



were due to being hired for three days and then fired in retaliation for prior Equal Employment Opportunity (EEO) activity.<sup>1</sup>

The Office received a statement dated August 27, 2004 from Vanita Wallace, postmaster, and a statement dated August 26, 2004 by Ronald A. Mele, chief steward, detailing the events occurring in early August 2004 that appellant alleged caused or aggravated his condition.

By letter dated September 8, 2004, the Office informed appellant that the evidence was insufficient to support his emotional condition claim. The Office advised him as to the medical and factual evidence required to support his claim.

Appellant submitted additional information including a September 12, 2004 statement, an August 21, 2004 vacancy announcement noting that the position had been awarded to appellant, an August 19, 2004 time and attendance sheet, an October 4, 2004 report by James F. Zender, Ph.D., and an October 2, 2004 letter from Mr. Mele.

By decision dated November 16, 2004, the Office denied appellant's claim that his depression had been aggravated by events occurring in the performance of duty.

Subsequent to the decision, the Office received additional information including a December 26, 2004 statement by Mr. Mele and an October 27, 2004 letter from Ms. Wallace, an October 28, 2004 statement of management's position, a February 24, 2005 EEO Commission decision, an October 27, 2004 agency decision dismissing his EEO claim.

On March 14, 2005 appellant requested reconsideration and submitted evidence in support of his claim.

By decision dated May 18, 2005, the Office denied modification of its November 16, 2004 decision.

In a letter dated May 13, 2006 appellant requested reconsideration of the May 18, 2005 decision. In support of his claim, appellant submitted evidence including a May 5, 2006 report by Dr. Robert B. Pohl, a treating Board-certified psychiatrist, and evidence previously submitted. Dr. Pohl diagnosed impulse control, severe major depression and panic disorder with agoraphobia. He concluded that appellant was totally disabled at the time that he attempted to return to work with the employing establishment in August 2004.

By decision dated August 2, 2006, the Office denied appellant's request on the grounds that it was not timely filed and did not present clear evidence of error.

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<sup>1</sup> The record contains evidence that the Office accepted adjustment reaction and major depression under file number 09-0369200. On September 1, 2005 the Office of Personnel Management approved appellant's application for disability retirement.

## LEGAL PRECEDENT

The Federal Employees' Compensation Act<sup>2</sup> provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>3</sup>

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 relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup>

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 the case is reviewed on its merits.<sup>5</sup> Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

Title 20 of the Code of Federal Regulations, section 10.607(b) (20 C.F.R. § 10.607(b)) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. 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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. The Board makes an independent determination of whether

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> 20 C.F.R. § 10.605.

<sup>4</sup> 20 C.F.R. § 10.606.

<sup>5</sup> *Donna L. Shahin*, 55 ECAB 192 (2003).

<sup>6</sup> 20 C.F.R. § 10.608.

<sup>7</sup> *See Alberta Dukes*, 56 ECAB \_\_\_\_ (Docket No. 04-2028, issued January 11, 2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

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>8</sup>

### **ANALYSIS**

The Office denied appellant's May 13, 2006 request for reconsideration, finding that it was not timely filed and failed to present clear evidence of error. The Board, however, finds that the request was timely and that the Office evaluated the request under an improper standard of review

Appellant's request for reconsideration dated May 13, 2006 sought review of the May 18, 2005 merit decision. By decision dated August 2, 2006, the Office denied appellant's request for reconsideration finding that it was not timely filed within one year of the November 16, 2004 decision and failed to demonstrate clear evidence of error. However, appellant's May 13, 2006 request was filed within one year of the May 18, 2005 merit decision. The case will be remanded for the Office to review the evidence that appellant submitted and make the proper analysis pursuant to section 10.606(b). The Office shall then issue an appropriate decision.

### **CONCLUSION**

The Board finds that appellant's May 13, 2006 request for reconsideration was timely filed and was improperly reviewed under the clear evidence of error standard.

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<sup>8</sup> See *Alberta Dukes*, *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 2, 2006 is set aside and this case is remanded for further proceedings consistent with this decision.

Issued: April 5, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board