

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

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D.B., Appellant )

and )

DEPARTMENT OF THE AIR FORCE, AIR )  
NATIONAL GUARD, WISCONSIN NATIONAL )  
GUARD, Madison, WI, Employer )

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**Docket No. 07-528  
Issued: June 21, 2007**

*Appearances:*  
*Appellant, 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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 18, 2006 appellant filed a timely appeal of the September 18, 2006 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated July 14, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On January 8, 2005 appellant, then a 51-year-old information technology specialist, filed a claim for stress and mental anguish which she attributed to her work environment and continual harassment. The employing establishment noted effective January 11, 2005, she would work in a new position as a supply technician. By decision dated July 14, 2005, the Office denied appellant's claim, finding that she did not sustain an injury in the performance of duty as she did not establish any compensable employment factors. In a nonmerit decision dated September 1, 2005, the Office denied appellant's August 1, 2005 request for reconsideration as it neither raised substantive legal questions nor included new and relevant evidence.

In a letter dated July 13, 2006, which the Office received on July 18, 2005, appellant requested reconsideration of the Office's July 14, 2005 decision. The envelope containing the reconsideration request is not of record. Appellant's request was accompanied by reports from Dr. Marshall Fields, a Board-certified family practitioner, dated January 11 and 21, 2005, which listed dates of disability.<sup>1</sup> Although her request noted that she was providing an "Arbitrator's Summary," no such evidence was of record.

By decision dated September 18, 2006, the Office denied appellant's request for reconsideration, finding that it was untimely filed and did not establish clear evidence of error.<sup>2</sup>

## **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>4</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.<sup>6</sup> In those instances when a request for reconsideration is not timely filed, the

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<sup>1</sup> Dr. Field's January 11, 2005 report was previously of record.

<sup>2</sup> Subsequent to the September 18, 2006 decision, the Office received a copy of an April 19, 2006 arbitration award. 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). The Board may not consider this evidence for the first time on appeal.

<sup>3</sup> 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607 (1999).

<sup>6</sup> 20 C.F.R. § 10.607(a) (1999).

Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.<sup>7</sup>

### ANALYSIS

The one-year time limitation begins to run on the date following the date of the original Office decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>8</sup> In this case, the most recent merit decision is July 14, 2005. Therefore, appellant had one year from July 14, 2005 to submit a timely request for reconsideration. The Office received appellant's July 13, 2006 request for reconsideration on July 18, 2006. Because the request was received more than one year after the July 14, 2005 merit decision, the Office found the request to be untimely.

The Board notes that Office regulation and Chapter 2.1602.3(b)(1) of the Office procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.<sup>9</sup> The Board notes that the envelope containing the request was not retained in the record. The Office procedure manual states that, when there is no evidence to establish the mailing date, the date of the letter itself should be used.<sup>10</sup> For this reason, the Board finds that as appellant's reconsideration request was dated July 13, 2006 and there is no other evidence to establish the mailing date, her request for reconsideration was timely filed. As she timely filed her request for reconsideration within one year of the July 14, 2005 merit decision, the Office improperly denied appellant's reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.

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<sup>7</sup> 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>8</sup> *Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>9</sup> *See* 20 C.F.R. § 10.607(a). Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

<sup>10</sup> *Id.* *See also Donna M. Campbell*, *supra* note 8.

**CONCLUSION**

The Board finds that appellant's July 13, 2006 request for reconsideration was timely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 18, 2006 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this opinion of the Board.

Issued: June 21, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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