



## **FACTUAL HISTORY**

This is the fifth appeal in the present case. In the first four appeals, the Board issued decisions affirming the Office's refusal to reopen appellant's case for reconsideration because his applications for review were not timely filed and failed to present clear evidence of error.<sup>2</sup> The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

In a December 12, 2007 memorandum, appellant requested reconsideration of his claim and argued that he had established numerous employment factors relating to such matters as harassment and discrimination by supervisors, working in a job beyond his physical condition, improper denial of leave usage and unfair assessment of his work performance. He discussed at length a number of Board cases which he believed showed that various incidents and conditions at work constituted employment factors.

Appellant submitted a July 22, 1997 amended complaint for a case filed against the employing establishment and employing establishment officials in the U.S. District Court for the District of Hawaii; an October 19, 1992 Equal Employment Opportunity (EEO) document stating that the employing establishment had not yet presented its "full relief package" to the Army Headquarters for review; an April 17, 1996 EEO document noting that appellant's appeal was pending assignment to an attorney for preparation of a decision; and a June 17, 1996 EEO document indicating that his complaint was being investigated. Appellant also submitted a February 11, 1987 voucher authorizing him to claim airfare expenses, an April 11, 1989 document in which a supervisor stated that the employing establishment did not have a job that did not require any standing or walking and a December 12, 2007 report in which Dr. Jarret Ko, an attending Board-certified psychiatrist, indicated that appellant had an emotional condition due to work stresses.

In a January 4, 2008 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

## **LEGAL PRECEDENT**

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.<sup>3</sup> 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.<sup>4</sup>

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<sup>2</sup> Docket No. 95-1566 (issued April 15, 1997); Docket No. 96-28 (issued January 20, 1998); Docket No. 00-2779 (issued October 3, 2001); Docket No. 02-1096 (issued April 21, 2003). On October 7, 2003 the Board issued an order denying appellant's petition for reconsideration in connection with Docket No. 02-1096. The Office had previously denied appellant's claim that he sustained an employment-related emotional condition on the grounds that he did not establish any compensable employment factors. The last Office merit review on this issue is dated May 28, 1993.

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”<sup>5</sup> Office regulations and procedure provide 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(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>8</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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> 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.<sup>11</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 decision.<sup>12</sup>

### ANALYSIS

In its January 4, 2008 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was filed on December 12, 2007, more than one year after the Office’s May 28, 1993 decision denying his

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<sup>5</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, “The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). 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.” *Id.* at Chapter 2.1602.3c.

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> See *Leona N. Travis*, *supra* note 8.

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

emotional condition claim, and therefore he must demonstrate clear evidence of error on the part of the Office in issuing this decision.<sup>13</sup>

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its May 28, 1993 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In support of his untimely reconsideration request, appellant submitted a December 12, 2007 memorandum in which he claimed that he had established employment factors relating to such matters as harassment and discrimination by supervisors, working in a job beyond his physical condition, improper denial of leave usage and unfair assessment of his work performance. He discussed at length a number of Board cases which he believed showed that various incidents and conditions at work constituted employment factors.

However, the argument contained in this memorandum would not be relevant to the main issue of the present case as it does not tend to lend any support to appellant's assertion that he has submitted sufficient evidence to establish various employment factors. The Office determined that appellant did not establish any compensable employment factors because he did not present adequate documentary evidence to supported his claimed employment factors. Appellant's mere assertions that he has proven such factors would not establish his claim or otherwise show that the Office had erred in its determination.<sup>14</sup>

Appellant also submitted a number of administrative documents, but these documents would not be relevant as they would not help to substantiate appellant's assertions regarding his claimed employment factors. The district court filing and the EEO documents do not contain any holdings regarding appellant's claimed employment factors, let alone holdings of wrongdoing by the employing establishment. The travel voucher and the document concerning available work also would not tend to help appellant to establish his claim. The December 12, 2007 medical report is not relevant as appellant's emotional condition claim was denied on a factual, rather than medical basis.<sup>15</sup>

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's May 28, 1993 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

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<sup>13</sup> The Office denied appellant's claim that he sustained an employment-related emotional condition on the grounds that he did not establish any compensable employment factors.

<sup>14</sup> Moreover, the Board cases detailed by appellant do not show that the Office erred in its legal analysis. The Board further notes that appellant's December 12, 2007 memorandum contains arguments which are similar to those contained in previously submitted documents, including those dated June 16, 1998, September 6, 2000 and November 15, 2001.

<sup>15</sup> When a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

**CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 4, 2008 decision is affirmed.

Issued: October 20, 2008  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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