

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

HENRY D. RICHARDS, Appellant

and

**U.S. POSTAL SERVICE, REDDING GENERAL
MAIL FACILITY, Redding, CA, Employer**

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**Docket No. 06-561
Issued: July 12, 2006**

Appearances:
Henry D. Richards, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 4, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' May 24, 2005 decision denying appellant's request for reconsideration. Appellant also timely appealed the Office's December 15, 2005 decision denying appellant's request for reconsideration as it was untimely filed and failed to present clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the nonmerits of this case. As the last merit decision in this case was issued on July 11, 2003, over one year prior to the January 4, 2006 filing date, the Board does not have jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for merit review under 5 U.S.C. § 8128(a); and (2) whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On November 1, 2001 appellant, then retired from the employing establishment in his capacity as an accountable clerk from December 8, 1986 through June 8, 1993, filed an occupational disease claim, alleging that he sustained dysphoria/stress and alcoholism as a result of his federal employment. He noted a specific incident that occurred on June 8, 1993. Appellant indicated: "In trying to perform my prescribed duties, and because of [the employing establishment's] continuous violations of the security of accountable mail, I was sent home." He alleged that the stress caused his emotional condition and his alcoholism. Appellant stopped work on June 11, 1993 and did not return. The employing establishment controverted the claim.

In a statement dated July 24, 2001, appellant explained that as accountables clerk he was responsible for all the accountable mail. His daily routine was to retrieve the mail and then go to the registry cage for his accountable mail. Appellant described the bookkeeping that was necessary in order to properly process the accountable mail. He stated that, on June 8, 1993, his supervisor distributed the accountable mail to waiting carriers when appellant had not yet recorded or routed the registers causing him great stress. Appellant also noted that his supervisor did not require the carriers to sign for the accountable mail. He noted that this happened before. The record also contains an earlier statement by appellant's supervisor where he indicated that on June 8, 1993 there was light mail volume and the carriers wanted there accountables so that they could leave. Appellant's supervisor indicated that he refused to give the accountables to them, and that he therefore proceeded to distribute the accountables to the waiting carriers. He indicated that he told appellant to "relax." The supervisor indicated that he attempted to enter the cage to calm appellant and he became very agitated and threw a parcel on the desk.

By decision dated January 13, 2003, the Office denied appellant's claim for compensation. It found that appellant had not established the existence of an employment factor within the performance of duty that had a causal relationship to appellant's emotional condition. The Office noted that, when a disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes with the coverage of the Federal Employees' Compensation Act. However, the Office determined that appellant's alleged stress arose as a result of his supervisor's monitoring of his regular work duties and therefore constituted an administrative function not covered by the Act.

Appellant requested a review of the written record and in a decision dated July 11, 2003 the hearing representative affirmed the January 13, 2003 denial of appellant's claim. The hearing representative agreed with the Office that the incident listed by appellant was an administrative function absent evidence of error or abuse and did not establish a compensable factor of employment.

By letter dated July 2, 2004 and received by the Office on July 6, 2004, appellant requested reconsideration. In support thereof, appellant submitted some documents that were already in the record. New documents included various statements from colleagues. In a June 30, 2004 statement, Richard Christ indicated that he responded to interrogatories by saying that the stress caused by the on-duty incident of June 8, 1993 was caused by appellant trying to do his job. In a statement dated June 27, 2004, Michael Fullerton indicated that many carriers started before their scheduled start time and earlier than appellant's start time, and that, when

appellant arrived at the accountable cage, carriers were asking for their accountable mail to leave for their routes. John Hanson submitted a statement indicating that, when he worked as a carrier, he would frequently go to get accountable mail before appellant was ready, and that this would upset appellant. Glenda Dickey, another carrier, indicated in a statement dated June 23, 2004 that many carriers would come in early and that appellant complained to his supervisors about carriers coming to the accountable cage before he was ready for them. Appellant also submitted a statement by David R. Robidoux, a carrier, dated May 15, 2004 indicating that appellant was an organized and systematic person and that appellant was often stressed by carriers arriving early to pick up their accountable mail. He also noted occasions where the supervisors or carriers would circumvent appellant and pick up their accountable mail. Mr. Robidoux contended that appellant was put in a difficult position as it was his responsibility to maintain the accountable mail and his reputation was at stake if something were missing. Finally, in a statement dated May 6, 2004, Pete Foote indicated that he was a supervisor and that it was improbable or nearly impossible for an accountable clerk to handle the accountable mail in a timely manner in appellant's unit.

