

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

R.T., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS & BORDER
PROTECTION, El Paso, TX, Employer**

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**Docket No. 14-779
Issued: August 22, 2014**

Appearances:

*John W. Wesley, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 24, 2014 appellant, through counsel, filed a timely appeal from the August 28, 2013 decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error.¹ Because more than 180 days elapsed from the most recent merit decision dated August 8, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

¹ Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant and his attorney on March 7, 2014 to confirm his continuing desire for an oral argument in Washington, DC. No written confirmation was received within the time allotted. The Board will decide the appeal on the record.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On January 21, 2011 appellant, then a 30-year-old border patrol agent, filed a Form CA-1 traumatic injury claim alleging that on August 21, 2010 he developed post-traumatic stress disorder after participating in an hour long shoot-out at the Mexican border. Several bullets struck near his vehicle and children were in the line of fire. Appellant did not stop work but resigned on February 11, 2011.

Appellant submitted a witness statement from R. Bride, a coworker, dated January 21, 2011, who witnessed shots fired at the Mexican border in an incident which lasted over an hour. He notified agents of the incident and they were transferred away from the border.

Appellant submitted a January 21, 2011 witness statement from P. Crane, a coworker, who stated that several days after the shooting, he visited appellant who recounted several traumatic incidents in his life including violent encounters at work. Mr. Crane reported that appellant was not doing well and several days later he accompanied appellant to a physician's office.

The employing establishment submitted an incident report documenting the shooting on August 21, 2010. The report indicated that on August 21, 2010 gunfire was exchanged in Mexico between Mexican Federal Police and several assailants. The incident began when Mexican Federal Police were attempting to conduct a vehicle stop on a stolen vehicle and the vehicle refused to stop. The occupants began to shoot at the police with automatic weapons. Appellant, on the American side of the border, withdrew after approximately 12 bullets began to land near and around his vehicle from a distance approximately 80 yards south of his deployment. He took a position of cover. The border was closed and traffic rerouted out of the affected area. During this time, several additional barrages of gunfire were heard from Mexico.

In a decision dated March 11, 2011, OWCP denied appellant's claim for a traumatic injury. It found that the evidence did not support that the incident or events occurred as alleged.

On March 5, 2012 appellant requested reconsideration. He submitted an SF-50, notice of personnel action, which noted that he resigned effective February 11, 2011. Appellant submitted an undated report from Dr. Hatem Nour, a Board-certified psychiatrist, who diagnosed bipolar disorder with post-traumatic stress disorder. Dr. Nour noted that appellant was unable to perform his current job and his impairment prevented him from carrying a gun or being in a high stress job.

On June 5, 2012 OWCP referred appellant for a second opinion to Dr. Robert Scott Benson, a Board-certified psychiatrist, for a determination of whether appellant sustained a work-related emotional condition. In a July 13, 2012 report, Dr. Scott noted that appellant had symptoms which met the criteria for alcohol dependence in partial remission and had a previous

diagnosis of bipolar disorder type 1, recurrent episode. He noted that appellant's description of the events of August 21, 2010 would not meet the criteria for trauma to support the diagnosis of post-traumatic stress disorder. Dr. Benson stated that appellant described easy irritability and anger outbursts that would make any employment difficult. The factors contributing to his condition were unclear but the available evidence did not support that his current emotional condition was related to the August 20, 2010 incident.

In an August 8, 2012 decision, OWCP determined that the hour long shoot-out on the Mexican border was a compensable work incident. It denied appellant's claim for compensation on the grounds that he did not submit sufficient medical evidence to establish that he sustained an emotional condition as a result of the claimed incident.

In an appeal form dated August 5, 2013, appellant requested reconsideration. OWCP received the request on August 23, 2013. Appellant resubmitted the employing establishment incident report and witness statements from Mr. Bride and Mr. Crane. In an August 7, 2013 letter, received on August 23, 2013, appellant's attorney asserted that his diagnosed post-traumatic stress disorder, alcohol dependence and major depressive disorder were a direct result of the August 21, 2010 border shoot-out. Counsel stated that, prior to this incident, appellant was a fully functioning employee with no mental or social limitations. After the shoot-out, appellant developed a disabling psychiatric illness for which he was hospitalized, lost his career and the ability to carry a firearm. He self-medicated with alcohol. Counsel asserted that appellant developed post-traumatic stress disorder as a direct result of the prolonged gun battle on August 21, 2010. He noted that appellant was heavily involved in the shoot-out and was the closest to the border when the firefight broke out and feared for his life. Since then, appellant had visual hallucinations. Counsel stated that appellant continued to seek psychiatric treatment for his illness and Dr. Gregoria Marrero, an attending psychiatrist diagnosed post-traumatic stress disorder and mood disorder. In August 2012, the Social Security Administration accepted appellant's disability for the psychiatric condition of post-traumatic stress disorder.

