

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

R.H., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Bastrop, TX, Employer**

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**Docket No. 11-2067
Issued: May 10, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 29, 2011 appellant filed a timely appeal of a September 15, 2011 nonmerit decision of the Office of Workers' Compensation Programs' (OWCP) denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision by OWCP dated December 20, 2001 and the filing of the appeal, the Board lacks jurisdiction to review the merits of this case.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R.

¹ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2). An appeal of final adverse OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

§§ 501.2(c) and 501.3, the Board has jurisdiction over the September 15, 2011 nonmerit decision.³

ISSUE

The issue is whether 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.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated January 13, 2010, the Board affirmed a March 27, 2009 decision which found appellant's request for reconsideration was untimely and failed to show clear evidence of error.⁴ The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.⁵

In an August 25, 2011 letter, appellant requested reconsideration and argued that OWCP made procedural errors in his claim. He contended OWCP failed to make an independent finding in determining whether the incidents of discrimination and/or harassment had occurred as alleged. Appellant commented that the issue was not whether he established harassment or discrimination under the standards by the Equal Employment Opportunity Commission (EEOC) but whether he submitted sufficient evidence to establish an injury in the performance of duty. He noted that while OWCP may look to evidence from an EEOC claim in determining whether incidents or harassment occurred as alleged, OWCP must make its own independent findings and stated that this did not happen. Appellant further argued that his procedural challenge applied to the fact that OWCP failed to obtain and provide a qualified medical opinion. He also contended that FECA procedures were unconstitutional to him, as a disabled veteran and that the denial of equal protection of the law by OWCP was an error of justice that must be corrected for the faith and good of the public interest.

Evidence received in support of his request for reconsideration included: copies of previously submitted documents, some of which had handwritten markings and annotations of varying legibility. Some of the annotations appeared to relate to personnel actions of the employing establishment.

³ After appellant filed his appeal with the Board on September 29, 2011, OWCP issued an October 19, 2011 decision denying his request for reconsideration on the grounds it was untimely and failed to show clear evidence of error. This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. See *Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

⁴ Docket No. 09-1200 (issued January 13, 2010). On May 19, 2010 the Board denied appellant's petition for reconsideration. Order Denying Petition for Reconsideration, Docket No. 09-1200 (issued May 19, 2010).

⁵ The relevant facts indicate that on June 5, 2000 appellant, an accounting technician, filed an occupational disease claim for an emotional condition due to workplace harassment and racial discrimination. In a May 21, 2001 decision, OWCP's hearing representative affirmed an August 22, 2000 decision denying the claim on the grounds no compensable work factor had been established. By decision dated December 20, 2001, OWCP denied modification of its prior decisions.

By decision dated September 15, 2011, OWCP determined the request for reconsideration was untimely and failed to show clear evidence of error.

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.⁶ 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.⁷

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 evidence of error.⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of 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 error on the part of OWCP.¹⁴ 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

⁶ 20 C.F.R. § 10.607(a).

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

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office 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 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.

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁵

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.¹⁶

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the December 20, 2001 merit decision. In implementing the one-year time limitation, OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁷ As appellant's August 25, 2011 request for reconsideration was submitted more than one year after December 20, 2001, the date of the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁸

In the December 20, 2001 merit decision, OWCP found appellant failed to establish any compensable employment factors that caused his emotional condition. The Board finds that he has not submitted evidence establishing clear evidence of error by OWCP in its finding that he did not establish any compensable employment factors that caused or contributed to his emotional condition.

Appellant's legal arguments do not raise a substantial question concerning the correctness of OWCP's decision and are insufficient to show clear evidence of error in OWCP's denial of his emotional condition claim. He argued that OWCP made procedural errors but he did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that OWCP committed an error. Appellant contended that it did not make findings of fact in his claim. In finding that he did not establish any compensable employment factors, OWCP clearly set forth findings of facts in its merit decisions of August 22, 2000, May 21, 2001 and December 20, 2001. It found some allegations occurred but were not compensable employment factors and that other allegations were not substantiated. While appellant alleged OWCP failed to make independent findings, he failed to identify any specific, alleged work-related incidents or factors of employment he felt were not adequately addressed by OWCP. Thus, his argument is without merit.

Appellant next argued that OWCP failed to obtain and provide a qualified medical opinion. OWCP denied his claim on the grounds no compensable factors of employment had been established. As appellant failed to establish a compensable employment factor, it was

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁶ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁷ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁸ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

unnecessary for OWCP to address medical evidence regarding causal relationship.¹⁹ Accordingly, this argument does not show any specific error on the part of OWCP.²⁰

Appellant also indicated that he was a disabled veteran and stated that FECA procedures were unconstitutional to him and that he was denied equal protection of the law by OWCP. He has not specified or established any particular manner in which FECA procedures were applied to his case in an unconstitutional manner. These contentions not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.²¹

Additionally none of the previously submitted documents appellant provided with his request are of sufficient probative value to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of OWCP's decision. He has not explained how resubmission of these documents represent the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error. While the notations and annotations on the evidence may be new, appellant did not explain how these markings establish clear evidence of error in OWCP's decision. Under the clear evidence of error standard, it is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. For these reasons, OWCP properly denied appellant's request for reconsideration.

On appeal, appellant essentially reiterates the same arguments he set forth before OWCP. As noted above, his arguments and the evidence submitted on reconsideration are of insufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.

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.

¹⁹ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

²⁰ See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

²¹ See *id.* Furthermore, it has been held that constitutional questions are unsuited to resolution in administrative hearing procedures. As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim. Federal courts retain jurisdiction over decisions under FECA where there is a charge of a violation of a clear statutory mandate or where there is a constitutional claim. *Robert F. Stone*, 57 ECAB 292 (2005).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board