

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

L.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Las Vegas, NV, Employer**

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**Docket No. 13-1201
Issued: September 16, 2013**

Appearances:
Minnette Turner-Miles, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 15, 2013 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated March 8, 2013 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than 180 days elapsed between the last merit decision dated October 8, 2010 and the filing of this appeal on April 15, 2013, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 46-year-old customer service supervisor, filed a Form CA-1 claim for benefits based on traumatic injury on April 13, 2009. On the form, she stated that she experienced anxiety and stress due to a confrontation which occurred with her supervisor, Corey Richards, on April 13, 2009. Appellant related that she had been off work since April 3, 2009 and had gone into the workplace that day to drop off paperwork when she was confronted by Mr. Richards. She alleged that he forbade her from obtaining a copy of her 2007 performance evaluation and instructed her to call before coming into the office. Appellant stated that Mr. Richards displayed a nasty, sarcastic, hostile attitude toward her which caused her anxiety and stress and led to her being hospitalized for three days.

In an April 15, 2009 statement, appellant asserted that Mr. Richards failed to process paperwork for her disability claims and that as a result she experienced pain, numbness, tingling and severe discomfort in her right arm and right hand when she returned home, leading to her hospitalization. She alleged in a statement dated April 22, 2009 that the April 13, 2009 meeting with him eventually resulted in a total loss of mobility in her right arm and hand.

By letters dated April 17 and May 26, 2009, the employing establishment controverted the claim. It asserted that appellant was not working at the time of the alleged incident and was not in the performance of duty. It also advised that she previously filed Form CA-2 claims under case File No. xxxxxx863 using the same date of injury of August 25, 2008 and identical language as she had in the instant claim. The employing establishment stated that these claims had already been adjudicated and denied by OWCP.

In a statement received by OWCP on April 22, 2009, Mr. Richards indicated that appellant entered his office on April 13, 2009 and was present for no more than 10 minutes. He stated that she handed him CA-1 and CA-2 forms and asked for her 2007 performance evaluation. Mr. Richards asserted that he denied appellant's request to use one of their computers to do her own research because it would have been a violation of the Fair Labor Standards Act to allow her to work while she was off duty, as she was not an exempt employee. He concurred that he told her that she needed to call the office prior to showing up. Mr. Richards stated that he had never supervised appellant as she had been off work or on detail since he arrived at the worksite in October 2008. He also stated that she was not in a work status or performing duties when she stopped by on April 13, 2009, as she was on continuation of pay for a work injury which allegedly occurred in March 2009.

In a May 16, 2009 statement, appellant responded to the statement provided by Mr. Richards. She asserted that he behaved in a rude, abrupt and disrespectful manner during the April 13, 2009 meeting, which actually lasted 45 minutes to an hour. Appellant stated that she had been allowed to perform other work-related tasks while she was not in a work status but that Mr. Richards denied her access to the computer because of personal reasons. She stated that his conduct on that date caused her to become ill and that she required hospitalization for heart palpitations, elevated blood pressure and a collapsed right arm. Appellant further alleged that Mr. Richards had treated her disrespectfully and was retaliating against her because she had filed Equal Employment Opportunity claims against management.

By decision dated May 28, 2009, OWCP denied appellant's claim for an emotional condition, finding that she failed to establish fact of injury.

By letter dated June 16, 2009, appellant requested an oral hearing, which was held on October 8, 2009. At the hearing, she essentially reiterated her previous allegations. Appellant also stated that at the time of the April 13, 2009 confrontation she had already been out sick from post-traumatic stress disorder, heart palpitations, hearing loss, panic attacks and neuropathy; therefore, she had a friend accompany her on April 13, 2009. She asserted that she went to the post office consistent with procedure because she needed to file additional claims and obtain forms; Mr. Richards, however, unfairly denied her requests.

By decision dated December 30, 2009, OWCP's hearing representative affirmed the May 28, 2009 decision.

On July 6, 2010 appellant requested reconsideration.

By decision dated October 8, 2010, OWCP denied modification of the May 28, 2009 decision.

