



## ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

## FACTUAL HISTORY

The case is on appeal to the Board for the second time. In the prior appeal, by decision dated November 13, 2003,<sup>2</sup> the Board affirmed the denial of appellant's claim for an emotional condition, finding that he had not established that it was sustained in the performance of duty. The Board found the evidence of record insufficient to establish appellant's allegations of harassment and retaliation, but found the evidence sufficient to establish appellant's allegations regarding his work duties and overwork. Next, the Board determined that the record did not contain any rationalized medical opinion evidence establishing a causal relationship between his emotional condition and the accepted employment factors. Accordingly, the Board affirmed the Office's decisions of August 26 and October 30, 2002. The law and the facts surrounding these appeals are set forth in the Board's prior decisions and are hereby incorporated by reference.

Following the Board's November 13, 2003 decision, in a letter dated March 5, 2004, which the Office received on March 8, 2004, appellant requested reconsideration. By decision dated April 15, 2004, the Office denied further review of the merits of the claim on the grounds that appellant's March 5, 2004 reconsideration request of the Office's October 30, 2002 decision was untimely filed and did not establish clear evidence of error.<sup>3</sup>

## LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>4</sup> The Office 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>5</sup> 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>6</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, if the claimant's application for review shows "clear

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<sup>2</sup> *Id.* On April 1, 2001 appellant, then a 33-year-old claims representative, filed an occupational disease claim for an emotional condition resulting from harassment at work.

<sup>3</sup> On appeal to the Board, appellant submitted additional new evidence. This evidence had also been received by the Office on April 15, 2004, the date of its decision. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.607 (1999); *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>6</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

evidence of error” on the part of the Office.<sup>7</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

The Office’s procedures at Chapter 2.1602.3b(1) provide the following with regard to the time limitations for filing a reconsideration request:

“(1) *Decisions.* The [Office’s] regulations establish a one-year time limit for requesting reconsideration (20 C.F.R. § 10.607(a)). The one-year period begins on the date of the original decision. **However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Employees’ Compensation Appeals Board (ECAB), and any merit decision following action by the ECAB...**”<sup>9</sup> (Emphasis in the original.)

### ANALYSIS

In the instant case, the letter from appellant requesting reconsideration was dated March 5, 2004 and was received by the Office on March 8, 2004. The Office found that this was not within one-year of the October 30, 2002 decision and, therefore, concluded that it was not timely filed. However, the last merit decision was the Board’s November 13, 2003 decision. As appellant’s March 5, 2004 request for reconsideration was filed within one-year of this decision, pursuant to Chapter 2.1602.3b(1) of the Office’s own procedures, the request for reconsideration was timely filed and the Office erroneously reviewed the evidence submitted in support of appellant’s reconsideration request under the clear evidence of error standard. Therefore, the Board will remand the case to the Office for review of the request under the proper standard of review.

### CONCLUSION

The Board finds that the Office improperly denied appellant’s request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

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<sup>7</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

<sup>8</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (January 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 15, 2004 is set aside and the case is remanded for further action consistent with this decision.

Issued: December 9, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member