

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

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**THOMAS E. BEWICK, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Madison, WI, Employer**

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**Docket No. 04-1525  
Issued: November 15, 2004**

*Appearances:*  
*Timothy M. Scheffler, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On May 24, 2004 appellant, through his attorney, timely filed an appeal of an Office of Workers' Compensation Programs' nonmerit decision dated April 30, 2004, in which the Office denied his untimely request for reconsideration. Because more than one year has elapsed between the last merit decision of record, the Office's March 28, 2003 decision 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). As the only decision filed within one year from the date of appeal is the nonmerit decision of April 30, 2004, the Board has jurisdiction to review such decision under 20 C.F.R. §§ 501.2(c) and 501.3(d).

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On February 5, 2003 appellant, then a 52-year-old letter carrier, filed an occupational disease claim alleging that in June 2000 he first became aware of his emotional condition and he realized in August 2000 that his condition was caused or aggravated in part by his federal employment. He stated that he delayed filing his claim as he thought an agreement could be reached with regards to his requests. Appellant stopped work on February 5, 2003 and has not returned.

In a January 27, 2003 statement, appellant advised that his mother had a stroke on March 15, 2000. He stated that his stress, anxiety, attention deficit disorder and depression were in part attributable to his manager's conduct through the denials of preferred work hours, so that he could visit his mother at the time he wanted and work the schedule which his physician recommended; the denials of leave requests, including requests under the Rehabilitation Act and the Family Medical Leave Act (FMLA); and disciplinary actions which he received for his absences from work.

In a February 24, 2003 letter, the Office advised appellant that the evidence submitted was insufficient to establish that the manager's actions were in error or abusive. The Office further advised him of the type of factual and medical evidence he needed to submit to establish his claim. In response, appellant submitted medical evidence, which referenced his emotional and plantar fasciitis conditions, Equal Employment Opportunity grievance statements and letters and a variety of documents and administrative actions concerning leave requests, requests to take time off work, requests to work a different work schedule and disciplinary actions taken in response to the time he took off work.

By decision dated March 28, 2003, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. The Office found that the medical evidence supported his condition of depression and attention deficit disorder caused by the stroke suffered by his mother and the conflicts with his supervisor regarding leave requests. The Office, however, found that the requests to take off time from work, the requests to work a different schedule and the disciplinary actions which were taken in response to the time appellant took off work involved administrative matters and no error or abuse by the employing establishment had been established.

In an April 7, 2004 letter, appellant, through his counsel, requested reconsideration alleging that he endured three main sources of work stress. This included the stress of being unable to meet the demands of his job later in the day because of his depression and anxiety; the error and abuse in the employing establishment's handling and denial of his leave requests; and the error and abuse in the manner the employing establishment disciplined him, including discipline for time off as a result of an approved workers' compensation claim. Appellant also raised numerous allegations of stress from evidence of record. Copies of evidence already of file along with new evidence was submitted.

## LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>1</sup> The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>2</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>3</sup> The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>4</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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>6</sup>

## ANALYSIS

In denying appellant's April 7, 2004 request for reconsideration, the Office properly determined that appellant failed to file a timely application for review of its March 28, 2003 decision. In implementing the one-year time limitation, the Office's procedures provide that the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 20 C.F.R. § 10.607 (1999); *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>4</sup> *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face that such decision was erroneous." 20 C.F.R. § 10.607(b) (1999).

<sup>5</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>6</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>7</sup> The only merit decision in this case is the Office's March 28, 2003 decision denying appellant's claim. His April 7, 2004 letter requesting reconsideration was submitted more than one year after the last merit decision of record, the Office's March 28, 2003 decision. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

The issue for purposes of establishing clear evidence of error in this case is whether there was an error in the Office's determination that appellant failed to establish that he sustained an emotional condition in the performance of duty.

The Board finds that appellant's untimely letter requesting reconsideration fails to show clear evidence of error. He asserted that his stress arose from three different sources: his inability to meet the demands of his job; the employing establishment's handling and denial of his leave requests; and the manner in which the employing establishment disciplined him, including discipline for time off as a result of an approved workers' compensation claim. Appellant provided a discussion of the evidence of file to support his contention that his stress arose from those sources and raised numerous allegations pertaining to the employing establishment's conduct. His letter requesting reconsideration, however, is not positive, precise and explicit and does not manifest on its face that the Office committed an error. Rehashing the events claimed to have caused appellant's emotional condition and interpreting the evidence previously of record does not constitute a statement or proof of error on the part of the Office. Moreover, the Board notes that appellant's discussion of the medical evidence is irrelevant to whether or not the initial decision was in error since the Office found that there were no compensable factors of employment.<sup>8</sup>

Appellant alleged that his requests for schedule changes were a result of his medical qualifying condition and asserted that the employing establishment erred by not accommodating his medical condition to allow for a safe completion of his work duties, by continuing opposition to each of his accommodation requests for more than two years and by denying his requests for leave under the FMLA. While the record reflects that appellant had a medical condition and that the employing establishment had changed his schedule several times to accommodate his medical condition, his argument fails to establish any error on the part of the Office with respect to its handling of the schedule changes, the times he was scheduled to work and/or the denial of leave, even qualifying FMLA absences. The evidence of record before the Office reflects that the Dispute Resolution Team in a November 21, 2002 Step B decision, did not find error with respect to the employing establishment with regard to the schedule change request. Additionally, the record before the Office contained an October 24, 2000 letter, which indicated that appellant had a letter of warning removed; a January 29, 1999 settlement which indicated that, without prejudice to either party, he was allowed to take an annual leave day, would also be paid for a days work; and a November 21, 2001 letter, which indicated that appellant was paid for an

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002); *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>8</sup> *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

intermittent period from March 2 to September 6, 2001, because of his accepted February 1, 2001 plantar fasciitis condition. The mere fact that personnel actions are later modified or rescinded does not in and of itself establish error or abuse.<sup>9</sup> Thus, contrary to appellant's contention, this evidence does not raise a substantial question as to the correctness of the Office's March 28, 2003 decision.

Appellant contended that the Office erred in finding that there was no error or abuse on the part of management in the handling of leave requests and discipline. He asserted that the evidence from the union demonstrated that management committed errors in terms of the grievance process and deviated from its normal procedures. However, this is not borne out by the evidence of record, as discussed above and does not address any error on the part of the Office.

Appellant also contends that the employing establishment erred by failing to communicate to him in a timely fashion whether or not he would be disciplined. He asserted that on April 10, 2002 his supervisor advised him in a "job discussion" that he would receive discipline for failing to maintain a regular schedule. Appellant asserted that normal agency procedure was two to three days between the time an employee was informed of a discipline and its issuance. He asserted that he was not informed about the status of his discipline until almost three weeks later, when he learned that he would not be disciplined. There is no evidence that the Office erred in its March 28, 2003 decision with regard to this evidence. Moreover, there is no evidence to show that the employing establishment violated its policy on the issuance of discipline or that it acted unreasonably in this regard. Accordingly, appellant's argument has failed to raise a substantial question as to the correctness of the Office's March 28, 2003 decision.

Appellant has also raised other allegations pertaining to the employing establishment's actions and his interpretation of the evidence. However, as previously stated, a rehashing of the events claimed and the interpretation of the evidence does not constitute a statement of error on the part of the Office.

As appellant has not submitted any evidence or argument raising a substantial question as to the correctness of the Office's March 28, 2003 decision, he has failed to establish clear evidence of error.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

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<sup>9</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member