

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

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| L.W., Appellant |) | |
| |) | |
| and |) | Docket No. 15-1788 |
| |) | Issued: April 26, 2016 |
| DEPARTMENT OF HEALTH & HUMAN |) | |
| SERVICES, CENTER FOR MEDICARE & |) | |
| MEDICAID SERVICES, Baltimore, MD, |) | |
| Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 26, 2015 appellant filed a timely appeal from a May 12, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Since more than 180 days elapsed from the last merit decision of September 17, 2009 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

¹ Appellant timely requested an oral argument pursuant to 20 C.F.R. § 501.5 (b). On February 19, 2016 the Board exercised its discretion and denied the request as the arguments on appeal could be adequately addressed in a decision based on review of the record. *Order Denying Request for Oral Argument*, Docket No. 15-1788 (issued February 19, 2016).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ By decision dated March 19, 2015, the Board affirmed the April 1, 2014 OWCP decision which denied further merit review of appellant's case as his February 26, 2014 request for reconsideration was untimely filed and did not demonstrate clear evidence of error. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On June 5, 2007 appellant, then a 47-year-old health insurance specialist, filed both traumatic injury (Form CA-1) and occupational disease (Form CA-2) claims alleging that he experienced significant stress and sustained a traumatic mental injury as a result of harassment and discrimination by the employing establishment and a verbally abusive and threatening work environment. He noted that the employing establishment banned him from its buildings and asserted that the employing establishment prevented him from filing a workers' compensation claim. In the occupational disease claim, appellant alleged that he developed a stress-related condition and first realized that it was caused or aggravated by his employment in 1994. He was terminated from employment on May 6, 1997.

In a June 12, 2007 statement, the employing establishment controverted the claim on the basis that appellant did not file a timely notice of injury within three years of the claimed injury. It also pointed out that none of his supervisors were available to confirm or refute his claims.

By letter dated June 15, 2007, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that appellant explain the delay in filing the claim, describe the specific work factors he attributed to his claim, and explain the development of his condition. OWCP also requested supporting documentation and a detailed medical report addressing the causal relationship of the alleged work factors and his condition.

On June 5, 2007 appellant filed a claim for wage-loss compensation (Form CA-7) benefits. On the back of the claim form, the employing establishment noted that there was no record of any wage loss and that appellant was terminated on May 6, 1997.

In a nine-page statement dated July 30, 2007, appellant described various incidents at work which he believed constituted a hostile, threatening, and racially insensitive environment, the medical and psychological treatment he sought, and his attempts to complete the appropriate forms and paperwork with the employing establishment. He noted that he first filed a complaint with the employing establishment in 1994 but no action was taken. Appellant submitted various notices of disciplinary action from the employing establishment, medical documents, Office of Personnel Management (OPM) personnel records, and an affidavit from Kermit E. Lee, a computer systems specialist at the employing establishment.

By decision dated August 31, 2007, OWCP denied appellant's occupational disease claim as it had not been timely filed. It found that he did not file his claim within the 3-year time period of the alleged injury as required under FECA and the evidence of record did not establish that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

³ Docket No. 14-1242 (issued March 19, 2015).

On October 12, 2007 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. In an attached 11-page statement, he requested tolling of the three-year filing of claim requirement because he provided verbal and written notice to his employer of a possible work-related injury. Appellant also alleged that the employing establishment acted wrongly and cited various cases regarding error and abuse on the part of the employing establishment. He described the harassment and hostile work environment he believed contributed to his condition. Appellant further requested that the Branch of Hearings and Review produce the presence of specific witnesses and documents. He resubmitted his July 30, 2007 statement and various documents.

In a July 8, 2008 letter, an OWCP hearing representative denied appellant's request for the issuance of a subpoena.

On July 29, 2008 a hearing was held. Appellant explained that he did not notify the employing establishment sooner because he did not realize that he was injured at that time. He asserted that various e-mails and discussions he had with his supervisors about work-related events, specifically a November 19, 1996 incident, when he felt harassed and discriminated against, put them on "notice" that the work incidents he described could have caused or resulted in his condition. Appellant further alleged that his untimely filing should be excused under the "equitable tolling rule" because the employing establishment showed misconduct in its actions by barring him from the building, not assisting him or providing him with information, and allowing the filing deadline to pass.

In a September 12, 2008 statement, appellant reiterated his allegations that the equitable tolling rule should apply in this case and resubmitted various documents. He also provided additional personnel records, Equal Employment Opportunity Commission (EEOC) complaints and decisions, medical reports, and insurance billing statements.

By decision dated December 1, 2008, an OWCP hearing representative affirmed the August 31, 2007 decision.

