in an undated letter, which was received on August 14, 2002 and submitted evidence in support of his request.

By decision dated September 9, 2002, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within the one-year time limitation and failed to present clear evidence of error. The instant appeal follows.

The only decision before the Board is the Office's September 9, 2002 decision denying appellant's request for reconsideration of the July 11, 2001 decision. Because more than one year had elapsed between the issuance of this decision and September 23, 2002, the date that

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<sup>1</sup> Docket No. 00-1955 (issued July 11, 2001).

<sup>2</sup> Docket No. 02-222 (issued June 17, 2002).

appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 11, 2001 Office decision.<sup>3</sup>

The Board finds that the Office properly denied appellant's request for reconsideration received on August 14, 2002 under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>4</sup>

Section 8128(a) of the Federal Employees' Compensation Act<sup>5</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>8</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>9</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>10</sup>

The Board finds that appellant failed to file a timely application for review. The last merit decision in this case was issued on July 11, 2001. As appellant's undated reconsideration request, which was received on August 14, 2002, was outside the one-year time limit that began the day after July 11, 2001, appellant's request for reconsideration was untimely.

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<sup>3</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>4</sup> *Ronald P. Morgan*, 53 ECAB \_\_\_\_ (Docket No. 01-1053, issued February 14, 2002).

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Cleopatra McDougal-Saddler*, 53 ECAB \_\_\_\_ (Docket No. 00-2462, issued August 20, 2002); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989)

<sup>7</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>8</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. § 10.606(b)(2).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, *supra* note 6.

In those cases where a request for reconsideration is not timely filed, the Board has held 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>11</sup> Office procedures 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>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>13</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>14</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>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</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>17</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 *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>18</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>19</sup>

The Board finds that the evidence submitted by appellant in support of the request for reconsideration does not raise a substantial question as to the correctness of the July 11, 2001 merit decision nor is it of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, appellant submitted an October 6, 1998 affidavit by Mr. Perotta, a January 30, 2001 letter by Ms. Myers, a March 2000 letter by appellant; statements by appellant; a September 21, 1998 letter by Phil Burns, acting lead manager, distribution operations; and a September 23, 1998 letter requesting his claim be adjudicated as an occupational claim, all of which were previously of record and had been

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<sup>11</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(d) (February 2002).

<sup>13</sup> See *Jadine Jackson*, 53 ECAB \_\_\_\_ (Docket No. 01-1473, issued February 20, 2002); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> See *Jesus D. Sanchez*, *supra* note 10.

<sup>16</sup> See *Leona N. Travis*, *supra* note 14.

<sup>17</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>18</sup> *Ronald Q. Pierce*, 53 ECAB \_\_\_\_ (Docket No. 01-1007, issued February 7, 2002).

<sup>19</sup> *Leon D. Faidley, Jr.*, *supra* note 6; *Thankamma Mathews*, 44 ECAB 765 (1993).

considered by the Board prior to the issuance of its decision.<sup>20</sup> Also submitted was an August 5, 2002 letter from the Board informing appellant that his petition for reconsideration of the Board's July 11, 2001 decision was untimely and a July 22, 2002 letter to President Bush. None of this evidence addresses the relevant issue of whether the claimant sustained an emotional condition causally related to factors of his employment.

The Board finds that the evidence is not 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 corrections of the Office decisions. The evidence does not establish clear evidence of error and therefore, the Office properly denied appellant's request for reconsideration.

The September 9, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
June 5, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>20</sup> *James A. England*, 47 ECAB 115 (1995).