

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

S.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS BENEFITS ADMINISTRATION,)
Oakland, CA, Employer)

Docket No. 13-1618
Issued: December 12, 2013

Appearances:
Mark Coby, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2013 appellant, through her attorney, filed a timely appeal from the January 29, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for reconsideration. Because more than 180 days elapsed from January 12, 2012, the date of the most recent OWCP merit decision, to June 28, 2013 and 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 the case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In December 2010, appellant, then a 51-year-old clerk, filed an occupational disease claim alleging that she sustained an emotional condition in the performance of duty. She alleged stress due to various incidents and conditions at work, including that her workplace was extremely noisy and management did not adequately respond to her requests to be moved to a quiet area. Christina Charles, a supervisor, verbally abused appellant on December 20, 2010 and January 10, 2011, when she was accused of taking documents from a copy machine. Management also mishandled appellant's leave requests, a supervisor treated her unfairly because of the supervisor's professional relationship with her husband; and her suggestions on how to improve the work environment were ignored.

In a July 14, 2011 decision, OWCP denied appellant's emotional condition claim finding that she did not establish any compensable work factors. It found that appellant did not submit sufficient evidence to establish her claimed work factors, including those involving the work environment, harassment and wrongdoing in administrative matters.

In a January 12, 2012 decision, an OWCP hearing representative affirmed the July 14, 2012 decision that appellant had not establish any compensable work factors. He found that the evidence did not establish the factual allegations and therefore he did not evaluate the medical evidence of record.

Appellant requested reconsideration of her claim in April 2012 and submitted additional evidence. In a July 9, 2012 decision, OWCP denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The submitted evidence was found not relevant to the issue of the case.

Appellant, through counsel, requested reconsideration in an undated statement that was received on January 15, 2013 in the Integrated Federal Employees' Compensation System (iFECS). Counsel argued that two attachments, a November 28, 2012 statement of Malinda Wade, a coworker and a January 10, 2013 report of Dr. Paul Guillory, an attending clinical psychologist, were sufficient to establish appellant's emotional condition claim. The attached documents were also received on January 15, 2013 in iFECS.

In the January 10, 2013 report, Dr. Guillory diagnosed appellant with generalized anxiety disorder and depressive disorder secondary to "her employment at the Veterans Administration." He did not identify which work incidents or conditions were believed to have contributed to her diagnosed emotional condition.

Ms. Wade stated that appellant was relocated to the 14th floor of her building in March 2012. She noticed that appellant's workstation was located in a noisy aisle where people conversed. There was a steel folder bin next to appellant's desk where people slammed folders which created a "loud noise that sounded like an explosion." Appellant advised Ms. Wade that the workplace was too noisy and that it was difficult for her to concentrate. In response to a request to move to a quiet work location, appellant was moved to Ms. Wade's workstation

“which was also noisy.” Ms. Wade overheard appellant tell her supervisor that it was noisy in the location to which she moved. Regarding a January 10, 2011 incident, Ms. Wade stated:

“[Appellant] was sitting at her desk and [Ms.] Charles was standing over her bent down in her face screaming at [appellant] asking her ... did you take my documents from the copy machine? [Appellant] [stated], ‘no.’ Ms. Charles displayed an authoritative, intimidating and angry demeanor toward [appellant]. It appeared that Ms. Charles became increasingly irate when [appellant] explained that she did not have her documents. I felt that Ms. Charles’ actions were unprofessional and inappropriate.”

In a January 29, 2013 decision, OWCP denied appellant’s request for further review of the merits of her claim. It found that her request was untimely filed and failed to demonstrate clear evidence of error. OWCP determined that appellant’s reconsideration request was untimely because it was received on January 15, 2013, more than one year after OWCP’s last merit decision, dated January 12, 2012. It also found that the witness statement and medical evidence did not establish clear evidence of error in the prior denial of her emotional condition claim.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.² The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³ When review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.⁴

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁵ OWCP regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of OWCP.⁶

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.5a (October 2011). OWCP’s procedure further provides, “The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate.”

