

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEE McVEY-MEHTA and DEPARTMENT OF COMMERCE,  
INTERNATIONAL TRADE ADMINISTRATION, King of Prussia, Pa.

*Docket No. 97-1566; Submitted on the Record;  
Issued May 5, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's October 4, 1996 request for reconsideration on the grounds that she did not submit a substantive legal argument nor new and relevant evidence; and (2) whether the Office properly denied appellant's February 12, 1997 request for reconsideration as untimely and lacking clear evidence of error.

On February 5, 1992 appellant, then a 35-year-old trade reference assistant, filed a claim for stress which she attributed to sexual discrimination by her supervisor in training, work assignment, leave and office protocol. In a February 4, 1993 decision, the Office denied appellant's claim on the grounds that the fact of an injury had not been established. Appellant requested written review of the record by an Office hearing representative. In a May 18, 1993 decision, an Office hearing representative found that appellant had not established that she was subjected to discrimination, harassment or disparate treatment. He stated that the incidents raised by appellant involved administration actions such as leave policy or disciplinary actions which were not considered to be within the coverage of workers' compensation law as there was no evidence of unreasonableness or error by the employing establishment. He concluded that appellant's dissatisfaction with her duties and the training she received, her lack of promotion potential and the treatment she received in the filing and processing of her claim were not compensable factors of employment under the Federal Employees' Compensation Act. He therefore affirmed the Office's February 4, 1993 decision.

Appellant made several requests for reconsideration. In a November 8, 1993 merit decision, the Office denied appellant's request for modification of its prior decision, finding that the evidence submitted did not establish that she was subjected to discrimination or harassment or show that she had compensable factors of employment. In an April 14, 1994 merit decision, the Office again denied appellant's request for modification. In a March 15, 1995 merit decision, the Office denied appellant's request for modification. In a July 2, 1995 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted

in support of the request was irrelevant, immaterial or duplicative and therefore insufficient to warrant further review of the prior merit decision. In decisions dated January 4 and November 20, 1996, the Office denied appellant's request for reconsideration on the grounds that her requests for reconsideration neither raised substantive legal questions nor included new and relevant evidence and therefore were insufficient to warrant review of its prior decisions. In a March 28, 1997 decision, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and did not establish clear evidence of error in the Office's merit decisions denying appellant's claim.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year prior to the filing of an appeal with the Board. As appellant's appeal was filed on April 2, 1997, the Board has jurisdiction only over the Office's decisions of March 28, 1997 and November 20, 1996.<sup>1</sup>

The Board finds that the Office properly denied appellant's October 4, 1996 request for reconsideration.

Under 20 C.F.R. §10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>2</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>3</sup> Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>4</sup>

In her October 4, 1996 request for reconsideration appellant submitted a letter from the Social Security Administration which stated that she was found to be entitled to monthly disability benefits. This letter is irrelevant to the issue of whether appellant was disabled due to compensable factors of employment. The Board has held that entitlement to benefits under the Social Security Act does not establish entitlement to benefits under the Federal Employees' Compensation Act. In determining whether an employee is disabled under the Act, the findings

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<sup>1</sup> Subsequent to filing an appeal with the Board, appellant, in a May 5, 1997 letter, requested a hearing before an Office hearing representative. In a May 29, 1997 decision, the Office denied appellant's request for a hearing on the grounds that she was not entitled to a hearing as a matter of right because she had previously requested reconsideration before the Office. The Office considered appellant's request within its discretion and denied her request on the grounds that the issue in her case could be equally well addressed by submitting new evidence and requesting reconsideration. The Office and the Board may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). In this case, appellant's right to a hearing is a different issue than her right to reconsideration. The Board therefore has no jurisdiction over the issue of appellant's right to a hearing before an Office hearing representative.

<sup>2</sup> 20 C.F.R. § 10.138(b)(2).

<sup>3</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>4</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

of the Social Security Administration are not determinative of disability under the Act. The Social Security Act and the Federal Employees' Compensation Act have different standards of medical proof on the question of disability. Therefore, disability under one statute does not establish disability under the other statute. Furthermore, under the Act, for a disability determination, appellant's injury or occupational disease must be shown to be causally related to an accepted injury or compensable factors of federal employment. Under the Social Security Act, conditions which are not employment related may be taken into consideration in rendering a disability determination.<sup>5</sup>

The Board further finds that the Office properly denied appellant's February 12, 1997 request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) the Act,<sup>6</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations<sup>7</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>8</sup> In *Leon D. Faidley, Jr.*,<sup>9</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration and decision by the Employees' Compensation Appeals Board, but does not include prereducement hearing/review decisions."<sup>10</sup>

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on March 15, 1995. As the Office did not receive the most recent application for

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<sup>5</sup> *Daniel Deparini*, 44 ECAB 657 (1993).

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.138(b).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2).

<sup>9</sup> 41 ECAB 104 (1989).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

review until February 12, 1997 the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>13</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>14</sup> It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</sup> To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.<sup>17</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>18</sup>

In support of her most recent request for reconsideration appellant submitted a September 14, 1994 report and supporting office notes from Dr. Harold J. Byron, a Board-certified psychiatrist, who concluded that appellant had a schizophrenic reaction of paranoid type. He indicated that appellant was acutely psychotic and actively hallucinating. He did not discuss whether appellant's condition was related to any compensable factor of her

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<sup>11</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "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."

<sup>12</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>15</sup> *See Leona N. Travis*, *supra* note 13.

<sup>16</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Leon Faidley, Jr.*, *supra* note 9.

<sup>18</sup> *Gregory Griffin*, *supra* note 11.

employment. The evidence submitted by appellant does not establish that the Office erred in its merit decisions that appellant had not established that there existed compensable factors of employment which were the cause of her disability. She therefore has not established clear evidence of error.

The decisions of the Office of Workers' Compensation Programs, dated March 28, 1997 and November 20, 1996, is hereby affirmed.

Dated, Washington, D.C.  
May 5, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member