

FACTUAL HISTORY

On August 29, 2008 appellant, then a 46-year-old supervisor and acting manager, filed an occupational disease claim alleging that her post-traumatic stress disorder and major depressive disorder were a result of unfair and discriminatory tactics by management. On March 6, 2009 OWCP denied her claim on the grounds that the three events accepted as factual were not compensable in the absence of administrative error or abuse. In a prior appeal,² the Board found that it properly denied appellant's timely requests for reconsideration. The Board found that appellant's requests did not meet at least one of the three standards for obtaining a merit review of her case.

On December 25, 2012 appellant again requested reconsideration. She offered medical evidence as to her mental and physical state and argued: "I really tried to keep up with my appeals but I just couldn't, so I ask you to please understand and grant me reconsideration in filing an untimely appeal."³

In a January 4, 2013 decision, OWCP denied appellant's reconsideration request without reviewing the merits of her claim. It found that her request was untimely and failed to present clear evidence of error in its most recent merit decision.

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."⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such

² Docket No. 10-1896 (issued April 11, 2011).

³ Dr. Rick Jenkins, a Board-certified psychiatrist, noted on November 20, 2012 that appellant's recurrent major depressive disorder and post-traumatic disorder caused her not to appeal on a timely basis "as depression can cause isolation, sadness and not want to even get out of bed due to the condition."

⁴ 5 U.S.C. § 8128(a).

postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.⁵

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

The term “clear evidence of error” is intended to represent a difficult standard.⁷ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁸

ANALYSIS

The most recent merit decision in this case is OWCP’s March 6, 2009 decision denying appellant’s emotional condition claim. Appellant had one year from the date of that decision, or until March 6, 2010, to submit a reconsideration request to OWCP. Her December 25, 2012 request is therefore 2 years and nearly 10 months late. The question for determination is whether this request shows clear evidence of error in OWCP’s March 6, 2009 decision.

OWCP denied appellant’s emotional condition claim on March 6, 2009 because the three events that were established as factual were not compensable under FECA in the absence of administrative error or abuse. The Board notes that workers’ compensation does not cover an emotional condition resulting from administrative or personnel actions unless the claimant submits independent documentary proof that management committed error or abuse in those particular actions. OWCP denied appellant’s claim because she submitted insufficient evidence.

In her December 25, 2012 reconsideration request, appellant again submitted no proof of administrative error or abuse with respect to the three established events. She instead attempted to explain that her mental state had caused her to be untimely in her requests.

The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an OWCP decision for which the claimant can establish through probative medical evidence that she is unable to communicate in any way and that her testimony is necessary in order to obtain modification of the decision.⁹

The evidence appellant submitted to support her December 25, 2012 reconsideration request does not establish that she was unable to communicate in any way during the one-year period for requesting reconsideration. Indeed, as the Board noted in the last appeal, appellant

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁸ *Id.* at Chapter 2.1602.3.d(1).

⁹ 20 C.F.R. § 10.607(c).

successfully filed timely reconsideration requests in November 2009 and once again on February 23, 2010. There is no evidence that she was unable to communicate in any way during this one-year period such that it should be extended. As noted, appellant's December 25, 2012 reconsideration request is untimely by 2 years and nearly 10 months.

Appellant's argument, and the evidence she submitted to support her December 25, 2012 reconsideration request, have no bearing on OWCP's March 6, 2009 decision denying her emotional condition claim. Her request fails to show clear evidence of error in that decision. For this reason, the Board finds that OWCP properly denied appellant's request without reopening her case for a merit review. The Board will affirm OWCP's January 4, 2013 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's December 25, 2012 reconsideration request as untimely filed and failing to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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