

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

V.W., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
HOUSTON VETERANS ADMINISTRATION
CENTER, Houston, TX, Employer**

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**Docket No. 12-1901
Issued: March 5, 2013**

Appearances:

*Eric L. Pines, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2012 appellant, through her representative, filed a timely appeal from a June 27, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The most recent merit review in this case was the February 2, 2009 decision denying appellant's traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.

¹ 5 U.S.C. § 8101 *et seq.* For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3 (2008).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

On December 30, 2008 appellant filed a traumatic injury claim alleging head, neck, lower back, upper right shoulder and right ear injuries when she was attacked by a patient at work.² By decision dated February 12, 2009, OWCP denied her claim, finding that the incident occurred as alleged, but that there was insufficient medical evidence to establish a diagnosis connected to the established incident.

Appellant requested reconsideration on December 9, 2011. She submitted an October 4, 2011 report from Dr. Louis Tran, Board-certified in emergency medicine, who opined that appellant sustained a work-related injury on December 30, 2008 when she was punched in the right ear by a patient. Dr. Tran diagnosed herniated cervical disc, post-traumatic stress disorder (PTSD) and consequential sacroiliac joint subluxation.

In a November 23, 2011 report, Dr. Charles B. Covert, a Board-certified psychiatrist, stated that appellant experienced depression, anxiety and mental confusion after being assaulted by a psychotic patient on December 30, 2008. He diagnosed PTSD and chronic pain disorder. In a December 7, 2011 report, Dr. Covert noted that appellant's medical and psychological conditions were aggravated at work on a regular basis.

A police report dated December 30, 2008 reflects that appellant was assaulted at the employing establishment on that date. Appellant was taken to the emergency room for treatment.

By decision dated January 23, 2012, OWCP denied appellant's reconsideration request on the grounds that it was untimely and failed to establish clear evidence of error.

On May 4, 2012 appellant, through her representative, again requested reconsideration. Counsel argued that OWCP erred by failing to assist appellant in obtaining medical records or the police report of the alleged incident. He stated that the file was incomplete because the second page of the December 31, 2008 Form CA-16 was missing from the record and contended that the case file should be reconstructed.

The record contains a hospital report dated February 2, 2005; a March 3, 2005 report of an electromyography (EMG) of the upper and lower extremities; and a report of a magnetic resonance imaging (MRI) scan of the abdomen dated December 15, 2011.

In a June 1, 2012 statement, appellant indicated that the December 30, 2008 incident caused a worsening of her preexisting condition with headaches and depression. She submitted

² The record contains a December 31, 2008 Authorization for Examination and/or Treatment (Form CA-16).

reports from Dr. Covert dated November 23 and December 7, 2011, which were previously received and considered by OWCP.

By decision dated June 27, 2012, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.³ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁴ 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.⁵

OWCP, however, 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.⁶ OWCP regulations and procedure provide that it 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). 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 an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁸ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.¹¹ 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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. The one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision and upon any subsequent merit decision.¹⁴ As appellant's May 4, 2012 request for reconsideration was submitted more than one year after the February 12, 2009 merit decision, it was untimely filed. Consequently, she must establish clear evidence of error by OWCP in the denial of her claim.¹⁵ The Board finds that appellant has not established clear evidence of error in this case.

Appellant contended that her claim was improperly denied as she submitted sufficient medical evidence to support her claimed injuries. This contention does not establish error on the part of OWCP, but merely repeats arguments previously raised and considered.

Appellant argued that OWCP committed error by failing to assist her in obtaining medical evidence and a police report. The Board finds that appellant's contention is not persuasive, as it is not consistent with the general legal standards applicable to establishing a claim. In a traumatic injury claim under FECA, it is the employee, rather than OWCP, who has the burden of proof to establish the essential elements of her claim including the fact that she is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.¹⁶

Appellant contends that the case file should be reconstructed because the second page of the December 31, 2008 Form CA-16 was missing from the record. She has not shown how the

¹¹ See *M.L.*, Docket No. 09-956 (issued April 15, 2010). See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁴ 20 C.F.R. § 10.607(a); see *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁵ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Robert Broome*, 55 ECAB 339 (2004); see also *Elaine Pendleton*, 40 ECAB 1143 (1989). When an employee claims that he or she sustained a traumatic injury in the performance of duty, he or she must establish the "fact of injury," namely, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury. See *Paul Foster*, 56 ECAB 208 (2004); see also *Betty J. Smith*, 54 ECAB 174 (2002); *Tracey P. Spillane*, 54 ECAB 608 (2003). 5 U.S.C. § 8101(5). See 20 C.F.R. § 10.5(ee).

information contained in the second page of the document would establish error on the part of OWCP. Appellant's arguments on reconsideration are insufficient to raise a substantial question concerning the correctness of OWCP's denial of her claim or to shift the weight of the evidence in her favor.

The medical evidence includes 2011 reports from Dr. Tran, who opined that appellant had sustained a herniated cervical disc, PTSD and consequential sacroiliac joint subluxation as a result of an attack by a patient on December 30, 2008. Dr. Covert, a Board-certified psychiatrist, stated in 2011 that appellant experienced depression, anxiety and mental confusion after being assaulted by a psychotic patient on December 30, 2008. He also opined that her medical and psychological conditions were aggravated at work on a regular basis. The term clear evidence of error is intended to represent a difficult standard. A detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.¹⁷ While the reports of appellant's physicians are supportive of her claim, they do not establish clear error on the part of OWCP. Appellant also submitted a February 2, 2005 hospital report, a March 3, 2005 EMG report and a December 15, 2011 MRI scan report. These reports do not raise a substantial question as to the correctness of OWCP's decision.

Appellant has not provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's February 12, 2009 decision. Consequently, OWCP properly denied her reconsideration request as her request does not establish clear evidence of error.

CONCLUSION

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

¹⁷ *Joseph R. Santos*, 57 ECAB 554 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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