



## ISSUE

The issue is whether 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.

## FACTUAL HISTORY

On April 22, 2003 appellant, then a 40-year-old program manager, filed an occupational disease claim alleging that she developed Grave's disease and fibromyalgia due to job stress caused by a staff shortage, heavy workload and tight deadlines. The employing establishment controverted appellant's claim.

By decision dated December 24, 2003, the Office denied appellant's emotional condition claim on the grounds that the evidence did not establish that her condition was caused by a compensable factor of employment.

Appellant submitted an undated request for reconsideration, stamped as received by the Office on December 27, 2004. In a statement dated December 23, 2004, she alleged that her Grave's disease and fibromyalgia were caused by a heavy workload and hostile work environment that she attributed to her supervisor, Joseph Smith. She alleged that Mr. Smith reassigned her to a job that exceeded her skills and experience and he threatened to terminate her reasonable accommodations. Appellant submitted additional evidence in support of her reconsideration request.<sup>2</sup>

In a written statement dated December 20, 2004, David E. Jacobs, a former immediate supervisor, stated that many employees felt that the management style of Mr. Smith was abusive. He noted that Mr. Smith threatened to reassign employees, including appellant and that she was involuntarily reassigned after an unsuccessful attempt at mediation between herself and Mr. Smith. Mr. Jacobs attached a letter from an unidentified employee who alleged that Mr. Smith created a hostile work environment.

In a December 12, 2003 memorandum, Mr. Smith stated that appellant's reassignment was part of an effort to accommodate her Grave's disease and fibromyalgia.

Appellant submitted a job vacancy announcement and a notice of rights and responsibilities for employees filing Equal Employment Opportunity (EEO) complaints.

Appellant also submitted additional medical evidence.

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<sup>2</sup> Appellant also submitted a document previously of record.

By decision dated January 14, 2005, the Office denied appellant's reconsideration request on the grounds that it was not timely filed and failed to show clear evidence of error in the December 24, 2003 decision.<sup>3</sup>

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration 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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>9</sup> The Office's regulations 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. § 607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>10</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>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must

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<sup>3</sup> Appellant submitted additional evidence subsequent to the Office decision of January 14, 2005. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). Therefore, the Board may not consider this evidence for the first time on appeal.

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>6</sup> *Id.* at 768.

<sup>7</sup> 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB \_\_\_\_ (Docket No. 04-2028, issued January 11, 2005).

<sup>8</sup> *Thankamma Mathews*, *supra* note 5 at 769.

<sup>9</sup> *Alberta Dukes*, *supra* note 7.

<sup>10</sup> *See Gladys Mercado*, 52 ECAB 255 (2001).

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

<sup>12</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

be manifest on its face that the Office committed an error.<sup>13</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>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<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's 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 abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

### ANALYSIS

Since more than one year elapsed between the December 24, 2003 Office decision and appellant's reconsideration request, received by the Office on December 27, 2004, the request for reconsideration is untimely. Consequently, she must demonstrate "clear evidence of error" by the Office in denying her claim for compensation.<sup>18</sup>

The evidence submitted by appellant in her untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor.

In support of her untimely request for reconsideration, appellant submitted a statement from Mr. Jacobs, who indicated that many employees felt that Mr. Smith was abusive. He noted that appellant was involuntarily reassigned after an unsuccessful attempt at mediation between herself and Mr. Smith. However, in a December 12, 2003 memorandum, Mr. Smith stated that appellant's reassignment was part of an effort to accommodate her Grave's disease and fibromyalgia. This evidence does not demonstrate clear evidence of error in the December 24, 2003 decision, that denied appellant's emotional condition claim on the grounds that she failed to establish a compensable factor of employment.

Appellant submitted a job vacancy announcement and a notice of rights and responsibilities for employees filing EEO complaints. However, these documents do not address any specific employment factors alleged by appellant to have caused her emotional condition and therefore do not demonstrate clear evidence of error in the December 24, 2003 decision.

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<sup>13</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *Darletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003).

<sup>15</sup> *Leona N. Travis*, *supra* note 13.

<sup>16</sup> *Darletha Coleman*, *supra* note 14.

<sup>17</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>18</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

Appellant also submitted additional medical evidence. However, unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence.<sup>19</sup> Therefore, this evidence is not relevant to the issue decided by the Office in its December 24, 2003 decisions and does not demonstrate clear evidence of error.

The Board finds that the evidence submitted by appellant did not raise a substantial question as to the correctness of the Office's December 24, 2003 decision. Therefore, the Office properly denied her request for reconsideration.

**CONCLUSION**

The Board finds that the Office properly denied further merit review of appellant's claim on the grounds that her request for reconsideration was untimely and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 14, 2005 is affirmed.

Issued: June 13, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>19</sup> See *Garry M. Carlo*, 47 ECAB 299 (1996).