

of this case pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

On appeal, appellant contends that his request for reconsideration was untimely filed because he was advised by an attending physician not to have any contact with the employing establishment. He further contends that the medical evidence submitted in support of his reconsideration request establishes that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board. The pertinent facts and history are set forth. On July 23 and 29, 1998 appellant, then a 33-year-old mail handler, filed traumatic injury and occupational disease claims, respectively, alleging that he sustained work-related stress. In a November 24, 1998 decision, OWCP denied his claims for an emotional condition, finding that he had not established a compensable factor of employment or a causal relationship between the claimed condition and any compensable employment factor. Appellant did not submit any evidence identifying the work duties that caused his emotional condition. He also did not submit any medical evidence establishing causal relation. In an April 28, 2008 decision, OWCP denied appellant's August 16, 2007 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the November 24, 1998 decision. On May 2, 2008 appellant appealed to the Board and requested oral argument. In a January 30, 2009 order, the Board remanded the case to OWCP for proper assemblage and reconstruction of the case record and cancelled his request for oral argument.⁴ The Board found that the case record did not contain relevant medical evidence addressed in the April 28, 2008 decision or a copy of the November 24, 1998 decision. On March 20, 2009 OWCP issued a decision again denying appellant's August 16, 2007 request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error in its decision denying his emotional condition claims. In an October 21, 2009 decision, the Board affirmed the March 20, 2009 decision.⁵

By letter dated January 25, 2010, appellant requested reconsideration before OWCP. In a December 2, 2009 narrative statement, he described the development of his emotional condition. After appellant became a union representative in 1993, management's attitude changed towards

² 5 U.S.C. § 8101 *et seq.*

³ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

⁴ *Order Remanding Case and Cancelling Oral Argument*, Docket No. 08-1558 (issued January 30, 2009).

⁵ Docket No. 09-1214 (issued October 21, 2009).

him. He was harassed, belittled and verbally attacked by management. Ron Harris, a supervisor, accused him of being the Unibomber. Appellant was threatened by Paul Stokes, a supervisor, and Ron Snow, a tour superintendent. He complained to postal inspectors, allegedly who told him that they could not do anything until something happened to him. Carter Gillispie, an Employee Assistance Program counselor, advised appellant to fake being around his family until it became real to him. Appellant was required to perform duties outside his light-duty job description, which included cleaning up a chemical spill. Clarence Schoolfield, a supervisor, denied his request to wear protective clothing stating that, the clothing was not necessary as long as he did not get any chemicals on his skin. Management gave appellant unwarranted suspensions and wrote a false statement and retaliated against him for engaging in union and Equal Employment Opportunity Commission (EEOC) activities. Mr. Stokes altered his workers' compensation documents. Appellant contended that prior to management's change in attitude he received letters of appreciation and recommendation and a quality step increase based on his work performance.

In medical reports dated October 31, 2008 and June 6, 2011, Dr. Gerald I. Plovsky, a Board-certified psychiatrist, advised that appellant was disabled due to a post-traumatic stress disorder. He noted that appellant was functioning fairly well since being removed from his work environment at the employing establishment. Dr. Plovsky provided a history that appellant was psychologically assaulted and harassed by his supervisors in 1998 as they accused him of being a terrorist and violent. During this time, appellant felt provoked and threatened by his supervisors. His emotional reaction included extreme anxiety and humiliation which resulted in rage and anger. Dr. Plovsky stated that, although he did not act on these feelings, they could develop into a more severe psychiatric state. He advised that appellant's return to work could be detrimental to his mental health and the employing establishment. Dr. Plovsky noted that appellant continued to have a daily preoccupation with the way he was treated by the employing establishment. Appellant was fearful and frightened about any consideration of returning to his previous work environment. Dr. Plovsky concluded that appellant had not recovered from the 1998 trauma.

In an April 4, 2011 report, Rosalyn Harris-Offut, a certified registered nurse, stated that appellant had post-traumatic stress and schizotypal personality disorders. Appellant was totally disabled for work.

Appellant submitted duplicate copies of medical records previously of record. Unsigned treatment notes dated August 28 and September 11, 1998 advised that he had post-traumatic stress disorder and recommended that he not return to work or talk to anyone at the employing establishment. In reports dated December 22, 1998 and October 13, 1999, Dr. Plovsky obtained a history that appellant was harassed and belittled by the employing establishment. Appellant's requests to attend school and to take an examination were denied by management. It accused him of being the Unibomber. Management set appellant up to fail by assigning him extra work or different kinds of work. It discriminated against him based on his race as employees with the same problems he experienced were allowed to transfer to another office. Management's attitude towards appellant changed after he became a union representative. Dr. Plovsky opined that appellant had significant anxiety and post-traumatic stress disorder due to his work environment. In an October 29, 1999 report, Ms. Harris-Offut obtained a history that after he became a union representative management became verbally and psychologically abusive

towards him. Appellant was called names, terrorized, threatened and received angry statements and a dishonest written reprimand. Ms. Harris-Offut advised that he suffered from post-traumatic stress. Appellant could not return to work at the employing establishment. In a March 20, 2006 report and undated report, Ms. Harris-Offut advised that appellant's diagnosis remained post-trauma syndrome and schizotypal personality disorder. Appellant also continued to be disabled for work. A July 8, 1998 progress note which contained an illegible signature addressed his need to be reevaluated to determine his diagnosis. In another progress note dated July 8, 1998, Rita Clark⁶ stated that appellant was paranoid and delusional. An unsigned July 8, 1998 form report obtained a history that appellant was concerned about his safety at work. He was exposed to hazardous chemicals. Appellant suffered from delusional disorder. The report recommended that he take time off work.

