

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

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**GARY L. MALCHIODI, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Old Lyme, CT, Employer**

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**Docket No. 04-2149  
Issued: June 1, 2005**

*Appearances:*  
*Gary L. Malchiodi, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

On August 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions dated February 2, 2004, which denied his request for a merit review and June 2, 2004, which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. As these are nonmerit Office decisions, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUES**

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

**FACTUAL HISTORY**

On January 16, 2001 appellant, a 38-year-old rural carrier, filed a traumatic injury claim alleging on December 28, 2000 he was required to watch a video, which insulted his race and religion.

By decision dated April 18, 2001, the Office denied appellant's claim on the grounds that he failed to establish that his alleged condition was causally related to his employment. In a letter dated January 9, 2002, appellant requested reconsideration of the denial of his claim.

In a merit decision dated March 8, 2002, the Office denied modification of the April 18, 2001 decision.

In letters dated April 2 and 17, 2002, appellant requested reconsideration.

In a merit decision dated May 24, 2002, the Office denied modification.

Appellant requested reconsideration in an undated letter received on January 23, 2003 and submitted a January 8, 2003 report by Dr. Michael A. Friedman, a treating psychiatrist, in support of his request. Dr. Friedman diagnosed brief reactive psychosis, which he opined had been "exacerbated by an incident that occurred at work." He concluded that there was "a direct causal relationship between the worsening of [appellant's] condition and the circumstances at work" as appellant had "no prior history referable to the above condition."

By merit decision dated February 25, 2003, the Office denied modification.

Appellant requested reconsideration in a letter dated May 7, 2003 and received by the Office on May 20, 2003. In support of his request, he submitted an April 23, 2003 report by Dr. Friedman, who diagnosed appellant with brief reactive psychosis, which was currently in remission. He attributed the condition to a December 28, 2000 employment incident.

In a nonmerit decision dated February 2, 2004, the Office denied appellant's request for reconsideration finding that the evidence submitted was of a repetitious nature and did not warrant a merit review of the prior decision.

Appellant requested reconsideration in a letter dated April 28, 2004 and submitted a February 19, 2004 report from Dr. Friedman, who stated that he had treated appellant since March 2001 for a brief reactive psychosis. He opined that appellant experienced "an acute psychotic episode with prominent symptoms and tangential thinking." Dr. Friedman stated:

"It is also my opinion that this condition had dated back to December 29, 2000 and is causally related to an incident at work at the [employing establishment] in Old Lyme, Ct on December 28, 2000. Specifically, he watched a video that insulted his race and religion under the pretense of watching [an employing establishment] training film while coworkers and his supervisory personal (sic) gathered to watch his reaction.

"There is no prior history referable to the above condition. Being the victim of a coordinated practical joke as such, will in certain individuals, who are predisposed to this condition, cause various symptomatology, such as that which [appellant] is suffering from. As is the case, stressful situations, such as the one [appellant] was subject to on December 28, 2000 will exacerbate underlying conditions as well."

By decision dated June 2, 2004, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup>

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (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) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, appellant presented insufficient evidence to establish that the Office erroneously applied or interpreted a point of law, nor did he advance a relevant legal argument not previously considered by the Office.

Appellant submitted an April 23, 2003 report by Dr. Friedman. The Board finds that this report, however, contains identical information regarding the diagnosis of appellant's condition and opinion regarding the causal relationship between appellant's brief reactive psychosis and the accepted December 28, 2000 employment incident, which was previously reviewed by the Office in its February 25, 2003 merit decision. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case for further merit review.<sup>6</sup> Appellant, thus has failed to show that the

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<sup>1</sup> 5 U.S.C. § 8128(a) (“[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>2</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

<sup>6</sup> See *Shirley Rhynes*, 55 ECAB \_\_\_\_ (Docket No. 04-1299, issued September 9, 2004); *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

Office erred in interpreting or applying the law governing his entitlement to compensation under the Act and has not advanced any relevant legal argument not previously considered by the Office. He failed to submit relevant or pertinent new evidence not previously considered. As appellant failed to meet any of the three requirements for reopening his claim for merit review, the Board finds that the Office properly denied his reconsideration request on February 2, 2004.<sup>7</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.<sup>8</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>9</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>10</sup> The 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 evidence of error" on the part of the Office.<sup>11</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>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>13</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>14</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>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> 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

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<sup>7</sup> See *supra* note 3.

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 20 C.F.R. § 10.607; see also *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>10</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>11</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>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> See *Jesus D. Sanchez*, *supra* note 10.

<sup>16</sup> See *Leona N. Travis*, *supra* note 14.

decision.<sup>17</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>18</sup>

### **ANALYSIS -- ISSUE 2**

The one-year time limitation began to run the day following the February 25, 2003 Office decision. This was the last merit decision in the case.<sup>19</sup> Appellant's request for reconsideration was dated April 28, 2004, therefore, his request was untimely. Because appellant filed his request more than one year after the Office's February 25, 2003 merit decision, he must demonstrate "clear evidence of error" on the part of the Office in denying his claim for compensation.

The Board finds that the evidence submitted by appellant, in support of his request, does not raise a substantial question as to the correctness of the Office's February 25, 2003 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Dr. Friedman attributed appellant's brief psychotic condition to the accepted employment factor and concluded that "being the victim of a coordinated practical joke as such" will "cause various symptomatology, such as that which [appellant] is suffering from" in susceptible individuals. The Board notes that, while this medical opinion is generally supportive of appellant's claim that his emotional condition was due to the accepted employment factor, it is not sufficiently probative to shift the weight of the evidence in appellant's favor. Although it might be construed to produce a contrary result, it does not demonstrate any error on the part of the Office in issuing the February 25, 2003 merit decision. The Board has held that medical evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case.<sup>20</sup> The Board finds that appellant has failed to submit clear evidence of error such that the Office did not abuse its discretion in denying further merit review of his claim.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for a merit review. The Board further 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.

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<sup>17</sup> *Thankamma Mathews*, *supra* note 10.

<sup>18</sup> *See John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>19</sup> *See Veletta C. Coleman*, *supra* note 2.

<sup>20</sup> *See Pete F. Dorso*, *supra* note 18; *Fidel E. Perez*, 48 ECAB 663 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs' dated June 2 and February 2, 2004 are affirmed.

Issued: June 1, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member