Appellant submitted reports from Dr. Marrero dated April 25 to July 25, 2013, who noted a history of counseling for stress from 2009 to 2010. He was rehospitalized in August 21, 2013 after a confrontation with local police. Dr. Marrero noted that appellant presented with concerning symptoms of mood disorder, depression and anxiety, anger and irritability, unresolved grief and nonmilitary residual post-traumatic stress disorder symptomology impairing his social and industrial functioning. He diagnosed post-traumatic stress disorder, major depression with psychotic features, alcohol dependence and partner relational problem. In reports dated June 25 and July 25, 2013, Dr. Marrero noted that appellant reported improvement. He noted that appellant worked as a border patrol agent and had a psychotic-like episode. Dr. Marrero diagnosed post-traumatic stress disorder, major depression with psychotic features, alcohol dependence and partner relational problem. Also submitted were reports from a social worker dated May 28 to August 2, 2013, who treated appellant for a history of post-traumatic stress disorder. Appellant reported having nightmares and flashback over incidents he was involved in while a border patrol agent. He also reported significant traumatic history including his ex-fiancé aborting his child in 2002.

By decision dated August 28, 2013, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise and explicit and manifests on its face that OWCP committed an error.⁸ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on August 8, 2012. Appellant's August 5, 2013 letter requesting reconsideration was not received

³ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

by OWCP until August 23, 2013, more than one year after the August 8, 2012 merit decision. Therefore, it was not timely filed.¹⁰ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.

The Board finds that appellant has not established clear evidence of error on the part of OWCP in the denial of his emotional condition claim. On reconsideration, appellant's counsel asserted that appellant's diagnosed post-traumatic stress disorder, alcohol dependence and major depressive disorder were a direct result of the employment incident on August 21, 2010. He argued that before this incident appellant was a fully functioning employee with no mental or social limitations. Starting at the shoot-out, appellant developed disabling psychiatric illnesses. He continued to receive psychiatric treatment for his illness and was diagnosed with post-traumatic stress and a mood disorder. While appellant addressed his disagreement with OWCP's denial of the claim, his general allegations do not raise a substantial question as to the correctness of OWCP's decision. OWCP properly found that his statement of August 7, 2013 did not establish clear evidence of error. The Board notes that entitlement to benefits under another federal statute, in this case the Social Security Act, does not establish entitlement to benefits under FECA.¹¹ The Board has noted that there are different standards for medical proof on the question of disability under FECA and under the Social Security Act.¹²

On reconsideration, appellant resubmitted reports of the employing establishment incident report and the witness statements of Mr. Bride and Mr. Crane. OWCP had previously considered this evidence. Appellant did not explain how this evidence was positive, precise and explicit in manifesting that OWCP committed an error in denying his claim for compensation. The resubmission of this evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision.

Reports from Dr. Marrero dated April 25 to July 25, 2013 noted that appellant experienced trouble with anger and was recommended not to carry a weapon and was told to resign. He noted that appellant presented with concerning symptoms of mood disorder, depression and anxious, anger and irritability, unresolved grief, nonmilitary residual post-traumatic stress disorder symptomology impairing social and industrial functioning. Dr. Marrero diagnosed post-traumatic stress disorder, major depression with psychotic features, alcohol dependence and partner relational problem. In reports dated June 25 and July 25, 2013, he noted that appellant worked as a border patrol agent and had a psychotic-like episode. Dr. Marrero diagnosed post-traumatic stress disorder, major depression with psychotic features, alcohol dependence and partner relational problem.¹³ However, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. The Board notes that clear

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Freddie Mosley*, 54 ECAB 255 (2002).

¹² *Daniel Deparini*, 44 ECAB 657 (1993).

¹³ Also submitted was reports from a social worker who treated appellant for post-traumatic stress disorder. The Board has held that medical evidence must be from a qualified physician and that a social worker is not a physician as defined under FECA such that an opinion from a social worker is of no probative medical value. *See S.S.*, Docket No. 13-1919 (issued May 16, 2014); 5 U.S.C. § 8101(2) (defines the term "physician").

evidence of error is intended to represent a difficult standard. The submission of 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.¹⁴

Thus, appellant has not established clear evidence of error by OWCP in its August 28, 2013 decision.

On appeal, counsel asserted that OWCP erred in finding that the August 21, 2010 incident was not the cause of appellant's disability and that the statement of accepted facts provided to Dr. Benson was inaccurate and incomplete. An affidavit from appellant was submitted regarding the claim and other new evidence. As noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought. The Board may not consider new evidence for the first time on appeal.¹⁵

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁴ *D.G.*, 59 ECAB 455 (2008).

¹⁵ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2014
Washington, DC

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

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

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