

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

P.H., Appellant

and

**DEPARTMENT OF LABOR,
Jacksonville, FL, Employer**

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**Docket No. 12-1359
Issued: December 12, 2012**

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 June 8, 2012 appellant filed a timely appeal of a May 4, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision of December 2, 2010 and 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 does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant argues that OWCP applied the wrong regulations when it determined that appellant's request for reconsideration was untimely filed.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 12, 2010 appellant filed a traumatic injury claim alleging that on July 19, 2010 she became extremely agitated due to a work situation and was unable to control her mood swings. She stated that upon medical examination, she was deemed to have had an anxiety attack due to job-related stress. On December 2, 2010 OWCP denied appellant's claim for an emotional condition for the reason that appellant failed to establish a compensable factor of employment. In advising appellant of her appeal rights, OWCP stated, "*The request must be made within one calendar year of the date of the decision,...*" (Emphasis in the original.)

In an appeal request form dated November 29, 2011, appellant requested reconsideration of the December 2, 2010 decision. She also submitted a letter with this same date requesting reconsideration. The form and the letter were received by OWCP on December 6, 2011. Appellant submitted additional evidence in support of her reconsideration request.

By decision dated May 4, 2012, OWCP denied appellant's request for reconsideration, finding that it was not timely filed within one year of the December 2, 2010 decision and that appellant did not establish clear evidence of error. It explained, "According to the regulations in effect on the date the decision was issued, we will not review a decision unless the request is *received* within one year of that decision." (Emphasis in the original.)

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.² 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.³

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, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁴ OWCP regulations and procedures 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.⁵

² 20 C.F.R. § 10.607(a).

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

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ 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 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. *Id.* at Chapter 2.1602.3c.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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 OWCP's decision.¹¹

ANALYSIS

OWCP issued its most recent merit decision, the decision denying appellant's claim for an emotional condition, on December 2, 2010. The one-year time limitation for reconsideration began to run on the date following the date of that decision. Therefore, appellant had one year from December 2, 2010 to submit a timely request for reconsideration.¹²

OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹³ In the instant case, OWCP stated in its May 4, 2012 decision, "According to the regulations in effect on the date the decision was issued, we will not review a decision unless the request is *received* within one year of that decision." (Emphasis in the original.) Therefore, OWCP utilized the new regulations and found that as OWCP received appellant's request for compensation on December 6, 2011, or over one year after the December 2, 2010 decision, appellant's request was untimely filed. It proceeded to deny appellant's request for reconsideration utilizing the clear evidence of error standard.

The Board finds that OWCP erred in finding appellant's request untimely. The Board notes that appeal rights attach to each OWCP decision and the periods of limitations begin to run

⁶ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *Leona D. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² See *C.K.*, Docket No. 10-1665 (issued May 25, 2011).

¹³ 20 C.F.R. § 10.607 (2011).

upon the issuance of the decision.¹⁴ The right to reconsideration arises from the decision issued.¹⁵ Moreover, Chapter 2.1602.4e of OWCP's procedures provide:

*"Decisions Issued on or after June 1, 1987 through August 28, 2011. For decisions issued during this period, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be mailed to OWCP within one year of the date of OWCP's decision for which review is sought."*¹⁶

As the decision was issued on December 2, 2010, appellant's appeal rights attached at that time, and the regulations in place on the date of the December 2, 2010 decision should be determinative as to whether appellant's appeal request was timely filed. At the time that OWCP's December 2, 2010 decision was issued, OWCP's regulations provided that a request must be sent within one year of the date of OWCP's decision for which review was sought. If submitted by mail, the regulations provided that the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed.¹⁷ These procedures provided that if the postmark or other evidence establishing the date of mailing was not available, the date of the letter itself should be used.¹⁸ The Board finds that since OWCP did not retain the envelope containing appellant's request for reconsideration, and there is no other evidence to establish the date of mailing, the timeliness of the request will be determined by the date of the request for reconsideration, *i.e.*, November 29, 2011. As appellant's request for reconsideration was timely, OWCP improperly denied appellant's request by applying the legal standard reserved for cases where reconsideration is requested after one year.

Since OWCP erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of the evidence under the proper standard of review for a timely reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration was timely filed. The case is remanded for application of the applicable standard for review to be followed by the issuance of an appropriate decision.

¹⁴ See *T.G.*, Docket No. 11-1470 (issued February 1, 2012).

¹⁵ *Id.*

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4e (August 2011).

¹⁷ 20 C.F.R. § 10.607 (2010).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004); *L.R.*, Docket No. 10-2410 (issued April 6, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2012 is reversed, the case is remanded for further consideration consistent with this decision of the Board.

Issued: December 12, 2012
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