



## **FACTUAL HISTORY**

On January 2, 2005 appellant, then a 47-year-old clerk, filed an occupational disease claim alleging that on December 20, 2004 he first became aware of his anxiety reaction and realized that this condition was caused by his federal employment.

In a February 9, 2005 narrative statement, appellant contended that his stress and anxiety resulted from discrimination, prejudice, physical and emotional harassment, humiliation, ridicule and verbal threats of discipline and removal by M. Shah, a supervisor.

By decision dated November 7, 2005, the Office denied appellant's claim. It found that he failed to establish a compensable factor of his employment. On November 6, 2005 appellant requested reconsideration.

In a January 17, 2007 decision, the Office denied modification of the November 7, 2005 decision. It found that appellant failed to establish a compensable factor of his employment.

In a January 15, 2008 memorandum which was received by the Office on January 22, 2008, appellant, through counsel, requested reconsideration. Counsel contended that Mr. Shah's May 31, 2005 narrative statement, denying appellant's allegation of discrimination was false. Mr. Shah contended that appellant filed a claim for compensation because he was given an official discussion on December 19, 2004 for being away from the workroom floor for approximately 45 minutes. He stated that appellant only processed 43 pounds of mail in 7 hours which represented 1¾ hours of work by other employees, and he took several bathroom breaks and left his letter case to frequently talk to Ms. Combe, a coworker. Mr. Shah also stated that a letter of warning was issued to appellant on December 20, 2004 for being away from the workroom floor for 35 minutes. He related that appellant only processed 30 pounds of mail during his first 5 hours of work which was the equivalent of 1¼ hours of work by other employees. Mr. Shah also complained about lighting. A list contained the names of appellant's coworkers who had been either disrespected or discriminated against by Mr. Shah based on their sex, religion, ethnic origin or nationality. A summary of a town hall meeting held by Frank Bonglovanni, a plant manager, in August 2007, addressed employees' problems at work and their questions regarding communication between craft employees and supervisors, service scores, budget and safety issues, work procedures, employee accountability, disrespect by supervisors and equipment failure.

By decision dated July 28, 2008, the Office found that appellant's January 15, 2008 letter requesting reconsideration, which was received on January 22, 2008, was dated more than one year after the January 17, 2007 decision and was untimely. It further found that he did not submit any evidence establishing clear evidence of error in the Office's denial of his claim.

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>3</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>6</sup> Evidence that 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.<sup>8</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>9</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>10</sup>

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

<sup>5</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>6</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>7</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>8</sup> *Leona N. Travis*, *supra* note 6.

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *Darletha Coleman*, *supra* note 7.

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>11</sup>

### ANALYSIS

The Office issued a decision on July 28, 2008 which denied appellant's request for reconsideration of its January 17, 2007 decision on the grounds that the request was untimely filed and failed to establish clear evidence of error. The Board finds that the Office improperly refused to reopen appellant's claim for further consideration of the merits under section 8128 of the Act on the grounds that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

Appellant's request for reconsideration was dated January 15, 2008. The one-year time limitation begins to run on the date following the date of the original Office decision.<sup>12</sup> Therefore, the Board finds that appellant had until January 17, 2008 to file his request. A right to reconsideration within one year accompanies any merit decision on the issues.<sup>13</sup> The Board notes that the Office's procedure manual, Chapter 2.1602.3(b)(1), 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>14</sup> The procedure manual provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.<sup>15</sup>

The Board notes that while the January 15, 2008 reconsideration request was received by the Office on January 22, 2008, the envelope containing the reconsideration request was not retained in the record. For this reason, the Board finds that the reconsideration request was timely. Appellant timely filed his request for reconsideration within one year of the January 17, 2007 merit decision. The Board finds that the Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since it 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 for review of this evidence under the proper standard of review for a timely reconsideration request.<sup>16</sup>

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<sup>11</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (January 2004).

<sup>13</sup> *Id.*; *Larry J. Lilton*, 44 ECAB 243 (1992).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004). See 20 C.F.R. § 10.607(a).

<sup>15</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

<sup>16</sup> See *Donna M. Campbell*, 55 ECAB 241 (2004).

**CONCLUSION**

The Board finds that appellant's request for reconsideration was timely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 28, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision of the Board.

Issued: July 14, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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