

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New Orleans, LA, Employer)

**Docket No. 15-0739
Issued: December 17, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 17, 2015 appellant filed a timely appeal of a January 12, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from June 12, 2013, the date of the most recent OWCP merit decision, to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.²

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested oral argument. After exercising its discretion the Board, by order dated October 5, 2015, denied her request as the issues could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No.15-0739 (issued October 5, 2015).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits as her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 26, 2011 appellant, then a 39-year-old letter carrier, filed an occupational disease claim (Form CA-2) which OWCP accepted for generalized anxiety disorder.³ She initially stopped work on August 26 and returned on September 3, 2011. Appellant received intermittent wage-loss compensation between August 26, 2011 and November 10, 2012. She returned to full duty on November 12, 2012 with no restrictions.

Appellant subsequently submitted claims for compensation. She claimed intermittent disability from November 17 to December 3, 2012, and total disability beginning December 12, 2012.

On December 11 and 27, 2012 OWCP requested that appellant provide medical evidence establishing the period of her claimed disability.

Appellant submitted reports from Dr. Susan E. Uhrich, a Board-certified psychiatrist. This included a December 21, 2012 report in which Dr. Uhrich indicated that she was treating appellant for post-traumatic stress disorder and major depressive disorder. She asserted that the stressor at appellant's employment remained on the job where appellant worked and that this continued to precipitate panic attacks and increasing depression. Dr. Uhrich opined that appellant could not work from December 12 through 22, 2012.

In a February 27, 2013 decision, OWCP denied appellant's claim for disability for the periods November 17 to December 3, 2012 and December 12, 2012 and continuing. It noted that Dr. Uhrich's report did not establish total disability and that a conference was held with appellant, the employing establishment, and OWCP in which it was noted that appellant did not work directly with D.P.⁴ OWCP found that appellant had not submitted rationalized medical evidence supporting total disability for the claimed period.

On March 8, 2013 appellant requested reconsideration and submitted additional evidence. This included a March 8, 2013 report from Dr. Uhrich who advised that appellant had been unable to work due to increased anxiety. Dr. Uhrich asserted that the supervisor who had caused appellant's anxiety was in her current workplace and indicated that appellant could have no interaction with this supervisor.

³ OWCP found as an accepted factor that appellant's manager, D.P., yelled and screamed at her on September 29, 2010 and requested that she leave the work floor on September 23, 2010.

⁴ The record contains a December 11, 2012 statement from D.P. noting that he had no specific action or communication with appellant. He indicated that the only time he recalled speaking to appellant in the previous six months was to make sure she was not working outside her medical restrictions. D.P. explained that he notified the union of this conversation so there would not be an issue.

In a June 12, 2013 decision, OWCP denied modification of the prior decision. It noted that it previously held a conference with appellant and the employing establishment in which it clarified that appellant did not directly work with D.P. OWCP found that the medical evidence was insufficient to establish the claimed period of disability.

OWCP continued to receive medical reports dating from October 11, 2012 to October 30, 2014, some of which had previously been received. The evidence included an October 25, 2012 report from Dr. Uhrich who advised that appellant was under her care for her major depression and generalized anxiety disorder. She indicated that due to the medication appellant would be receiving, she was placing appellant on leave from work for the next two weeks.

A November 15, 2012 report from Dr. Dwight McKenna, a Board-certified internist, was also received. Dr. McKenna advised that appellant continued to present for back pain on an as needed basis. On February 14 and March 8, 2013 Dr. Uhrich noted appellant's status and diagnosed major depressive disorder and obsessive compulsive disorder. She indicated that appellant felt better and wanted to return to work.

In a June 10, 2014 statement, appellant indicated that she called the employing establishment on December 4, 2012 and asked for the evening supervisor. She indicated that D.P. answered the telephone and kept asking her what she wanted and she continued to ask to speak to the evening supervisor. When D.P. pressed her for the reason, appellant explained that she was running behind and was not going to make it back as she had a backache and she had taken a late lunch to complete her business class mail. She stated that he began screaming at her and she hung up the telephone. Appellant indicated that she stayed out a few days due to her back ache. She contacted her psychiatrist, who advised her not to return to work and placed her under her care.

On June 13, 2014 OWCP received a June 6, 2014 request for reconsideration from appellant's representative. Appellant's representative noted that appellant submitted a claim for compensation for the periods November 17 through December 3, 2012 and December 12, 2012 through March 11, 2013. She argued that the supervisor, D.P., was working in the same office as appellant during the time frame of November 11, 2012 through March 2013. Appellant's representative provided copies of "clock rings" from D.P. and argued that he was in the same location as appellant during the time frames in question.