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 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

The Board has recognized that exposure to such work conditions as extreme noise or temperature can constitute a factor of employment.¹² Verbal abuse can constitute a work factor, but it is well established that a raised voice does not in itself establish verbal abuse.¹³ When a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.¹⁴

ANALYSIS

In its January 29, 2013 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed more than one year after OWCP's January 12, 2012 decision. It was received by OWCP on January 15, 2013. Therefore, appellant must demonstrate clear evidence of error in OWCP's decision.¹⁵ On appeal, counsel argued that her reconsideration was timely because it was postmarked as mailed on January 10, 2012, *i.e.*, a date less than one year after the issuance of OWCP's January 12, 2012 decision. However, when review is sought for a merit decision issued on or after August 29, 2011, as in the present case, a reconsideration request is considered to be filed when it is received by OWCP.¹⁶

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *G.M.*, Docket No. 08-312 (issued July 17, 2008).

¹³ *B.B.*, Docket No. 09-1354 (issued February 1, 2010).

¹⁴ See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

¹⁵ See *supra* note 6.

¹⁶ See *supra* note 4. Counsel alleged that a postal receipt showed that appellant's reconsideration request was actually received on January 14, 2013, the Monday after Saturday, January 12, 2013, the date that fell one year after the issuance of OWCP's January 12, 2012 decision. However, the record does not contain evidence to support this assertion.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its January 12, 2012 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.

Appellant submitted a statement in which a coworker, Ms. Wade, discussed noise conditions in the workplace and a January 10, 2011 interaction between her and Ms. Charles, a supervisor. In its January 12, 2012 decision, OWCP denied appellant's emotional condition claim on the grounds that she had not established any compensable work factors. It found, that she had not established that the noise in her workplace or the January 10, 2011 incident constituted work factors.

With respect to appellant's claim of noise, at work the submission of the statement of Ms. Wade does not establish clear evidence of error in OWCP's January 12, 2012 decision. The statement is of a vague and generalized nature with regard to noise in the work environment. Although noise may be considered a work factor in some instances,¹⁷ Ms. Wade recounted appellant's impressions of noise conditions and, due to the vague nature of her statement, it remains unclear to what extent she actually witnessed appellant's work environment.¹⁸

With respect to the January 10, 2011 incident, Ms. Wade stated that Ms. Charles had screamed at appellant when Ms. Charles asked whether she took her documents from the copy machine. This would not establish clear evidence of error. The Board has held that a raised voice does not itself establish verbal abuse.¹⁹ The witness statement did not manifest on its face that OWCP committed an error by finding that Ms. Charles had not committed harassment or verbal abuse on January 10, 2011.

Appellant also submitted a January 10, 2013 report of Dr. Guillory, an attending clinical psychologist. He diagnosed generalized anxiety disorder and a depressive disorder. However, this report could not establish clear error of evidence in OWCP's January 12, 2012 decision. The decision denied the emotional condition on the basis that appellant failed to establish any compensable work factors. Therefore, it was unnecessary to evaluate the medical evidence of record.²⁰

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's January 12, 2012 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

¹⁷ See *supra* note 12.

¹⁸ For example, Ms. Wade indicated that appellant advised her that the workplace was too noisy and that it was difficult for her to concentrate and she stated that she overheard appellant tell her supervisor it was also noisy in a new location to which she moved.

¹⁹ See *supra* note 13. Ms. Wade also indicated that Ms. Charles "displayed an authoritative, intimidating and angry demeanor" and "became increasingly irate" after appellant stated that she had not taken the documents, but such vague statements would not show abuse on Ms. Charles' part.

²⁰ See *supra* note 14. On appeal, counsel provided an extensive discussion regarding the legal standard for showing clear evidence of error. However, he did not explain how the evidence submitted by appellant on reconsideration showed clear evidence of error in OWCP's prior decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2013
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