In a July 18, 2011 decision, OWCP denied appellant's January 25, 2010 request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated November 24, 1998.

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ does not entitle a claimant to a review of OWCP's decision as a matter of right.⁸ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁹

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed

⁶ The Board notes that Ms. Clark's professional qualifications are not contained in the case record.

⁷ 5 U.S.C. § 8128(a).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.607(b).

¹¹ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

so as to produce a contrary conclusion.¹⁴ 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.¹⁵

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.¹⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁷

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁸ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁹

The most recent merit decision in this case was OWCP's November 24, 1998 decision, which denied appellant's emotional condition claim because he did not establish a compensable factor of his employment. As appellant's January 25, 2010 letter requesting reconsideration of the merits of his claim by OWCP was made more than one year after the November 24, 1998 merit decision,²⁰ the Board finds that it was not timely filed.

The Board finds that appellant's December 2, 2009 narrative statement does not raise a substantial question as to whether OWCP's decision finding that he did not sustain an emotional condition while in the performance of duty was in error or shift the weight of evidence in his favor. Appellant contended that he was harassed, belittled, verbally attacked threatened and required to work outside his light-duty job description in cleaning up a chemical spill by Mr. Harris, Mr. Stokes and Mr. Snow. He alleged postal inspectors failed to investigate his allegations of harassment, Mr. Gillispie advised him to fake being around his family and Mr. Schoolfield denied his request to wear protective clothing when handling hazardous chemicals. Appellant also contended that management gave him unwarranted suspensions and

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁸ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁹ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

²⁰ Appellant had one year to request reconsideration by OWCP of its November 24, 1998 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

wrote a false statement and retaliated against him for participating in union and EEOC activities and Mr. Stokes altered appellant's workers' compensation documents. His allegations were previously considered and not established as factual. Appellant did not submit any probative evidence to establish the allegations as compensable. The Board finds that his contentions do not establish clear evidence of error in the denial of his emotional condition claim.

Dr. Plovsky's October 31, 2008 and June 6, 2011 reports found that appellant's post-traumatic stress disorder and resultant disability for work were due to harassment by the employing establishment in 1998 as his supervisors accused him of being a terrorist and violent. He advised that appellant's return to work could be detrimental to his mental health and the employing establishment. OWCP did not accept a compensable work factor with respect to harassment. This impacts on the medical history as reported by Dr. Plovsky. The physician's prior reports, resubmitted by appellant on reconsideration, were previously of record and reviewed by OWCP. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision.²¹ The Board finds, therefore, that Dr. Plovsky's reports do not establish clear evidence of error in OWCP's denial of appellant's emotional condition claim.

The April 4, 2011 report from Ms. Harris-Offutt, a registered nurse, has no probative medical value as a nurse is not considered to be a "physician" as defined by FECA.²² Moreover, this evidence is not relevant to the issue of whether appellant established a compensable employment factor.²³ The Board finds, therefore, that Ms. Harris-Offutt's report does not raise a substantial question as to the correctness of OWCP's decision. Ms. Harris-Offutt's other reports were previously of record and reviewed by OWCP and, thus, are insufficient to establish clear evidence of error.²⁴

The unsigned treatment notes dated August 28 and September 11, 1998 and July 8, 1998 progress notes which contained an illegible signature were previously of record and considered by OWCP in its prior decisions. The Board finds, therefore, that this evidence does not establish that OWCP committed clear evidence of error in denying appellant's emotional condition claim on November 24, 1998.²⁵

The Board finds that the arguments and evidence submitted by appellant in support of his untimely request for reconsideration do not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of OWCP.

²¹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

²² See 5 U.S.C. § 8101(2); *G.G.*, 58 ECAB 389 (2007).

²³ *F.R.*, Docket No. 09-575 (issued January 4, 2010).

²⁴ *Denis M. Dupor*, *supra* note 21.

²⁵ *Id.*

On appeal, appellant contended that his request for reconsideration was untimely filed because an attending physician advised him to not have any contact with the employing establishment. He did not submit evidence of any inability to report reconsideration before OWCP at any time during the year following the November 24, 1998 merit decision. While appellant may have chosen to rely on his attending physician's advice, his ability to request reconsideration was in no way dependent on contact with the employing establishment. He also contended that the medical evidence established that his emotional condition was work related. As noted, OWCP found that he did not establish a compensable work factor.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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