

ISSUE

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

On appeal, appellant contends that accompanying medical evidence from her attending physicians established her claim for recurrence of disability.

FACTUAL HISTORY

This case has previously been before the Board. In the Board's most recent decision and order, issued August 13, 2010,³ the Board affirmed August 12 and November 4, 2009 decisions of OWCP denying her claim for recurrence of disability. The law and the facts of the case as set forth in the Board's previous decision and order are incorporated by reference.⁴

In a December 20, 2010 letter, appellant requested reconsideration, asserting that the medical evidence of record was sufficient to establish her claim for a recurrence of disability commencing May 8, 2001. In a July 20, 2010 report, Dr. David W. Galarneau, an attending Board-certified psychiatrist and neurologist, related appellant's continued symptoms of depression and anxiety related to her compensation claim and financial difficulties. Dr. Galarneau diagnosed major depressive disorder, PTSD and panic disorder. Dr. Galarneau renewed medications.

By decision dated January 25, 2011, OWCP denied reconsideration on the grounds that the evidence submitted did not raise substantive legal questions or include new, relevant evidence. It found that appellant's letter and Dr. Galarneau's July 10, 2010 report were repetitive of arguments and evidence previously of record.

In a February 11, 2011 letter, appellant requested reconsideration on the grounds that the Office of Personnel Management and the Social Security Administration both found her eligible for disability retirement benefits. She also reiterated that the medical evidence of record established her claim for recurrence of disability.

By decision dated March 1, 2011, OWCP denied reconsideration on the grounds that the evidence submitted was irrelevant to her claim, as the determinations of other administrative agencies were not determinative under FECA as they had different standards of proof.

³ Docket No. 10-324 (issued August 13, 2010). On August 16, 2010 appellant filed a petition for reconsideration of the Board's August 13, 2010 decision and order. By order issued November 12, 2010, under Docket No. 10-324, the Board denied her petition for reconsideration.

⁴ OWCP accepted that on January 5, 1989 appellant sustained post-traumatic stress disorder (PTSD), major depressive disorder and anxiety disorder when she was robbed at gunpoint while in the performance of duty. Appellant stopped work in September 1995 after a coworker threatened her with a knife. Following a brief return to work in 2001, she stopped work and did not return. Appellant claimed a recurrence of disability commencing May 8, 2001 related to a telephone conversation with an employing official regarding work absences. OWCP denied the claim by decisions issued August 12 and November 4, 2009. The Board found that appellant did not submit sufficient rationalized medical evidence to establish a spontaneous change in her condition on May 8, 2001.

In an August 27, 2011 letter, appellant again requested reconsideration on the basis of new medical evidence. She submitted an August 23, 2011 report from Dr. Beverly Stubblefield, an attending licensed clinical psychologist, stating that a May 8, 2001 telephone call between appellant and an injury compensation specialist aggravated her PTSD and totally disabled her for work for the ensuing decade.⁵

By decision dated October 26, 2011, OWCP denied reconsideration on the grounds that appellant's request was not timely filed and failed to present clear evidence of error. It found that her August 27, 2011 letter and Dr. Stubblefield's report were insufficient to raise a substantial question regarding the correctness of OWCP's November 4, 2009 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁷ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁸ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁹ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).¹⁰

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹¹ Its regulations states that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.¹²

⁵ On March 7, 2011 appellant filed an appeal with the Board of OWCP's March 1, 2011 decision. This appeal was docketed as No. 11-967. By order issued October 7, 2011, the Board dismissed the appeal under Docket No. 11-967 at appellant's request to allow her August 27, 2011 reconsideration request to proceed.

⁶ 5 U.S.C. § 8128(a).

⁷ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁸ *Thankamma Mathews, id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁹ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁰ 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 7, *Jesus D. Sanchez, supra* note 8.

¹¹ *Thankamma Mathews, supra* note 7.

¹² 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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 by OWCP.¹⁷ The Board must make 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.¹⁸

ANALYSIS

In its October 26, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on November 4, 2009. Appellant's request for reconsideration was dated August 27, 2011, more than one year after November 4, 2009. Accordingly, her request for reconsideration was not timely filed.

In the August 27, 2011 letter, appellant contended that an August 23, 2011 report from Dr. Stubblefield, an attending licensed clinical psychologist, was sufficient to establish the claimed May 8, 2001 recurrence of disability. The Board finds that appellant's August 27, 2011 letter does not raise a substantial question as to whether OWCP's November 4, 2009 decision was in error or *prima facie* shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. Dr. Stubblefield's report does not address whether the 1995 knife incident constituted an intervening cause, a critical issue at the time of the November 4, 2009 merit decision. Therefore, his report is irrelevant and does not establish clear evidence of error.¹⁹

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's November 4, 2009 decision. Consequently, OWCP properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

¹³ *Thankamma Mathews*, *supra* note 7.

¹⁴ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *Jesus D. Sanchez*, *supra* note 8.

¹⁶ *Leona N. Travis*, *supra* note 14.

¹⁷ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁸ *Gregory Griffin*, *supra* note 9.

¹⁹ *Leona N. Travis*, *supra* note 14.

On appeal, appellant contends that accompanying medical reports established her claim for a recurrence of disability commencing May 8, 2001. The Board notes that his arguments and the majority of the medical reports were previously considered and rejected by OWCP. Regarding the medical documents that are new evidence not previously considered by OWCP, the Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued its decision.²⁰ Such evidence may be submitted to OWCP pursuant to a valid request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2011 is affirmed.

Issued: May 3, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁰ 20 C.F.R. § 501.2(c).