In e-mail correspondence dated May 20, 2013, Sherleen Randall Johnson, an acting, health and resource management specialist, confirmed that appellant was not under the direct supervision of D.P. Furthermore, D.P. was no longer at the duty station and there was no direct contact.

By e-mail correspondence dated September 16, 2014, Ezella G. Sayles, the manager of health and resources management explained that appellant worked in a one story building, where Gordon Calcagno was the manager and D.P. was his assistant. She explained that appellant did not work directly with him, but they were in the same building. Ms. Sayles confirmed that the station manager stated that there were no instances where she would have to communicate with D.P. She also noted that, while it was one big open floor, except for some private offices that the carriers did not work in, they did not have to work closely together.

In an October 30, 2014 report, Dr. Roy Berkowitz, a Board-certified surgeon, noted that appellant indicated that she had been enduring a great deal of emotional stress on the job. He advised that she related that her stress came from her previous and present supervisors. Dr. Berkowitz noted that in September 2011, “the patient was ‘put off of the floor’ because the supervisor stated that he/she was unable to work with this patient.” Dr. Berkowitz explained that appellant believed that she was and is being bullied by her supervisor. He related that appellant could not sleep and would get very angry “because she continues to, in her opinion, be unduly harassed at work.” Dr. Berkowitz also noted that she had lost approximately 20 to 25 pounds in the past six months. He advised that appellant had nightmares about being screamed at while working, although she denied current suicidal or homicidal ideation. Dr. Berkowitz examined appellant and diagnosed generalized anxiety disorder and major depressive disorder.

In a decision dated January 12, 2015, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁵

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.⁶ However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁷

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

and raise a substantial question as to the correctness of OWCP's decision.⁸ Evidence that 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 establish that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

In its January 12, 2015 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on June 12, 2013. Appellant's June 6, 2014 letter requesting reconsideration was received on June 13, 2014, more than one year after the June 12, 2013 merit decision and was, therefore, untimely.¹³ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in issuing the June 12, 2013 decision.

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. OWCP denied appellant's claim for wage-loss compensation for periods beginning November 17, 2012 as she had not submitted rationalized medical evidence supporting total disability for the claimed period. With her June 6, 2014 request for reconsideration, appellant's representative argued that appellant's time off during this period was supported because D.P. was working in the same office as appellant during the time in question. Appellant also provided a June 10, 2014 statement in which she indicated that she called the employing establishment on December 4, 2012 and D.P. answered the telephone and began screaming at her. Appellant also submitted evidence regarding her and D.P.'s time and attendance. However, OWCP denied the underlying claim for compensation because the medical evidence was insufficient to establish the claimed period of disability.¹⁴ It had previously considered appellant's assertions about being in the same workplace as D.P. In reasserting her allegations about D.P., appellant failed to explain how it manifested on its face that OWCP committed an error in denying his claim for compensation.¹⁵ Therefore, this evidence is insufficient to establish clear evidence of error.

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ *See supra* note 5. The reconsideration request must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

¹⁴ *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).

¹⁵ *See H.V.*, Docket No. 14-1210 (issued September 16, 2015).

Appellant also provided medical evidence. This included an October 25, 2012 report from Dr. Uhrich who advised that appellant was under her care for her major depression and generalized anxiety disorder. Dr. Uhrich indicated that due to the medication appellant would be receiving, she was placing appellant on leave from work for the next two weeks. She also provided subsequent treatment notes reporting appellant's status and diagnoses. A November 15, 2012 report from Dr. McKenna did not address disability causally related to the accepted emotional condition. On October 30, 2014 Dr. Berkowitz, indicated that she had been enduring a great deal of emotional stress on the job, which she related that her stress came from her previous and present supervisors. He referred to appellant's assertions of harassment at work and diagnosed generalized anxiety disorder and major depressive disorder. Dr. Berkowitz did not specifically address if appellant was disabled for the claimed period due to an accepted condition. This evidence does not raise a substantial question as to the correctness of OWCP's merit decision. Furthermore, even if these reports offered reasoned support for causal relationship of the claimed disability, they would be insufficient to establish clear evidence of error. Clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁷

On appeal, appellant argues that her claim was not given a merit review. However, as explained, her request for reconsideration was untimely received and she has not established clear evidence of error by OWCP. Because of this, OWCP properly denied a merit review of the claim.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits as her request was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹⁷ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board