

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

L.F., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
WRIGHT-PATTERSON AIR FORCE BASE,
OH, Employer**

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**Docket No. 11-62
Issued: August 3, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 12, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) September 22, 2010 nonmerit decision denying his request for reconsideration. Since more than one year has elapsed since the most recent merit decision of July 5, 2007 to the filing of this appeal on October 12, 2010, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2 and 501.3.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On February 2, 2006 appellant, then a 59-year-old criminal investigator, filed an occupational disease claim alleging that factors of his federal employment had aggravated his post-traumatic stress syndrome for the period beginning September 11, 2001.

By decision dated December 22, 2006, OWCP denied the claim on the basis the medical evidence failed to establish that the one accepted compensable factor of employment had aggravated or otherwise contributed to his emotional condition. It had found that appellant's presence at the Pentagon to provide counter intelligence support for one day in the aftermath of the September 11, 2001 attacks was a compensable factor of employment.

Appellant disagreed with OWCP's decision and requested a telephonic hearing, which was held on May 10, 2007. By decision dated July 5, 2007, OWCP's hearing representative affirmed the prior decision.

On August 30, 2010 appellant, through his legal counsel, requested reconsideration of the denial of his claim. In support of his request, a July 16, 2009 report from Dr. James Medling, a clinical psychologist, was submitted. Dr. Medling noted the history of injury and diagnosed chronic post-traumatic stress disorder, depressive disorder, and generalized anxiety disorder. Dr. Medling stated, in part, appellant "was assigned to the Pentagon after the 9/11 terrorist attack and after three days requested to be reassigned due to health problems and a flare up of his symptoms of post-traumatic stress." He opined that appellant suffered a "substantial aggravation of his preexisting complaints of post-traumatic stress disorder resulting from his Vietnam experience, with his assignment to the Pentagon after the 9/11 terrorist attack and from his refusal to sign an Air Force letter of agreement that resulted in his transfer, perceived "demotion," and an Equal Employment Opportunity Commission (EEOC) suit that was settled out of court."

By decision dated September 22, 2010, OWCP denied appellant's request for reconsideration finding it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or his application for review within one year of the date of that decision.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

OWCP, however, 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

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

evidence of error.⁵ OWCP regulations and procedure provide that OWCP 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which 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 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.¹¹

ANALYSIS

In its September 22, 2010 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on August 30, 2010, more than one year after OWCP's hearing representative's July 5, 2007 merit decision.¹² Thus, it was filed outside the one-year time period. Appellant must therefore demonstrate clear evidence of error on the part of OWCP in issuing its prior decisions.

Appellant's request for reconsideration does not establish clear evidence of error. He has not established how the new medical evidence submitted after the July 5, 2007 OWCP decision demonstrates clear error in the denial of his claim. As noted, appellant established only one compensable employment factor, his one-day exposure to the aftermath of the terrorist attack while performing his assigned duties at the Pentagon recovery site on or about September 12, 2001, but the medical evidence was insufficient to establish that the compensable work factor caused, aggravated or otherwise contributed to his psychiatric condition. While Dr. Medling's

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedures further provide, 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).

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² According to OWCP procedure, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

July 16, 2009 report is generally supportive of appellant's claim, it is insufficient to establish clear evidence of error. The term clear evidence of error is intended to represent a difficult standard. The submission of evidence which, if submitted before the denial was issued, would have required further development, is still not enough to establish clear evidence of error.¹³ Dr. Medling's report does not manifest on its face that OWCP committed an error in denying appellant's claim. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant's counsel asserts OWCP's decision is contrary to fact and law. However, for the reasons articulated herein, appellant has not established clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 22, 2010 is affirmed.

Issued: August 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ *Joseph R. Santos*, 57 ECAB 554 (2006).