



## ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and did not establish clear evidence of error.

## FACTUAL HISTORY

On August 23, 2011 appellant, then a 59-year-old rating veterans service representative, filed an emotional condition claim alleging depression with anxiety, hypertension, fibromyalgia and arthritis as a result of undue stress and a hostile attitude at work.

By letter dated September 3, 2011, the employing establishment controverted appellant's claim contending that no adverse action was taken due to her performance improvement plan and that she was not treated different from similarly situated employees. It submitted a Form SF50, leave summary analysis and position description.

In a letter dated September 19, 2011, OWCP advised appellant that insufficient evidence was received to establish her emotional condition claim as compensable. It requested additional evidence.

In a decision dated November 2, 2011, OWCP denied appellant's emotional condition claim finding insufficient factual evidence to establish a hostile or stressful work environment. It also found insufficient medical evidence to demonstrate that she sustained a diagnosed condition as a result of her employment.

In an undated letter, received on November 7, 2012, appellant requested reconsideration. She stated that she previously submitted medical reports to her employing establishment to include with her claim, but the records were not submitted as she requested. Appellant explained that it was very difficult to go to work around October 2009 when she started to experience pain, confusion and headaches. Her symptoms became more severe due to the exacerbation at work. Appellant noted that the constant threats to her job began with David Bosworth, a coworker, who did not provide any initial training or feedback for over five months. Mr. Bosworth then tried to put her on a performance improvement plan. On June 10, 2010 the mission for the unit changed to a national project but appellant was not provided training or teaching due to the improvement plan. Her health started to deteriorate and she developed severe anxiety disorder due to the stress and unfair treatment at work. Appellant related that she filed an equal employment opportunity (EEO) complaint and it was partially accepted based on a hostile work environment.

Appellant submitted various progress notes from the employee's health unit dated November 3, 2009 to October 12, 2012. The treatment records addressed her fibromyalgia with constant pain, hypertension, skin condition, depression, anxiety, sjögren's syndrome and arthritis.

Appellant also submitted reports by Dr. Gail Li, a psychiatrist. In a September 17, 2010 report, Dr. Li noted treating appellant since February 2007 for depression and anxiety. She advised that appellant had difficulty concentrating, poor memory, decreased work efficiency and

increased tendency to make errors in her reports. Because of appellant's depression and anxiety disorder, she was more vulnerable to stressful working environments. Dr. Li reported that appellant was more suited for the position of training coordinator or other similar position than the position of rater. In an October 12, 2010 report, she recommended that appellant continue in her position as a rater in a quiet environment, such as at home, in order to reduce distractions and improve her concentration.

In a September 27, 2011 report, Dr. Lauren Beste, a Board-certified internist, noted that appellant suffered from sjögren's syndrome, carpal tunnel syndrome and fibromyalgia. Appellant was also diagnosed with mild cognitive impairment based on detailed neuropsychology testing. Dr. Beste noted that appellant requested a job that did not involve extensive exertion, especially lifting, due to her carpal tunnel syndrome.

Appellant submitted August 7 and October 16, 2012 letters from the employing establishment's Office of Resolution Management which acknowledged that she filed a formal complaint of discrimination. She described various events at work that she believed established that she was subject to harassment and a hostile work environment.

By decision dated January 2, 2013, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error on the part of OWCP.

### **LEGAL PRECEDENT**

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.<sup>4</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>5</sup> OWCP may still reopen a claimant's case for merit review, even if the claimant's application was not filed within the one-year time limitation, if claimant's application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.<sup>6</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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> The evidence submitted must not only be of sufficient probative value to

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>8</sup> *Id.*

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>9</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.<sup>10</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

By decision dated November 3, 2011, OWCP denied appellant's emotional condition claim finding insufficient factual evidence to establish a hostile or stressful work environment and insufficient medical evidence to establish that her claimed condition arose as a result of her employment. Appellant's request for reconsideration of the November 3, 2011 decision was not received by OWCP until November 7, 2012. Because more than one year elapsed from the November 3, 2011 merit decision to the filing of her request, the Board finds that her request was untimely.<sup>13</sup>

The Board also finds that OWCP conducted a limited review of the claim and properly determined that appellant failed to establish clear evidence of error. On reconsideration, appellant described the events that she alleged created a hostile work environment and noted that she initially submitted medical evidence to establish her claim but the employing establishment did not submit it to OWCP as requested. OWCP received letters from the employing establishment acknowledging that appellant had filed formal Equal Employment Opportunity Commission (EEOC) complaint of discrimination. Appellant also submitted progress reports from the employing establishment health unit and Dr. Beste documenting treatment for fibromyalgia, hypertension, skin condition, depression, anxiety, sjögren's syndrome and arthritis. She also submitted a report from Dr. Li, documenting treatment for depression and anxiety, wherein Dr. Li opined that these conditions made appellant more vulnerable to stressful working environments.

The term clear evidence of error is intended to represent a difficult standard and the arguments provided here are not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error in denying appellant's emotional condition claim.<sup>14</sup> Appellant's own statements describing the events she believed created a hostile environment and evidence that she had filed an EEOC complaint is not explicit evidence that

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<sup>9</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>10</sup> *Id.*

<sup>11</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP erred when it denied her claim.<sup>15</sup> The additional medical evidence she submitted was not relevant to the underlying issue of whether she established a compensable employment factor supporting her emotional condition claim.<sup>16</sup> Appellant did not submit any evidence or argument of sufficient probative value to shift the weight in favor of her and raise a substantial question as to the correctness of the November 3, 2011 OWCP decision.<sup>17</sup> Thus, the Board finds that OWCP properly denied appellant's request for reconsideration.

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and she failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 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

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<sup>15</sup> See *A.D.*, Docket No. 12-1656 (issued March 21, 2013).

<sup>16</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>17</sup> *Supra* note 8.