

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**LARICE COOPER, Appellant**

**and**

**DEPARTMENT OF THE NAVY,  
MARINE CORPS LOGISTICS BASE,  
Albany, GA, Employer**

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**Docket No. 03-1678  
Issued: January 16, 2004**

*Appearances:*  
*John Swan, Jr., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On June 23, 2003 appellant filed a timely appeal from the June 4, 2003 decision of the Office of Workers' Compensation Programs, which denied a review of the merits of his claim on the grounds that his request was untimely filed and failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review this decision. The Board lacks jurisdiction to review the Office's March 11, 2002 decision denying appellant's claim for compensation, as more than one year has elapsed between the date of that merit decision and the date of the filing of this appeal.

**ISSUE**

The issue is whether the Office properly denied a merit review of appellant's claim on the grounds that his request was untimely filed and failed to establish clear evidence of error.

## **FACTUAL HISTORY**

On December 17, 2001 appellant, then a 55-year-old material handler, filed a claim for compensation alleging that he developed a blistering rash on or about August of that year as a result of material he handled in the course of his federal employment. The employing establishment advised that appellant volunteered to work overtime in the disassembly of storage racks in late July or early August 2001. He reported a rash in late September or early October 2001. The employing establishment acknowledged that appellant came into contact with dust but that no other employee had reported any rash or skin irritation while performing the same tasks.

On January 7, 2002 the Office requested that appellant submit additional information to support his claim, including details of the exposure or contact that he believed contributed to his condition and a comprehensive medical report from his treating physician explaining the cause of his condition. The Office allowed appellant a reasonable period of time, approximately 30 days, to submit the information requested.

On February 26, 2002 appellant submitted a duplicate claim form and stated: "I am attempting to determine if the injury has been documented/accepted at [the Office]. Please advise if the injury has been accepted."

In a decision dated March 11, 2002, the Office denied appellant's claim for compensation. Noting that it had received no response to its January 7, 2002 request for additional information, the Office found that the evidence of record was insufficient to establish that appellant experienced the claimed accident at the time, place and in the manner alleged. Fact of injury was, therefore, not established. Review rights attached to the Office's decision notified appellant that he had one year from the date of the decision to request reconsideration.

On March 3, 2003 appellant's representative advised that appellant was attempting to determine if the Office had accepted his claim. The representative added:

"Today, [appellant] authorized me to represent him in processing his claim. It is to be understood that since the beginning of this injury bills have been mounting and have been paid by him or his insurance.

"Today he provided me with a copy of a letter by [Dr.] Dennis A. Robinson, [Board-certified in allergy and immunology] connecting his health problem with his job. I have enclosed a copy of that letter. I hope that his letter will resolve any problems that you may have with this case.

"I am requesting the status of [appellant's] case."

On February 10, 2003 Dr. Robinson reported as follows:

"[Appellant] was found to be very allergic to mold, dust, dust mites and several pollens. He does seem to have allergic contact urticaria and allergic contact dermatitis when he is exposed to dust containing these substances in an old warehouse where he was asked to help with the breakdown of shelving units.

Please avoid his exposure in that warehouse. I do believe that he will do quite well and [be] able to maintain his present location of work with the publication subdivision of the base.”

On March 11, 2003 the Office provided appellant’s representative with a copy of the March 11, 2002 decision denying appellant’s claim for compensation. The Office advised that appellant needed to read and follow the review rights attached if he disagreed with the decision.

On March 19, 2003 appellant’s representative requested reconsideration. He asked that the claim be held in abeyance pending detailed information from Dr. Robinson. On April 14, 2003 the representative submitted additional evidence from Dr. Robinson. In a report dated March 24, 2003, Dr. Robinson wrote to appellant’s representative, as follows:

“We are enclosing a copy of our initial consultation note. I believe this will be information enough to help you with your case with [appellant]. He was found to be a very allergic individual. It is our theory that he came into contact with many of these allergens that he has in the dust in the warehouse where he was asked to do some after hours work. This is hard to prove completely, but most of the description of that warehouse would indicate there is a lot of mold exposure there.”

In a decision dated June 4, 2003, the Office denied a merit review of appellant’s claim. The Office found that appellant’s March 19, 2003 request for reconsideration was untimely and failed to present clear evidence of error in the March 11, 2002 decision denying his claim for compensation. The Office explained:

“If you do not present evidence establishing clear evidence of error, then you are not entitled to a merit review of your case. In your case, the only thing presented and argued by [your representative] is that you do have medical evidence from Dr. Dennis Robinson that indicates [that] you are allergic to mold, dust, dust mites, etc. This does not support that the prior decision was erroneous since this new information was not of record at the time the original denial was made.”

