

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

LOURDES G. McMANIS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 04-1338
Issued: November 5, 2004**

Appearances:
Lourdes G. McManis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 21, 2004 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated January 22, 2004 which denied his untimely request for reconsideration. The record also contains an August 11, 2003 nonmerit decision of the Office denying his request for reconsideration. Because more than one year has elapsed between the last merit decision dated June 10, 2002 and the filing of the appeal on April 21, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On April 16, 2001 appellant, then a 46-year-old mailing requirements clerk, filed an occupational disease claim (assigned number 13-202874) alleging that she suffered from anxiety, stress, depression and physical pain causally related to factors of her federal employment.¹ She stated that she was illegally and wrongfully terminated by the employing establishment in September 1997.² By letter dated June 1, 2001, the Office advised appellant about the type of factual and medical evidence she needed to submit to establish her claim.

Based on appellant's response to its June 1, 2001 letter, the Office issued a decision on July 2, 2001 finding that fact of injury was not established as the evidence of record did not establish that appellant sustained an emotional condition while in the performance of duty. The Office reissued its decision on September 21, 2001 because it was determined that the July 2, 2001 decision had been mailed to an incorrect address. In a letter dated October 1, 2001, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 27, 2002, the hearing representative set aside the Office's July 2, 2001 decision and remanded the case for further development of the evidence. After factual and medical development of the claim, the Office issued a decision dated June 10, 2002 denying appellant's claim because she failed to establish that her emotional condition was caused by compensable factors of her employment. By letter dated June 5, 2003, appellant requested reconsideration.

In a decision dated August 11, 2003, the Office denied appellant's request for reconsideration since it neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of its prior decision. Appellant requested reconsideration on December 18, 2003 and submitted numerous medical records relating to her physical and emotional conditions in support of her request.

On January 22, 2004 the Office denied appellant's request for reconsideration because it was not timely filed and failed to present clear evidence of error. The Office found that the medical evidence submitted by appellant was not relevant to the issue of whether she established that her emotional condition was caused by a compensable factor of her employment.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must: (1) show

¹ Appellant previously filed a claim for an emotional condition, which was denied by the Office on October 10, 1997.

² Appellant was subsequently reinstated by the employing establishment based on an October 25, 1999 arbitration decision. On July 27, 2001 she was separated from the employing establishment due to her physical inability to perform her work duties.

³ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁴ 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.⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 1

Appellant requested reconsideration of the Office's June 10, 2002 merit decision on June 5, 2003. She neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Further, she did not submit any relevant and pertinent new evidence in support of her request.

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent new evidence not previously considered by the Office, it properly refused to reopen appellant's claim for a review on the merits.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). 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.⁸

Section 10.607(a) of the Office's implementing regulation 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

and must be manifest on its face that the Office committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

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.¹⁵ 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 merit review in the face of such evidence.¹⁶

ANALYSIS -- ISSUE 2

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁷

The last merit decision in this case was issued by the Office on June 10, 2002, which denied appellant's claim for compensation on the grounds that she failed to establish that she sustained an emotional condition while in the performance of duty. As appellant's December 18, 2003 letter requesting reconsideration was made more than one year after the Office's June 10, 2002 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that she did not establish that she sustained an emotional condition causally related to compensable factors of her employment. She submitted numerous medical records regarding her physical and emotional conditions. The evidence indicated that appellant suffered from an employment-related emotional condition but, it is not sufficient to shift the weight of the

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *Larry J. Lilton*, 44 ECAB 243 (1992).

evidence in favor of the claim as it did not identify any compensable factors of appellant's employment as the cause of her condition. The Board, therefore, finds that the medical records submitted by appellant do not raise a substantial question as to the correctness of the Office's determination that she did not sustain an emotional condition while in the performance of duty.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The Board further finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2004 and August 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member