



## **FACTUAL HISTORY**

There have been several prior appeals in this case. In a decision dated February 19, 1999, the Board affirmed the Office's determination that appellant had not established an emotional condition causally related to compensable work factors.<sup>2</sup> By decision dated July 3, 2002, the Board found that appellant was entitled to further merit review of his claim.<sup>3</sup> In a decision dated March 17, 2004, the Board again found that appellant was entitled to a merit review of his claim.<sup>4</sup> On March 21, 2006 the Board affirmed merit decisions dated July 2, 2004 and January 13, 2005, finding that appellant had not established causal relationship between his emotional condition and the accepted compensable work factors.<sup>5</sup>

In a decision dated November 13, 2007, the Board affirmed an August 30, 2006 Office decision, finding that appellant's application for reconsideration was not sufficient to warrant further merit review of the case.<sup>6</sup> The history of the case as contained in the prior Board decisions is incorporated herein by reference.

In a letter dated January 12, 2009, appellant requested reconsideration of his claim. He stated that "new evidence was removed from the file" and the new evidence was witness statements from Mr. Ferebee and Ms. Bailey, coworkers. Appellant stated that the employing establishment erroneously interpreted the seniority roster when it stated that Mr. Mack was the senior clerk with "retreat" rights to the Riverhead facility. He argued this was discrimination.

The evidence submitted with the reconsideration request included a brief undated statement from Ms. Bailey, who stated that she was a clerk in 1986 and Mr. Mack did not work at the Riverhead facility nor was he on the clerk seniority roster. In a statement dated April 2, 2006, Mr. Ferebee stated that he was a clerk from 1985 to 1987 and there was no one named Gregory Mack working at the Riverhead facility.

By decision dated February 2, 2009, the Office determined that appellant's reconsideration was untimely. It further determined that the request did not show clear evidence of error by the Office.

## **LEGAL PRECEDENT**

The Federal Employees' Compensation Act 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.<sup>7</sup> The employee shall exercise this right through a request to

---

<sup>2</sup> Docket No. 97-925 (issued February 19, 1999).

<sup>3</sup> Docket No. 02-236 (issued July 3, 2002).

<sup>4</sup> Docket No. 04-303 (issued March 17, 2004).

<sup>5</sup> Docket No. 05-836 (issued March 21, 2006).

<sup>6</sup> Docket No. 07-425 (issued November 13, 2007).

<sup>7</sup> 5 U.S.C. § 8128(a).

the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>8</sup>

Section 8128(a) of the Act<sup>9</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>10</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>11</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>12</sup> As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.<sup>13</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>14</sup>

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>15</sup> In accordance with this holding the Office has stated in its procedure manual that it 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>16</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>17</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>18</sup> Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish

---

<sup>8</sup> 20 C.F.R. § 10.605 (1999).

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

<sup>12</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *See Leon D. Faidley, Jr.*, *supra* note 10.

<sup>15</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>17</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>18</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.<sup>19</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>20</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>21</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>22</sup>

### ANALYSIS

Appellant submitted an application for reconsideration dated January 12, 2009. The last decision on the merits of the emotional condition claim was the Board's decision dated March 21, 2006. Since the application for reconsideration was not filed within one year of this merit decision, it is untimely.

As an untimely application for reconsideration, appellant must establish "clear evidence of error" by the Office to warrant a merit review. In his January 12, 2009 letter, he indicated that he felt witness statements from Coworkers Bailey and Ferebee had been removed from the file. The record indicates that, while appellant had referred to these witness statements in an April 18, 2006 reconsideration request, the statements were not received by the Office at that time. According to the case file, the Office did not receive the statements until March 10, 2008 and then again on January 14, 2009.

The statements do not show clear evidence of error by the Office. In this case, the Office has accepted compensable work factors, including administrative error in terminating employment in 1988.<sup>23</sup> Appellant appears to be attempting to establish additional compensable work factors. To the extent that appellant asserts that the employing establishment erred in denying him "retreat" rights back to the Riverhead facility, he did not submit sufficient evidence that would show clear evidence of error by the Office in not accepting the alleged factor. Appellant submitted a June 16, 1994 letter from the employing establishment stating that appellant was not the senior clerk who elected to exercise retreat rights back to Riverhead, and that Mr. Mack had elected to retreat. The witness statements assert only that Mr. Mack was not working at Riverhead in 1986. The evidence does not establish clear evidence of error in the Office's previous decision. In addition, the claim was denied on the grounds the medical evidence did not establish an emotional condition causally related to compensable work factors. Appellant's evidence did not establish error by the Office in this regard.

---

<sup>19</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>20</sup> See *Leona N. Travis*, *supra* note 18.

<sup>21</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>22</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>23</sup> An administrative law judge found appellant had involuntarily resigned and the employing establishment failed to provide adequate notice and an opportunity to respond.

The Board finds that appellant's January 12, 2009 application for reconsideration did not show clear evidence of error by the Office. His application for reconsideration was properly denied without merit review of the claim.

**CONCLUSION**

The Board finds that appellant's application of reconsideration was untimely and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 2, 2009 is affirmed.

Issued: December 10, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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