

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

S.A., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Terminal Island, CA, Employer**

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**Docket No. 12-1019
Issued: October 15, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 29, 2012 appellant filed a timely appeal from a November 18, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely and insufficient to show clear evidence of error.¹ As more than one year elapsed from the last merit decision issued on July 3, 2000 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

¹ The last merit decision was the July 3, 2000 OWCP decision, which denied modification of an April 22, 1999 decision finding that appellant failed to establish that his June 9, 1997 claim was timely filed or that he met the requirements for waiver of the time limitations. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On June 9, 1997 appellant, then a 48-year-old federal correctional officer, filed a traumatic injury claim alleging that on February 18, 1978 he sustained mental trauma, diagnosed phobias and post-traumatic stress disorder (PTSD) as a result of being taken hostage when a riot developed at the correctional institution where he worked. In an attached statement, he stated that he was given three days off work but was forced to return to work at the same location where he was taken hostage. Appellant was never asked to complete any prison policy forms or federal workers' compensation forms and alleged that he was traumatized and rendered incapable of remembering to complete any forms.³ He worked at the employing establishment for five more years before he resigned in 1984.

Appellant submitted a June 9, 1997 damage claim form and hospital records noting that he was admitted for neuropsychiatric treatment from July 30 to August 8, 1996.

By letter dated June 30, 1997, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional information. It asked for an explanation regarding why he did not file his claim within 30 days of becoming aware of his condition and why he waited 19 years before filing his claim. OWCP also requested that appellant provide a specific description of the events that he believed caused or contributed to his emotional condition and that he submit any relevant medical evidence.

In a July 18, 1997 statement, appellant explained that he did not file his traumatic injury claim within 30 days due to the emotional damage of almost losing his life and fighting with inmates. He could not remember to fill out the appropriate paperwork. Appellant related that agency policy stated that, when an employee was incapable of completing paperwork, a staff supervisor would take over and complete all documents. He explained that while he managed to fulfill his duties as a correctional officer for five years thereafter, he felt numb and was unaware of the trauma he was carrying.

In a decision dated August 4, 1997, OWCP denied appellant's claim finding that it was untimely filed because he did not file a claim within three years of when he became aware or reasonably should have been aware of a relationship between his condition and the February 18, 1978 incident.

³ The record reflects that on June 9, 1997 appellant also filed an occupational disease claim describing the same allegations and facts. He indicated that he first became aware of his alleged condition on February 21, 1978. Since appellant is alleging that his alleged condition resulted from a single, February 18, 1978 employment incident and not over a period longer than a single workday or shift, the Board will treat his claim as a traumatic injury claim. See 20 C.F.R. § 10.5(q) & (ee).

On August 20, 1997 appellant requested an oral hearing, which was held on July 21, 1998.⁴ He submitted September 5 and 17, 1997 Department of Veterans' Affairs (VA) decisions denying his claim for various service-connected psychiatric disorders. VA progress notes document that appellant received treatment in July and August 1996 and February 1998.

By decision dated December 22, 1998, an OWCP hearing representative affirmed the August 4, 1997 decision finding that appellant failed to timely file a claim.⁵

In a February 23, 1999 letter, appellant requested modification of OWCP's decision based on new evidence.

In an April 22, 1999 decision, OWCP denied modification of the December 22, 1998 decision.⁶

On February 10, 2000 appellant filed a request for reconsideration on the grounds of new evidence showing material prejudice. No additional evidence was received.

By decision dated July 3, 2000, OWCP denied modification of the April 22, 2000 decision finding that appellant's claim was untimely filed.⁷

In an August 15, 2000 letter, addressed to an OWCP claims examiner, appellant informed OWCP that he waived his right to the 90-day review in order to submit new evidence for review within the one-year time limitation according to 20 C.F.R. § 10.607(a). On August 23, 2000 he submitted the August 10, 2000 report of Dr. Thomas Grieder, who related that appellant was under his care for post-traumatic stress disorder and was chronically and severely disabled due to PTSD, related primarily to his military service.

In an August 27, 2002 letter, appellant stated that he wanted a final resolution of his case as soon as possible. He submitted various reports from psychiatrists demonstrating that he was being treated for PTSD and other mental and emotional conditions.

⁴ A hearing was originally scheduled for March 16, 1998 but appellant requested a postponement.

⁵ OWCP explained that the question of whether appellant was incompetent and unable to timely file a claim was a medical one and it was his burden to show that he was incompetent during that period. It noted that the medical evidence showed that he was hospitalized for his psychiatric conditions but there was no evidence from 1980 to 1986 indicating that he was mentally unstable. OWCP also pointed out that appellant was gainfully employed during this entire period and carried on most normal activities of daily living.

⁶ OWCP determined that appellant did not submit any evidence to support his allegation that his supervisor had knowledge of his mental condition within 30 days of the incident. It also explained that the "prisoners of war" language and reference to incompetence in the procedural manual applied when the circumstances of a claimant's detention or incompetence prevented him from timely filing a claim. However, once a prisoner of war is released he is also bound by the same timeliness requirements. OWCP further determined that appellant's references to various cases were not applicable as they did not correlate to his claim.

⁷ OWCP determined that appellant failed to provide sufficient evidence establishing that he was mentally incompetent and incapable of filing a claim within three years of the February 18, 1978 employment incident. It also found that because appellant failed to adequately explain his failure to timely file a claim it was not able to consider his argument regarding whether appellant submitted new evidence of material prejudice.

