



causally related to a meeting at work on October 1, 1996. By decision dated March 12, 1997, the Office denied the claim. On June 3, 1997 appellant filed an occupational disease or illness claim (Form CA-2), alleging that she sustained depression, reactive hypoglycemia and irritable bowel syndrome as a result of shift work, irregular sleep and stress at work.

In a decision dated January 7, 1998, the Office denied the claim. The statement of accepted facts indicated that the Office had accepted that appellant performed shift work; however, the Office determined that none of appellant's other allegations, including harassment, had been established as compensable work factors. By letter dated August 5, 1998, the Office stated that it was correcting the January 7, 1998 decision and the claim was denied on the grounds that the medical evidence was not sufficient to establish a medical condition causally related to shift work and irregular sleep. The Office did not address the specific medical evidence of record.

Appellant requested reconsideration and submitted additional evidence. Pursuant to an Equal Employment Opportunity Commission (EEOC) claim, an administrative judge issued a proposed bench decision dated October 19, 1998 finding that appellant had established sexual harassment based on a hostile work environment. The administrative judge also found that the employing establishment had violated the Rehabilitation Act<sup>1</sup> when appellant's supervisor: (1) disclosed her medical condition and use of medication; (2) pressured appellant to brief coworkers on her mental condition; and (3) took away her assignment to conduct Model One Training. In a final agency decision dated December 24, 1998, the employing establishment acknowledged that the supervisor's actions constituted a violation of the Rehabilitation Act in the three specific instances noted. The employing establishment, however, rejected the conclusions of the administrative judge with respect to sexual harassment and found no harassment or discrimination occurred.

By decision dated May 10, 2000, the Office denied modification of its prior decisions. The Office accepted as compensable factors that appellant's supervisor had disclosed her medical condition and use of medication, encouraged her to disclose the information at a meeting and also that a coworker had called appellant a "selfish bitch."<sup>2</sup> The remainder of appellant's allegations were held not to be compensable work factors. The Office stated that the medical evidence was insufficient to establish causal relationship.

By letter dated June 20, 2003, appellant requested reconsideration of her claim. Appellant submitted a decision from the EEOC's Office of Federal Operations dated May 30, 2003, with respect to her appeal of the final agency decision. The EEOC found that appellant had established that she was discriminated against due to a hostile work environment based on gender. The agency's finding of no discrimination was reversed and the agency was directed to take corrective action.

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<sup>1</sup> 29 U.S.C. § 701 *et seq.*

<sup>2</sup> The Office found that the removal of appellant's assignment to conduct Model One Training was not a factor of employment, without discussing the employing establishment's decision or providing further explanation.

In a decision dated September 8, 2003, the Office denied the request for reconsideration without merit review of the claim. The Office determined that appellant's June 20, 2003 request for reconsideration was untimely and that appellant did not show clear evidence of error as "the issue is medical in nature and the EEOC report is not written or submitted by a physician."

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>6</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>7</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>8</sup>

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>9</sup> In accordance with this holding the Office has stated in its procedure manual 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</sup> Evidence which does not raise a

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</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>6</sup> 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 specific point of law; (2) advancing a relevant legal argument 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.

<sup>7</sup> 20 C.F.R. § 10.607.

<sup>8</sup> *See Leon D. Faidley, Jr.*, *supra* note 4.

<sup>9</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). *See also* 20 C.F.R. § 10.607(b).

<sup>11</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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>15</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>16</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 improperly denied merit review in the face of such evidence.<sup>17</sup>

### ANALYSIS

In this case, appellant submitted a request for reconsideration dated June 20, 2003, of a May 10, 2000 Office decision on the merits of the claim. Since the request for reconsideration was more than one year after the merit decision, it was properly found to be untimely pursuant to 10.607(a).

The Office must therefore make a determination if clear evidence of error was demonstrated by the request for reconsideration. In the September 8, 2003 decision, the Office noted that appellant had submitted the May 30, 2003 EEOC decision, but found no clear evidence of error stating that the issue in the case was medical in nature and the EEOC decision did not constitute probative medical evidence.

The Board finds that the Office failed to properly explain its findings with respect to the issues presented. It is a well-established principle that the Office must make proper findings of fact and a statement of reasons in its final decisions.<sup>18</sup>

The underlying issue in this case is not limited to the medical evidence alone. Although the Office had accepted that appellant established several compensable factors, the Office had not previously accepted harassment or discrimination as a compensable work factor in this case. The underlying issues in the case, therefore, are both factual and medical. On reconsideration appellant submitted a May 30, 2003 EEOC decision that reversed the employing establishment decision and found that appellant was subject to gender-based discrimination. This evidence is sufficient to shift the weight of the evidence to appellant and raise a substantial question as to the

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<sup>13</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>14</sup> See *Leona N. Travis*, *supra* note 12.

<sup>15</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>17</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>18</sup> See *Beverly Dukes*, 46 ECAB 1014 (1995); *Arietta K. Cooper*, 5 ECAB 11 (1952); 20 C.F.R. § 10.126.

correctness of the Office decision.<sup>19</sup> The Office's brief and incomplete assessment of the evidence submitted did not satisfy its obligation to provide a decision with appropriate findings and clearly stated reasons. The case will be remanded to the Office for an appropriate decision that properly considers the evidence submitted in this claim on the issue of clear evidence of error.

**CONCLUSION**

The Board finds that the Office failed to properly adjudicate the clear evidence of error issue presented.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 8, 2003 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 10, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>19</sup> See *Jimmy L. Day*, 48 ECAB 654 (1997), where an EEOC decision was found to be sufficient to establish clear evidence of error.