



## ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

## FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated April 8, 2008, the Board found that appellant had established a compensable work factor on November 30, 2004, when he was working at his radar screen and two airplanes failed to maintain proper separation.<sup>3</sup> A second allegation regarding a change in work rules was found not to be a compensable work factor. The Board affirmed the denial of appellant's claim for compensation on the grounds that the medical evidence did not establish a diagnosed emotional or physical condition causally related to the employment incident. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

In a letter dated May 7, 2012, appellant, through his representative, requested reconsideration. He stated that there was new probative evidence indicating the claim should be reevaluated.<sup>4</sup> Appellant submitted reports from August 31, 2006 to December 27, 2007 from Dr. Said Haidar, a psychiatrist, who stated that appellant had experienced anxiety since November 2005, diagnosing generalized anxiety disorder and "stress of situation at work." Dr. Haidar noted that "one time" appellant had mismanaged a situation at work as an air traffic controller and was disciplined. On January 22, 2007 he stated that appellant had been diagnosed with general anxiety disorder and major depressive disorder, noting the dates of treatment. Dr. Haidar stated that appellant's condition was aggravated by work stressors. On December 27, 2007 he noted that appellant was also seeing a counselor.

Appellant also submitted a July 27, 2006 memorandum from Dr. Marvin Jackson, an employing establishment physician, stating that appellant's medical clearance for air traffic controller duties had been temporarily withdrawn on July 13, 2006. In a report dated March 13, 2008, Dr. Jackson recommended that appellant be permanently medically disqualified from air traffic controller duties. He noted reports submitted by Dr. Haidar. In a report dated March 19, 2008, Dr. Nestor Kowalsky, an employing establishment surgeon, advised appellant that he was permanently medically disqualified from air traffic controller duties. Appellant also submitted a March 10, 2006 report from Dr. Nicholas Jarmoszuk, a gastroenterologist, indicating that appellant was being treated for proctitis.

By decision dated July 16, 2012, OWCP found the application for reconsideration was untimely. It further determined that appellant did not establish clear evidence of error with respect to the denial of his claim for compensation.

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<sup>3</sup> Docket No. 08-82 (issued April 8, 2008).

<sup>4</sup> The record indicates that evidence was submitted on April 10 and May 14, 2012.

## LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>5</sup> The employee shall exercise this right through a request to the district OWCP. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>6</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.<sup>7</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>9</sup> 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’s decision for which review is sought. 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 evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup>

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 and raise a substantial question as to the correctness of OWCP’s decision.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>14</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.605 (1999).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>11</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>12</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>13</sup> *Id.*

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

### **ANALYSIS**

The last decision on the merits of the claim for compensation was dated April 8, 2008, when the Board addressed the merits of the claim. Appellant's application for reconsideration was dated May 7, 2012. As this was more than one year after the last merit decision, it was untimely filed.

Since the application for reconsideration was untimely, appellant must establish clear evidence of error by OWCP to be entitled to a review of the merits of his claim. In this case appellant submitted additional medical evidence with his application for reconsideration. None of the evidence submitted is sufficient to establish clear evidence of error.

Dr. Haidar submitted reports of treatment dated August 31, 2006 to December 27, 2007. There is a general reference to stress at work in the August 31, 2006 report, with a brief statement as to an undated incident where appellant had been disciplined. The compensable work factor was a November 30, 2004 incident involving the performance of assigned duties. Dr. Haidar did not provide a detailed description of the November 30, 2004 incident or otherwise provide a complete factual and medical background. Moreover, he did not provide an opinion, supported by medical rationale, establishing a diagnosed condition as causally related to the compensable work factor.

The evidence from the employing establishment physicians noted only that appellant was found medically disqualified from air traffic controller duties as of July 2006. There is no rationalized medical opinion, based on a complete background, on causal relationship between a diagnosed condition and the employment incident.

As noted, the evidence must be of such probative value that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of OWCP's decision. The application for reconsideration and the evidence submitted clearly does not meet this standard. Therefore the Board finds that OWCP properly denied merit review in this case.

### **CONCLUSION**

The Board finds appellant's application for reconsideration was untimely and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 16, 2012 is affirmed.

Issued: March 13, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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