By decision dated May 24, 2005, the Office denied appellant's request for reconsideration for the reason that the evidence was repetitive and that appellant did not raise any new arguments not previously addressed.

On July 19, 2005 appellant filed an appeal with the Board from the Office's May 24, 2005 decision, which the Board docketed as No. 05-1547.

On August 15, 2005 appellant again requested reconsideration and resubmitted his narrative and statements from colleagues.

Based on a request by appellant to pursue his reconsideration before the Office, the Board dismissed the appeal on October 7, 2005.¹

Subsequent to the Board's dismissal, appellant requested reconsideration on October 3 and 24, 2005 reiterating his contentions and summarizing his witnesses statements previously of record. Additionally, appellant resubmitted the actual witness statements, medical reports and leave slips which were previously of record and previously reviewed by the Office.

By decision dated December 15, 2005, the Office denied appellant's request as it was not timely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

The Act² provides that the Office may review an award for or against compensation upon application by an employee who receives an adverse decision. The employee may obtain this

¹ Docket No. 05-1547 (issued October 7, 2005).

² 5 U.S.C. § 8101 *et seq.*

relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.³

To required the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulations provide that the application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.⁵

ANALYSIS -- ISSUE 1

In his request for reconsideration, appellant did not make any argument that the Office erroneously applied or interpreted a specific point of law or advanced a legal argument not previously considered by the Office. Appellant did submit new evidence in the form of statements by several of his colleagues attesting to the fact that appellant often became stressed because of carriers trying to pick up mail early and that supervisors would sometime distribute the mail. None of this evidence constituted relevant and pertinent new evidence. Although the statements had not previously been considered, they are repetitive of other statements in the record. Furthermore, there is no dispute that the events occurred as alleged by appellant, however, the Office found that these events fell under the supervisor's monitoring of appellant's work duties, which constituted an administrative function and therefore was not compensable under the Act. Accordingly, the Office properly denied reconsideration in its decision dated May 24, 2005.

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.⁶ 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.⁷ 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

³ 20 C.F.R. § 10.605.

⁴ 20 C.F.R. § 10.606.

⁵ *Donna L. Shahin*, 55 ECAB __ (Docket No. 02-1597, issued December 23, 2003).

⁶ 5 U.S.C. §§ 8101-8193, § 8128(a). 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).

⁷ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

final merit decision was in error.⁸ 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.⁹ 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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷

⁸ *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).

⁹ 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).

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ See *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez*, *supra* note 84.

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, *supra* note 10.

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁷ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS -- ISSUE 2

In the instant case, the last merit decision was issued on July 11, 2003 when the hearing representative affirmed the Office's denial of the claim. Appellant filed his request for review on October 3 and 24, 2005, over one year after the July 11, 2003 merit decision. Accordingly, appellant's request for review was not timely filed and was appropriately evaluated under the clear evidence of error standard. Appellant did not submit any new evidence with his recent request for reconsideration but submitted evidence which was cumulative or duplicative of that previously submitted and considered by the Office. This evidence consisted of witness statements, appellant's narrative statements of the events, medical reports and leave slips. The Board finds that appellant failed to establish clear evidence of error in the issuance of the July 11, 2003 decision, and thus the Office properly denied reconsideration of appellant's claim.

CONCLUSION

The Office properly denied appellant's request for merit review in its decision dated May 24, 2005 and properly denied appellant's request for reconsideration in its decision dated December 15, 2005 as appellant's request was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 15 and May 24, 2005 are affirmed.

Issued: July 12, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board