

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

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**JOSE A. FERNANDEZ, Appellant**

**and**

**U.S. POSTAL SERVICE, FORT BLISS  
STATION, El Paso, TX, Employer**

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**Docket No. 04-1823  
Issued: November 29, 2004**

*Appearances:*  
*Jose A. Fernandez, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On July 12, 2004 appellant filed a timely appeal from an April 5, 2004 decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's April 5, 2004 nonmerit decision. Because more than one year has elapsed between the issuance of the Office's February 5, 2003 decision, in which an Office hearing representative affirmed the denial of appellant's claim on the grounds that he failed to establish a compensable factor of employment, and July 12, 2004, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 5, 2003 decision.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration on the merits of his claim on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On November 20, 2001 appellant, a 52-year-old postal clerk, filed a traumatic injury claim alleging that his mental and nervous breakdown and losing his temper on November 15, 2001 was due to an incident with his supervisor during a safety talk. Appellant stopped work on November 20, 2001 and has not returned.

In a decision dated April 8, 2002, the Office denied appellant's emotional condition claim on the grounds that he failed to establish any compensable factors of employment.

Appellant requested an oral hearing, which was held on November 19, 2002. Subsequent to the hearing, appellant submitted additional medical and factual evidence in support of his claim. In a decision dated February 5, 2003, an Office hearing representative affirmed the denial of appellant's claim on the grounds that he failed to establish that he sustained a compensable injury in the performance of duty.

Appellant requested reconsideration in a letter dated February 9, 2004 and received by the Office on February 13, 2004. In support of his request, appellant submitted a disability determination by the Social Security Administration and medical evidence. In a decision dated April 5, 2004, the Office determined that the request was untimely and failed to establish clear evidence of error.

## **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>1</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>2</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>3</sup> The Office procedures state that it 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>1</sup> 5 U.S.C. § 8128(a). To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>1</sup> the Office's regulations provide that a claimant must: (1) show 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) submit relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2). 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. *See* 20 C.F.R. § 10.607(a). When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act. *See Joseph A. Brown, Jr.*, 55 ECAB \_\_\_\_ (Docket No. 04-376, issued May 11, 2004). The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB \_\_\_\_ (Docket No. 04-208, issued March 18, 2004).

<sup>2</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>3</sup> *Leon J. Modrowski*, 55 ECAB \_\_\_\_ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

evidence of error” on the part of the Office.<sup>4</sup> In this regard, the Office will limit its review to how the newly submitted evidence bears on the prior evidence of record.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<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> 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.<sup>11</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 merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

The most recent merit decision in this case is the Office’s February 5, 2003 decision in which an Office hearing representative affirmed the denial of appellant’s claim on the grounds that he failed to establish that he sustained a compensable injury in the performance of duty. The Office properly notified appellant that any request for reconsideration must be made within one

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<sup>4</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>5</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>6</sup> See *Darletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> See *Pasquale C. D’Arco*, 54 ECAB \_\_\_\_ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> See *Leon J. Modrowski*, 55 ECAB \_\_\_\_ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez*, *supra* note 3.

<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

<sup>10</sup> See *Nelson T. Thompson*, *supra* note 5.

<sup>11</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>12</sup> See *George C. Vernon*, 54 ECAB \_\_\_\_ (Docket No. 02-1954, issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

year of that decision. Appellant's February 9, 2004 request for reconsideration is therefore untimely.

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its February 5, 2003 decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>13</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>14</sup> Evidence that 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 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.<sup>18</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>19</sup>

Appellant's February 9, 2004 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office in its February 5, 2003 decision. The Office denied appellant's claim for compensation because he failed to discharge his burden of proof to establish that the November 15, 2001 incident with his supervisor was a compensable factor of employment. The issue, therefore, is strictly a factual one. Appellant, however, submitted no factual evidence to address this issue when he submitted the February 9, 2004 request for reconsideration. Rather, he submitted medical evidence and a disability determination by the Social Security Administration<sup>20</sup> and alleged that he was instructed not to return to work by his treating physicians. None of this evidence is relevant to the reason the Office denied his claim on February 5, 2003. Nothing in appellant's February 9, 2004 request for reconsideration

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<sup>13</sup> See *Dean D. Beets*, *supra* note 6.

<sup>14</sup> See *Leona N. Travis*, *supra* note 7.

<sup>15</sup> See *Jesus D. Sanchez*, *supra* note 3.

<sup>16</sup> See *Leona N. Travis*, *supra* note 7.

<sup>17</sup> *Nelson T. Thompson*, *supra* note 5.

<sup>18</sup> *Leon D. Faidley, Jr.*, *supra* note 11.

<sup>19</sup> *Gregory Griffin*, *supra* note 12.

<sup>20</sup> Findings of other federal agencies are not dispositive of issues arising under the Act as such findings are made pursuant to different standards of proof. See *Wayne E. Boyd*, 49 ECAB 202 (1997).

remotely suggests that the Office's February 5, 2003 decision was erroneous in finding that a compensable factor of employment had been established.

Because appellant's February 9, 2004 request for reconsideration does not establish, on its face, that the Office's February 5, 2003 decision was erroneous, the Board will affirm the Office's April 5, 2004 decision not to reopen his case for a review on the merits. Appellant's untimely request does not warrant such action under the law.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 5, 2004 is affirmed.

Issued: November 29, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member