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees’ Compensation Act does not grant a claimant the right to a merit review of his case.<sup>1</sup> Rather, this section vests the Office with discretionary authority to review prior decisions:

“The Secretary of Labor may review an award for or against payment of

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<sup>1</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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>2</sup>

The Office, through regulations, has exercised its discretion under 5 U.S.C. § 8128(a). Section 10.607 of the regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought. This section further provides 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. The application must establish, on its face that such decision was erroneous.<sup>3</sup>

### ANALYSIS

On March 11, 2002 the Office denied appellant’s claim for compensation for failure to establish fact of injury. The Office found that the evidence of record was insufficient to establish that appellant experienced the claimed accident at the time, place and in the manner alleged. The Office notified appellant that he had one year from the date of the decision to request reconsideration. When appellant’s representative wrote to the Office on March 3, 2003 he did not request reconsideration. While a claimant need not specifically request reconsideration, the context of the letter and the circumstances of the case must make clear that the claimant is attempting to overturn the Office’s decision and have his claim reopened.<sup>4</sup> With regard to the contents of a request for reconsideration, the Office’s procedure manual states that, while no specific form is required, the request must be in writing and must identify the decision and the specific issues, for which reconsideration is being requested.<sup>5</sup> In this case, the representative inquired as to the status of appellant’s case and was unaware that the Office had rendered a decision. He noted that appellant had earlier inquired about the status of his case and after enclosing a medical report from Dr. Robinson that he hoped would resolve any problems, the representative stated: “I am requesting the status of [appellant’s] case.”

As he did not acknowledge the Office’s March 11, 2002 decision or express any disagreement with the findings therein or give any indication that he was seeking a reopening of appellant’s case for a reconsideration of its merits, the Board finds that the representative’s March 3, 2003 correspondence, received within one year of the denial of appellant’s claim, does not constitute a request or application for reconsideration under section 8128(a) of the Act.

It was only after the Office provided the representative with a copy of the March 11, 2002 decision and the review rights attached thereto that he advised the Office that he was

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607 (1999).

<sup>4</sup> *Richard J. Chabot*, 43 ECAB 357 (1991).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2.a (June 2002).

requesting reconsideration under the Act. Because he made this request on March 19, 2003 more than one year after the March 11, 2002 denial of appellant's claim, the Office properly found that the request was untimely. The question for determination, therefore, is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its March 11, 2002 decision.

In denying a merit review of appellant's claim, the Office explained that the only thing presented and argued was that medical evidence from Dr. Robinson indicated that appellant was allergic to mold, dust, dust mites and so forth: "This does not support that the prior decision was erroneous since this new information was not of record at the time the original decision was made." The Board finds that the Office has misapplied the standard of review in this case. If a claimant submits new evidence of sufficient probative value to *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office decision,<sup>6</sup> the Office must reopen his case for a review on its merits.

The Board has found that new evidence may indeed satisfy the clear evidence of error standard and warrant further review of a case on its merits. In *Jimmy L. Day*,<sup>7</sup> the Office issued a decision on July 27, 1993 denying an emotional condition claim on the grounds that the claimant failed to establish a compensable factor of employment.<sup>8</sup> On February 26, 1995 more than one year after the Office's merit decision, the claimant requested reconsideration and submitted a January 3, 1995 Equal Employment Opportunity (EEO) Commission decision, finding that he was the victim of unlawful retaliation. This was a document that was not available to the claimant in time to support either his original claim or a timely request for reconsideration. The Office denied a merit review of the case. On appeal the Board found that the January 3, 1995 EEO decision was new evidence that supported the claimant's allegations and raised a substantial question as to the correctness of the Office's decision denying the claim for failure to establish a compensable factor of employment. The Board set aside the Office's decision denying the untimely request for reconsideration and remanded the case to the Office for further review of the merits of the claim.

In this case, the Office summarily rejected the evidence submitted because it was new, without conducting a limited review of how this new evidence bears on the evidence previously of record.<sup>9</sup> The Board will remand the case to the Office so that it may conduct such a limited review and determine whether appellant has demonstrated clear evidence of error on the part of the Office in its March 11, 2002 decision.

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<sup>6</sup> See *Thankamma Mathews*, 44 ECAB 765 (1993) (describing clear evidence of error).

<sup>7</sup> 48 ECAB 654 (1997).

<sup>8</sup> An emotional reaction to an administrative or personnel action is not compensable unless the evidence shows error or abuse on the part of the employing establishment. *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991), *reaff'g* 41 ECAB 387 (1990).

<sup>9</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

**CONCLUSION**

The Office misapplied the clear evidence of error standard and, therefore, denied a review of appellant's claim on improper grounds. The Board will set aside the Office's June 4, 2003 decision and remand the case to the Office for a proper application of the standard of review and an appropriate final decision on appellant's untimely request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 4, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 16, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member