

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
City of Industry, CA, Employer**

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**Docket No. 14-1149
Issued: August 26, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 21, 2014 appellant filed an application for review of the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated December 6, 2013. Because more than 180 days elapsed from December 14, 2011, the date of the most recent merit decision, to the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for further review of the merits as it was untimely filed and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 30, 2011 appellant, then a 56-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he had developed stress and anxiety as a result of actions by management of the employing establishment. In an attached statement dated September 29, 2011, he listed the factors of employment alleged to have caused his condition. Appellant stated that management's changing of his working conditions had caused him stress and anxiety due to his inability to complete duties in the time allotted, inability to meet strict deadlines, being required to work overtime, being threatened with discipline, and being intimidated and harassed. He alleged that he was subjected to constant scrutiny, tension, degradation and humiliation, and that he had to leave his job in order to escape the hostile work environment. Appellant alleged that on April 4, 2011 his supervisor harassed him about retiring; and that on May 16, 2011 his supervisor changed his leave time and scrutinized his work, causing him to be embarrassed in front of his coworkers and that she threatened him with discipline. He stated that management was following him both on duty and off duty, with up to six managers following him on the street at one time and noted that, while the harassment began on May 16, 2011, it continued afterward. Appellant submitted several hand-written statements reiterating the events of May 16, 2011 and thereafter.

In a letter dated July 1, 2011, appellant's coworker addressed why appellant was retiring. She stated that the supervisor had created a hostile work environment. Appellant's coworker stated that the supervisor had chosen to belittle, berate and threaten her employees to get more than they could physically give, and that her actions appeared contrary to retaining the older and more experienced work force, motivated by a belief that she could achieve her goals through age discrimination.

By decision dated December 14, 2011, OWCP denied appellant's claim for compensation. It found that he had failed to establish a factual basis to support his claim by supporting his allegations with probative and reliable evidence.

On January 4, 2012 appellant requested an oral hearing before an OWCP hearing representative. The telephonic hearing was scheduled for April 2, 2012, but appellant failed to appear and OWCP determined that he had abandoned his request for a hearing on May 8, 2012.

In a record of a telephone conversation dated May 14, 2012, appellant stated that his representative never got an appointment letter for the telephonic hearing. The claims examiner told appellant that there was no authorization for representation present in his case file, and that he needed to submit paperwork designating his representative. The representative, also present for the telephone conversation, requested another copy of the initial decision.

On May 17, 2012 appellant requested reconsideration of the December 14, 2011 decision. In support of his request for reconsideration, he submitted an illegible prescription slip.

By decision dated May 22, 2012, OWCP declined appellant's request for reconsideration, finding that the submitted documents did not raise substantive legal questions and did not include new or relevant evidence.

On September 19, 2012 appellant again requested reconsideration of the December 14, 2011 decision. He did not submit any argument or evidence with his request.

By decision dated March 5, 2013, OWCP declined appellant's request for reconsideration, finding that he had neither raised substantive legal questions nor included new and relevant evidence with his request.

On July 27, 2013 appellant requested reconsideration of the December 14, 2011 decision. OWCP received the request on August 2, 2013, according to the date stamp. In an attached letter, appellant stated that he had sent OWCP proof of what had occurred, and that he had witnesses as to the fact that his supervisor would not give him any workers' compensation forms to be filled out or send him to a physician. He stated that he had been seeing a physician for two years and that he should still be working. Appellant attached a report from Dr. Daniel Lane, an osteopath, which noted that he continued to have depression and prescribed three medications.² Dr. Lane stated that appellant had ongoing anxiety and depression exacerbated by stressors related to episodes of maltreatment at work and that he was moving to New Orleans in order to "get away from things for a while."

By decision dated December 6, 2013, OWCP declined appellant's request for reconsideration. It found that his request was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ When review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.⁵

OWCP 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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for

² Dr. Lane's certification or licensure as an osteopath could not be confirmed via a search of the database of the American Osteopathic Association.

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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 OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP 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 OWCP.¹²

In order to establish 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 OWCP's decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As noted above, when review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the

⁷ 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5(a) (October 2011). OWCP's 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 OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate."

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Robert F. Stone*, 57 ECAB 292, 295 (2005).

document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.¹⁷ As OWCP received his request for reconsideration more than one year after December 14, 2011, appellant's request for reconsideration was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁸

The underlying claim for compensation was denied on the grounds that appellant had not established a factual basis for his claim. On reconsideration, he alleged that he had provided OWCP proof of what had occurred, and that he had witnesses as to the fact that his supervisor would not give him any workers' compensation forms to be filled out or send him to a physician. Appellant also submitted a medical report from Dr. Lane. Dr. Lane's medical report is irrelevant to the grounds upon which appellant's claim was denied. To the extent that Dr. Lane addressed the cause of appellant's condition, he merely restated appellant's allegations. Appellant did not submit probative evidence establishing clear evidence of error in the finding that he had failed to establish a factual basis for his claim. His own statement, submitted on reconsideration, repeated his prior allegations and contained a new allegation that his supervisors had refused to give him workers' compensation forms.

The Board notes that the term clear evidence of error is intended to represent a difficult standard. Appellant must present evidence or argument which on its face shows that OWCP made an error. Neither appellant's argument nor the medical report of Dr. Lane submitted with his July 27, 2013 request for reconsideration raised a substantial question as to the correctness of OWCP's December 14, 2011 decision. The Board finds that these submissions are insufficient to shift the weight of evidence in favor of appellant's claim or raise a substantial question that OWCP erred by denying his claim on the basis that he had not established a factual basis for his claim. Therefore, the Board finds that he has not presented clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁷ *Supra* note 5.

¹⁸ *Supra* note 7; *see D.G.*, 59 ECAB 455, 458 (2008).

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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