On August 7, 2009 OWCP received appellant's request for reconsideration. In an 11-page statement, appellant asserted that the date of injury was March 3, 1997 and that he had notified various individuals and union representatives of the incidents at work which he attributed to his emotional condition. He stated that he reported his injury on March 4, 2007 and expressed interest in filing a workers' compensation claim. Appellant indicated that his emotional condition prevented him from being aware of the time limitation to file a claim. He further alleged that OWCP erred in denying an "excusable neglect waiver" of the three-year time limitation. Appellant noted several federal laws and court proceedings in support of his contention.

Appellant submitted copies of the American with Disabilities Act of 2008; Executive Orders 13078, 13163, 13217; various court and administrative decisions and documents; and handwritten notations. He also resubmitted evidence previously of record.

In a decision dated September 17, 2009, OWCP affirmed the December 1, 2008 decision denying his claim as untimely filed.

Appellant subsequently submitted multiple requests for reconsideration which OWCP denied, finding that the evidence submitted was insufficient to warrant further merit review.

On June 20, 2013 appellant again requested reconsideration. He reiterated his previous arguments and resubmitted medical reports, personnel records, and the MSPB decision. In a nonmerit decision dated June 27, 2013, OWCP denied appellant's June 20, 2013 reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

On February 26, 2014 appellant again requested reconsideration. He asserted that it was inconsistent that the Secretary of the U.S. Department of Labor approved his disability claim under an UnumProvident Settlement while OWCP continued to deny his workers' compensation claim. Appellant provided two pages of frequently asked questions about The UnumProvident Settlement. By decision dated April 1, 2014, OWCP again denied appellant's February 26, 2014 request for reconsideration. It determined that appellant's request was untimely filed and failed to establish clear evidence of error.

Appellant appealed to the Board. On March 19, 2015 the Board affirmed the April 1, 2014 OWCP decision denying appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

On March 28, 2015 appellant again requested reconsideration. He alleged that his occupational disease claim should be considered timely based on federal employee misconduct, human rights violations, federal and state employee trickery, and racial profiling. Appellant explained that federal employees were aware of 5 U.S.C. §§ 8122 and 8128 regarding the time limitations to file a workers' compensation claim before he applied for workers' compensation. He cited *Irwin v. Veterans Administration*, 498 U.S. 89 (1990). Appellant also resubmitted a copy of 5 U.S.C. § 8122, Executive Order 13107, the concurring opinion of Supreme Court Justice Sandra O'Connor in the case *Arizona v. Isaac Evans* (issued March 1, 1995), Rules Governing Petitions for Executive Clemency from the U.S. Department of Justice, and Appointment Affidavits dated September 29, 1987 and February 17, 1989.

By decision dated May 12, 2015, OWCP denied appellant's March 28, 2015 reconsideration request finding that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year the last merit decision for which review is sought.⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

⁴ 20 C.F.R. § 10.607.

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

OWCP, however, may not deny an application for review solely because the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁶ OWCP regulations and procedures provide 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 OWCP.⁷

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

ANALYSIS

In the last merit decision of appellant's case, dated September 17, 2009, OWCP denied appellant's occupational disease claim on the basis that he did not file his claim within the three-year limitation period provided in 5 U.S.C. § 8122(b). As it received appellant's March 28, 2015 request for reconsideration more than one year after the September 17, 2009 merit decision, the Board finds that OWCP properly determined that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim for compensation.¹¹

Along with his reconsideration request, appellant asserted that his claim should be reopened due to federal employee misconduct. He alleged that federal employees were aware of sections 5 U.S.C. §§ 8122 and 8128 regarding the time frame to file workers' compensation claims before he filed his claim. Appellant noted that federal employees were also aware of his ineligibility, human rights violations, state and federal employee misconduct, state and federal employee trickery, racial profiling, his being under the care of a mental health provider, and no effective representation but still denied his claim. He provided a photocopy of part of the decision *Irwin v. Veterans' Administration*, 498 U.S. 89, which addressed equitable tolling.

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

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (October 2011). OWCP procedures further provide that 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 an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.

⁸ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ See *Robert F. Stone*, 57 ECAB 292 (2005); see also *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

This, however, does not raise a substantial question as to the correctness of OWCP's September 17, 2009 merit decision. The evidence submitted by appellant with his March 28, 2015 reconsideration request does not establish that appellant filed a timely occupational disease claim or that the employing establishment had timely notice of his injury. He has not presented any evidence to raise a substantial question as to the correctness of OWCP's decision to deny his claim. The Board finds, therefore, that appellant has not established clear evidence of error.

On appeal, appellant alleges that various federal agents and employees harassed and discriminated against him. He submitted a copy of Rules Governing Petitions for Executive Clemency, Article 2 Section 2 of the Constitution and various documents from the Federal Register. None of these allegations or evidence submitted, however, raise a substantial question concerning the correctness of OWCP's decision or manifests on its face that OWCP's decision was in error.

As none of the evidence raises a substantial question concerning the correctness of OWCP's September 17, 2009 merit decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits as his reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board