OWCP treated appellant's August 27, 2002 letter as a request for hearing. By decision dated November 7, 2002 the Branch of Hearings and Review denied appellant's request for hearing on the grounds that he had previously requested reconsideration of the case.

On August 12, 2011 appellant submitted a request for reconsideration and an affidavit. In a handwritten statement, he noted that the VA would not treat him because they found that he was diagnosed with a substantiated prison stressor from his federal employment. Appellant stated that, under the Torture Victim Protection Act, U.S. citizens could seek damages for torture and summary executions and noted that civilian hostages held without will or forcibly detained fell into this category. He also reported that if the VA medical evidence could have been submitted before September 17, 1997 the evidence would be of sufficient probative value to create a conflict in medical opinion or establish clear procedural error and would shift the weight of evidence in favor of the claimant. Appellant contended that this evidence demonstrated clear evidence of error on behalf of OWCP. He further stated that the reasonable doubt doctrine applied particularly if the basic incident allegedly arose under combat or similarly strenuous conditions.

In a September 14, 1994 report, Dr. Spencer Eth, a Board-certified psychiatrist and neurologist, stated that appellant had been an outpatient in the Mental Health Clinic since April 14, 1994 and noted a history of moderate to severe symptoms of post-traumatic stress disorder and depression.

In a January 19, 1996 report, Nicholas H. Caskey Ph.D., a clinical psychologist, stated that appellant had attended the weekly PTSD process group and had described several traumatic events while serving in the U.S. Air Force in Vietnam. He also noted that he worked as a guard at a federal prison and was held hostage by prisoners during an uprising.

Appellant resubmitted the VA's September 5 and 17 and December 11, 1997 decisions denying his claim for service-connected psychiatric disorders and other conditions.

By decision dated November 18, 2011, OWCP denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error. It determined that the most recent merit decision on record was the July 3, 2000 decision affirming the denial of appellant's claim. Because appellant filed for reconsideration on August 12, 2011, more than one year after the July 3, 2000 decision, his claim was untimely filed. OWCP further determined that the evidence submitted was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁸ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁹ OWCP may still

⁸ 20 C.F.R. § 10.607(a).

⁹ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

reopen a claimant's case for merit review, even if the claimant's applications was not filed within the one-year time limitation, if claimant's application demonstrates 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 decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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 and raise a substantial question as to the correctness of OWCP's decision.¹³ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.¹⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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 improperly denied merit review in the face of such evidence.¹⁶

ANALYSIS

In its November 18, 2011 decision, OWCP denied appellant's August 12, 2011 request for reconsideration of the July 3, 2000 decision on the grounds that it was untimely filed and failed to present clear evidence of error. The underlying issue of the July 3, 2000 decision was whether his June 9, 1997 traumatic injury claim was untimely filed. The Board finds that OWCP improperly determined that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

On July 3, 2000 OWCP issued a decision affirming the denial of appellant's claim as untimely filed. Appellant had until July 3, 2001 to make a timely request for reconsideration.¹⁷ OWCP determined that he submitted a request for reconsideration on August 12, 2011, which was not within the one-year time limitation. The Board finds, however, that appellant submitted

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁴ *Id.*

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

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹⁷ OWCP regulations provide that the one-year time limitation for requesting reconsideration begins to run on the date of the original OWCP decision. 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

a request for reconsideration of the July 3, 2000 decision and submitted evidence and argument in support of his request, within the required one-year time period.

In a letter dated August 15, 2000, addressed to his claims examiner, appellant informed OWCP that he waived his right to the 90-day review in order to submit new evidence for review pursuant to the one-year time limitation of 20 C.F.R. § 10.607(a). On the same day he submitted a new medical report, dated August 10, 2000 from Dr. Grieder. Although the August 15, 2000 letter does not mention the word “reconsideration,” the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word “reconsideration.”¹⁸ No special form is required as long as the request is made in writing, identifies the decision and specific issues to be considered and is accompanied by relevant and pertinent new evidence or argument not previously considered.¹⁹ Even though appellant did not reference the word “reconsideration” he referenced the statutory provision for a timely filing of reconsideration under 20 C.F.R. § 10.607(a). The Board finds that his August 15, 2000 letter constituted a timely request for reconsideration.

Subsequent to the July 3, 2000 decision denying his traumatic injury claim, appellant submitted various psychiatric reports demonstrating that he was treated for PTSD and other mental disorders. He also provided various statements explaining why he did not file his traumatic injury claim within the three-year time limitation. The Board finds that appellant’s August 15, 2000 letter, submitted with the various reports and statements referenced above, constituted a timely request for reconsideration.²⁰

Appellant filed his request for reconsideration within one year of the July 3, 2000 OWCP decision. The Board finds that OWCP improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(2).²¹ Since it erroneously reviewed the evidence submitted in support of appellant’s reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

CONCLUSION

The Board finds that OWCP improperly found that appellant’s request for reconsideration of OWCP’s July 3, 2000 decision was untimely filed.

¹⁸ *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

¹⁹ *Taimanglo*, *id.*

²⁰ *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

²¹ 20 C.F.R. § 10.606(b)(2) of OWCP’s regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2011 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this decision.

Issued: October 15, 2012
Washington, DC

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

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

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