

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

D.M., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS & BORDER PROTECTION,
El Paso, TX, Employer

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**Docket No. 24-0677
Issued: October 10, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 10, 2024 appellant filed a timely appeal from an April 25, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 27, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² 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 as follows.

On November 8, 2019 appellant, then a 49-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that she sustained recurrent major depressive disorder and generalized anxiety disorder causally related to factors of her federal employment. She did not stop work.

By decision dated July 21, 2020, OWCP denied appellant's emotional condition claim, finding that she had not factually established that the implicated employment factors occurred.

On August 17, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 27, 2021, OWCP's hearing representative affirmed the July 21, 2020 decision.

In a statement dated January 27, 2022, received by OWCP on February 7, 2022, appellant requested reconsideration. She argued that the original electronically filed case contained numerous articles showing misconduct, neglect, dereliction of duty, and obstruction of justice by the employing establishment management officials. Appellant alleged that a toxic work environment caused her emotional reaction. She alleged that OWCP ignored the facts and evidence presented, the claims examiner failed to develop the claim, and the employing establishment lied and covered up evidence. Appellant attached a retaliation case with the Merit System Protection Board (MSPB) that she had agreed to settle. The settlement agreement indicated that it did not constitute an admission by the employing establishment of any violation of law or of any allegations made by appellant.

By decision dated February 16, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On August 15, 2022 appellant filed a timely appeal from the February 16, 2022 nonmerit decision of OWCP. By order dated December 1, 2022, the Board set aside OWCP's February 16, 2022 decision and remanded the case for OWCP to apply the standard for an untimely reconsideration request.³

By decision dated March 14, 2023, OWCP denied appellant's request for reconsideration, finding that it was untimely and failed to demonstrate clear evidence of error.

² *Order Remanding Case*, Docket No. 23-1154 (issued February 29, 2024); *Order Remanding Case*, Docket No. 22-1194 (issued December 1, 2022).

³ *Order Remanding Case*, Docket No. 22-1194 (issued December 1, 2022).

In a statement dated April 17, 2023, appellant argued that her case was never developed and that according to the telephone hearing conducted on November 20, 2020, the employing establishment had 20 days to submit comments and copy appellant but failed to comply with order of the hearing representative. She argued that she had submitted evidence to OWCP, but OWCP and the employing establishment were in collaboration to prevent her claim from being processed. Appellant noted that she submitted a document on January 4, 2021, and alleged that it was disregarded and OWCP was intimidating her so she would give up.

On September 10, 2023 appellant filed a timely appeal from the March 14, 2023 decision.

By order dated February 29, 2024, the Board set aside the March 14, 2023 decision and remanded the case for findings of fact and a statement of reasons, pursuant to the standards set forth in 20 C.F.R. §§ 10.500(a) and 10.126.⁴

By decision dated April 25, 2024, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁵ To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁷ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁹ OWCP's 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, if the

⁴ *Order Remanding Case*, Docket No. 23-1154 (issued February 29, 2024).

⁵ *Supra* note 1 at § 8128(a); *see M.M.*, Docket No. 21-1203 (issued December 22, 2022); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁸ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

claimant's request demonstrates clear evidence of error on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 evidence of error on the part of OWCP.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated 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.¹⁵

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁶ The claimant must present evidence, which on its face shows that OWCP made an error.¹⁷ 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.¹⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

¹⁰ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see also id.* at § 10.607; *supra* note 7 at Chapter 2.1602.5a (September 2020).

¹¹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹³ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *Id.*

¹⁵ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁶ *Supra* note 7 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁷ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁸ *Id.*

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.¹⁹ As appellant's request for reconsideration was not received by OWCP until February 7, 2022, more than one year after issuance of the January 27, 2021 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its January 27, 2021 decision.

Appellant alleged that numerous articles provided evidence of misconduct at the employing establishment and a toxic work environment that caused her emotional condition. However, she failed to provide specific evidence of misconduct by the employing establishment towards herself, and evidence of specific work factors to substantiate her claim of a toxic work environment. Appellant also alleged that the employing establishment lied and covered up the facts and that OWCP failed to properly develop her claim. She noted that she had submitted a document on January 4, 2021, and alleged that it was disregarded as OWCP was intimidating her so she would give up. The Board notes that the document received on January 4, 2021 merely appeared to reference appellant's personal email account. The Board notes that the underlying issue is factual in nature, whether fact of injury was established with regard to appellant's claim for an emotional condition. In the absence of specific established factual allegations regarding work factors that allegedly caused her emotional condition, appellant did not show that the employing establishment failed to adequately respond to her claim or that OWCP failed to develop her claim. Appellant also attached a settlement agreement in a retaliation case she filed with the MSPB; however, the settlement agreement indicated that it did not constitute an admission by the employing establishment of any violation of law or of any allegations made by appellant. Her continued arguments do not manifest on their face that OWCP committed an error in the January 27, 2021 decision.²⁰

As noted, 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, and evidence which, if submitted before the denial was issued, would have required further development, is not clear evidence of error.²¹ The Board finds that the evidence submitted on reconsideration is insufficient to demonstrate clear evidence of error on the part of OWCP in its January 27, 2021 decision.²²

As appellant's request for reconsideration was untimely filed, and failed to demonstrate clear evidence of error, the Board finds that OWCP properly denied her request for reconsideration.

¹⁹ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, *supra* note 11; *see supra* note 7 at Chapter 2.1602.5a (September 2020); *see also J.S.*, *supra* note 16.

²⁰ *See L.T.*, Docket No. 21-0844 (issued April 21, 2023); *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

²¹ *Supra* notes 16, 17, and 18.

²² *See W.R.*, Docket No. 18-1042 (issued February 12, 2019).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board