

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

M.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 14-109
Issued: March 21, 2014**

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, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2013 appellant, through her attorney, filed a timely appeal from a September 16, 2013 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days has elapsed from the last merit decision dated January 5, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3. The only decision properly before the Board is the September 16, 2013 nonmerit decision denying her request for reconsideration.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board on appeal. The pertinent facts are as follows. On January 4, 2010 appellant, then a 31-year-old mail carrier, filed a traumatic injury

claim alleging that she developed traumatic stress when she was robbed at gun point on December 31, 2009 while delivering mail. By decision dated March 1, 2010, OWCP denied her emotional condition claim on the grounds that Dr. Youg J. Kwon, a Board-certified psychiatrist, offered a speculative opinion as he stated that her symptoms “appear” to be related to her employment incident. Appellant requested an oral hearing before an OWCP hearing representative on March 16, 2010. By decision dated July 20, 2010, the hearing representative denied appellant’s claim on the grounds that the record was “devoid of sufficient medical evidence showing that there was an actual diagnosable condition incurred specifically due to this incident.” By decision dated January 5, 2011, OWCP denied modification of its prior decisions. Appellant requested reconsideration on June 22, 2011. She resubmitted a report from Dr. Pawan K. Garg, a Board-certified psychiatrist, dated September 2, 2010 with a May 3, 2011 addendum as well as resubmitting factual information. Dr. Garg’s addendum noted that appellant’s post-traumatic stress syndrome (PTSD) condition was directly related to trauma sustained while performing her letter carrier duties on December 31, 2009. By decision dated September 6, 2011, OWCP declined to reopen her claim for consideration of the merits. The Board affirmed OWCP’s September 6, 2011 nonmerit decision on April 25, 2012.¹

Counsel requested reconsideration on October 12, 2012. In support of this request, Dr. Garg completed a form report on September 10, 2012. He noted that he first examined appellant on September 2, 2010 and diagnosed PTSD. Dr. Garg stated that she had emotional problems since she was injured at work as she was robbed at gunpoint while performing her letter carrier duties on December 31, 2009. He stated that appellant was traumatized with anxiety and recurring intrusive recollections of the trauma. Dr. Garg opined that her injury was directly caused by her workers’ compensation injury. By decision dated December 6, 2012, OWCP declined to reopen appellant’s claim for consideration of the merits on the grounds that the report was duplicative of his September 2, 2010 and May 3, 2011 notes. The Board reviewed her claim by decision dated June 25, 2013² and found that Dr. Garg’s report was repetitious and that OWCP properly denied further merit review. The facts and circumstances of the case as set forth in the Board’s prior decisions are adopted herein by reference.

Following the Board’s June 25, 2013 decision, counsel requested reconsideration on August 5, 2013. He submitted a brief detailing the burden of proof to establish a claim under FECA. In support of this request, appellant submitted treatment notes from Apex Behavioral Health as well as a summary of these records. The majority of the notes are signed by Linda Thibault, who lists her qualifications as “Psy.D., LLP.” Dr. Kwon completed a note dated January 20, 2010 and provided a diagnosis of post-traumatic stress disorder. He noted that appellant was robbed at work. In a second note dated February 3, 2010, Dr. Kwon indicated that she was seeing a psychologist and a third note dated March 3, 2010 he noted her fear of going out of the house. Appellant submitted a police report dated December 31, 2009. She also submitted a portion of an OWCP hearing transcript and its decision dated June 20, 2010.

¹ Docket No. 12-79 (issued April 25, 2012).

² Docket No. 13-698 (issued June 25, 2013).

By decision dated September 16, 2013, OWCP denied appellant's request for reconsideration on the grounds that the request was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Under section 8128(a) of FECA³ OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that "An application for reconsideration must be sent within one year of the date of [OWCP's] decision for which review is sought."⁴ In *Leon D. Faidley, Jr.*,⁵ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "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 be 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 To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ 41 ECAB 104, 111 (1989).

⁶ *Supra* note 4; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Jesus D. Sanchez*, *supra* note 6.

¹⁰ *See supra* note 8.

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

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 fundamental question as to the correctness of OWCP's decision.¹² 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.¹³

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated September 16, 2013 in which it declined to reopen appellant's case on the merits because the request was not timely filed and did not show clear evidence of error. Since more than 180 days elapsed from the date of issuance of the January 5, 2011 merit decision to the date of the filing of appellant's appeal, on October 21, 2013, the Board lacks jurisdiction to review that decision.¹⁴

The Board finds that the September 16, 2013 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute abuse of discretion.

In support of her request for reconsideration, appellant submitted a brief from counsel which did not address the specific issue in this case or the lack of medical evidence supporting her claim. As the legal arguments in the brief did not address any specific error on the part of OWCP, these arguments were not sufficient to require review of the merits of her claim.

Appellant also submitted medical treatment records and summary of these records. The majority of these documents were not signed by a physician instead listing the signature of Dr. Thibault. There is no evidence that Dr. Thibault is a medical doctor or a licensed clinical psychologist.¹⁵ A psychologist reports are not medical evidence as a psychologist is not a physician under FECA.¹⁶ As these notes were not signed by the physician the notes have no probative value in establishing appellant's claim.¹⁷ Furthermore, Dr. Kwon's three notes, the January 20, 2010 diagnosis of PTSD, the February 3, 2010 note indicating that appellant was seeing a psychologist and the March 3, 2010 note mentioning her fear of going out of the house are not sufficiently detailed and well reasoned to meet her burden of establishing that she sustained a compensable work injury on December 31, 2009 and do not have sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP's decision.

¹² *Supra* note 5 at 114.

¹³ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁴ *See* 20 C.F.R § 501.3(e).

¹⁵ *N.Y.*, Docket No. 12-993 (issued December 7, 2012).

¹⁶ 5 U.S.C. §§ 8101-8193, 8101(2); *Thomas R. Horsefall*, 48 ECAB 180 (1996).

¹⁷ *Merton J. Sills*, 39 ECAB 572 (1988).

Appellant also submitted a police report, a hearing transcript and a decision from the Branch of Hearings and Review. These documents are not relevant to the central outstanding issue in her claim, whether the medical evidence is sufficiently detailed and well reasoned to establish that she developed an emotional condition due to her December 31, 2009 work exposure. As these documents are not relevant, the documents cannot shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP's decision.

CONCLUSION

The Board finds that the August 5, 2013 request for reconsideration was untimely filed and that this request did not establish clear evidence of error on the part of OWCP.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2014
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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