

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

S.S., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Fort Dix, NJ, Employer**

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**Docket No. 13-2151
Issued: April 1, 2014**

Appearances:
John Nicholas Hernick II, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2013 appellant filed a timely appeal of the March 27, 2013 Office of Workers' Compensation Programs' (OWCP) decision denying his request for reconsideration as it was not timely filed and failed to establish clear evidence of error.¹ As more than one year elapsed from the last merit decision of January 4, 2012 to the filing this appeal, pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

¹ On February 26, 2014 the Board issued an order denying appellant's request for oral argument.

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On April 5, 2011 appellant, then a 75-year-old city medical officer, filed an occupational disease claim alleging that he developed an emotional condition causally related to factors of his federal employment. He claimed he experienced a cardiac incident in the course of his employment.

By decision dated June 13, 2011, OWCP denied appellant's claim as he had not established an injury in the performance of duty. It found that he failed to provide a factual basis to support his claim or any medical evidence containing a medical diagnosis in connection with the incident.

Appellant requested a video hearing, which was held on October 13, 2011. He submitted additional documents, statements from his representative dated November 11, 14 and December 6, 2011 with attachments; and an August 6, 2011 report from Dr. Joely P. Esposito, a licensed psychologist. On November 30, 2011 OWCP received a November 29, 2011 statement from the employing establishment regarding a November 12, 2011 statement by Kathleen Kiernan.

By decision dated January 4, 2012, OWCP's hearing representative affirmed the June 13, 2011 decision on the grounds that appellant failed to identify a compensable factor of employment incurred in the performance of his federal duties. The hearing representative found that on January 4, 2011 appellant had attended a meeting at which he was advised there had been a policy change which prevented a physician from entering a chart entry of "no show" on the chart when an inmate failed to present for an appointment. Ancillary to such, a physician would be required to seek out the inmate on the compound and bring them to the health unit. The hearing representative found that the change in policy was an administrative matter with no error or abuse on behalf of the employing establishment. The hearing representative further found that appellant failed to present sufficient evidence to support that he worked overtime during the time the change in policy was alleged to have occurred.

In a letter dated January 3, 2013, appellant requested reconsideration. He argued that the 38-page January 15, 2005 program statement of the Health Services Administrator (HSA) and the August 16, 2012 e-mail from Charleston Iwuagwu, Regional HSA -- MXR, show that appellant, who was then acting clinical director, was the only person authorized to make such a policy change on January 4, 2011, not the employing establishment's HSA Michelle Baker. Thus, appellant argued that error or abuse of authority by HSA Baker was, in fact, an employment factor arising in the performance of his work duties as acting clinical director and the medical evidence establishes that he developed one or more totally disabling medical conditions as a result of such an employment factor.

In his August 16, 2012 e-mail, Mr. Iwuagwu stated that physicians are under the oversight of the clinical director and not HSA. He further stated that while HSA has the administrative oversight of the entire Health Services Unit, the assignment of physician tasks/duties and/or change thereof is carried out by the clinical director.

By decision dated March 27, 2013, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.³ 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.⁴ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁵ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁶ if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

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

OWCP's procedures note that 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

³ See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

⁴ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ 20 C.F.R. § 10.607.

⁷ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

⁸ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

⁹ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁰ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 7.

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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ The Board notes that, for merit decisions issued prior to August 29, 2011, OWCP's procedures provided that the timeliness for a reconsideration request was determined not by the date OWCP received the request, but by the postmark on the envelope.¹⁵ OWCP's new procedures as of August 29, 2011 require that for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP.¹⁶ As appellant's January 3, 2013 request for reconsideration was received by OWCP on January 11, 2013, more than one year after the last merit decision of January 4, 2012, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁷

The underlying claim for compensation was denied on the grounds that appellant had not established a compensable factor of employment. On reconsideration, he alleged that the new evidence supports error or abuse by the employing establishment in implementing the change in policy on January 4, 2011. The 38-page January 15, 2005 program statement of HSA and the August 16, 2012 e-mail from Mr. Iwuagwo show HSA has the administrative oversight of the entire Health Services Unit and the clinical director provides the assignment of physician tasks/duties. However, appellant did not submit probative evidence establishing clear evidence of error in the finding that there was no error or abuse by the employing establishment in implementing the change in policy on January 4, 2011. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The weight of the evidence must shift in favor of the claimant. Appellant did not show clear evidence of error in OWCP's finding as to no compensable factors of employment as contributing to his condition.

¹¹ *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2011).

¹² *See M.L.*, *supra* note 7; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁶ *Id.* at Chapter 2.1602.4(e) (August 29, 2011).

¹⁷ *Supra* note 14; *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

On appeal, appellant contends that his reconsideration request was timely filed as it was mailed on January 4, 2013. As noted above, the evidence demonstrates that his reconsideration request was received after the one-year time period elapsed. Appellant also asserted that the employing establishment committed error or abuse in making and implementing an unauthorized policy change on January 4, 2011 which caused him to suffer disabling compensable emotional stressors triggering physical injuries. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The weight of the evidence must shift in favor of the claimant. Appellant did not show clear evidence of error in OWCP's finding as to no compensable factors of employment as contributing to his condition.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and insufficient to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board