Appellant requested reconsideration on December 5, 2012. She stated that since 2005, while working at the employing establishment, she had been diagnosed with mental illnesses, anxiety, obsessive compulsive disorder and depression. Appellant asserted that over a period of years she was subjected to a hostile work environment and was discriminated against, treated without dignity and respect and threatened by her boss, which aggravated her work-related conditions. She stated that she was diagnosed as being mentally disabled in 2008 and acquired additional diagnoses of post-traumatic stress disorder, panic disorder and agoraphobia. Appellant further asserted that she was forced into a medical disability retirement in 2009 because of her mental and physical disabilities and was awarded social security compensation in 2011 due to being mentally and physically disabled.

Appellant stated that she had submitted a report from Mary Reed, Ph.D., in psychology, dated September 11, 2009 and a May 4, 2009 report from Dr. Jimmy John Novero, a Board-certified neurologist, both of which she previously submitted. She also stated that she was submitting a January 12, 2010 report from Dr. Novero and a November 20, 2012 report from Dr. Rick Jenkins, a Board-certified psychiatrist, in support of her request. In addition, appellant submitted voluminous copies of correspondence which reiterate her previously stated allegations as well as copies of numerous medical reports which have been previously submitted.²

In his January 12, 2010 report, Dr. Novero stated that he had treated appellant for numbness in her feet and weakness of the lower extremity since December 16, 2008. He advised that she had findings consistent with peripheral neuropathy, with sensory loss in her distal lower

² Appellant stated in several letters to OWCP that she was trying to have OWCP adjudicate a claim for a peripheral sensory neuropathy condition, consequential to her April 13, 2009 emotional condition claim. She is apparently contending that this condition preventing from filing her request for reconsideration in a timely fashion. The Board notes that this contention pertains to a separate claim and is separate and apart from appellant's request for reconsideration of her emotional condition claim.

extremities, decreased symmetrical reflexes and mild-to-moderate weakness in the left lower extremity. Dr. Novero also noted complaints of lower back pain. He related in his May 4, 2009 report that appellant had been working in a hostile work environment, had a panic attack on August 25, 2008 and had failed to obtain promotions which she believed she deserved. Dr. Novero opined that her neuropathic symptoms were likely aggravated or exacerbated by the work-related stressors she experienced in August 2008 and had persisted and progressed since that time.

In his November 20, 2012 report, Dr. Jenkins stated that he had treated appellant since May 5, 2010 and continued to see her due to her mental disability. He advised that her current diagnoses consisted of major depressive disorder, recurrent and post-traumatic disorder. Dr. Jenkins asserted that these conditions were the reason appellant did not appeal the case decisions on a timely basis. He opined that depression can cause feelings of isolation, sadness and a desire to remain in bed.

By decision dated March 8, 2013, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle an employee to a review of an OWCP decision as a matter of right.⁴ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, OWCP has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) submitting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(b).

this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP granted under 5 U.S.C. § 8128(a).⁷

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP procedures state that OWCP will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the appellant's application for review shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁵ The Board makes an independent determination of whether an appellant 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.¹⁶

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on October 8, 2010. OWCP received

⁷ See cases cited *supra* note 2.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 3.

¹³ See *supra* note 10.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon Faidley*, *supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

appellant's request for reconsideration on December 11, 2012; thus, the request is untimely as it was outside the one-year time limit.¹⁷

The Board finds that appellant's December 5, 2012 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence establishing error in the decision of OWCP. The issue in this case is whether she established any compensable factor of employment as a result of her April 13, 2009 confrontation with Mr. Richards and thus whether fact of injury for an emotional condition was established. Appellant's December 5, 2012 letter merely states in summary fashion that she developed several psychiatric conditions and ultimately received disability retirement due to experiencing a hostile work environment over a period of years. She did not submit any independent evidence in support of her untimely request for reconsideration which would establish that OWCP erred in finding that she had not established a compensable factor of employment.

The medical reports from Drs. Jenkins and Novero are not relevant to the issue in this case as appellant failed to establish a compensable factor of employment in her emotional condition claim.¹⁸ The evidence submitted by appellant is not sufficient to *prima facie* shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

While appellant also alleges that her alleged emotional condition prevented her from timely requesting reconsideration, she has not submitted sufficient medical evidence to establish that she was so incapacitated during the entire one-year reconsideration period, to the point that she could not timely request reconsideration.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error in the March 8, 2013 OWCP decision. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied the claim.

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations* Chapter 2.1602(e)(6) (August 2011); for decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

¹⁸ The Board notes that as appellant has not established any compensable employment factors, the medical evidence need not be considered. See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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