

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

D.R., Appellant and DEPARTMENT OF VETERANS AFFAIRS, CLEMENT J. ZABLOCKI MEDICAL CENTER, Milwaukee, WI, Employer))))))))))))	Docket No. 13-1644 Issued: January 10, 2014
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<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
 RICHARD J. DASCHBACH, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant, through her attorney, filed a timely appeal from a May 8, 2013 Office of Workers' Compensation Programs' (OWCP) decision which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days has elapsed between the most recent merit decision, dated March 24, 2011, and the filing of this appeal on July 31, 2013, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's December 3, 2012 request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This claim has previously been before the Board. In a March 24, 2011 decision, the Board affirmed an OWCP hearing representative's decision dated December 29, 2009 denying

appellant's claim for an emotional condition. The Board found that appellant did not establish her allegations of harassment and unfair treatment and therefore failed to establish a compensable employment factor.¹ The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.²

On December 3, 2012 appellant through her attorney requested reconsideration. The basis of her request was the findings in a decision of the Equal Employment Opportunity Commission (EEOC) dated August 10, 2012 regarding discrimination. Appellant asserted that she established a compensable employment factor and her claim should be reevaluated. The August 10, 2012 EEOC decision found that appellant established that she had been discriminated against because of her disability when she was terminated from her employment as a health technician. The judge specifically determined that appellant showed she was a qualified individual with a disability noting that she had many physical and medical impairments including a back condition and depression. The judge further noted that appellant showed her absences were related to her disability and that the use of leave without pay was not excessive.

In a decision dated May 8, 2013, OWCP denied appellants request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.⁴ However, OWCP will reopen a claimant's case for merit review,

¹ Docket No. 10-1375 (issued March 24, 2011).

² On April 22, 2009 appellant, a health technician, filed an occupational disease claim alleging that she developed an emotional condition as a result of her workers' compensation claim and unfair treatment. She alleged that she was improperly transferred to accommodate her restrictions under claim File No. xxxxxx519. Appellant alleged that several coworkers stated that she did not belong in the urology department so she was transferred to the eye clinic and she felt as though she did not belong there. She further alleged that she no longer had access to rooms and supplies that she once had nor was she involved in meetings in her prior department or the eye clinic. Appellant did not stop work but was terminated on August 28, 2009.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

notwithstanding the one-year filing limitation, if the claimant's application for review shows 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 that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁵

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² The last merit decision in this case was the Board's March 24, 2011 decision. The Board affirmed the denial of appellant's emotional condition claim. As appellant's December 3, 2012 letter requesting reconsideration was made more than one year after the Board's March 24, 2011 merit decision, it was not timely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence to establish clear error in OWCP's finding that she had not established a compensable factor of employment. Appellant has not established clear evidence

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

¹¹ 20 C.F.R. § 10.607(a).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4a (October 2011), which provides in pertinent part: [A] right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any merit decision by ECAB.

of error by OWCP. She has not submitted sufficient evidence or argument which manifests on its face that OWCP committed an error in the denial of her claim.

Appellant asserted that the basis of her request for reconsideration was the findings of an EEOC decision dated August 10, 2012 regarding her termination. She asserted that she has now established a compensable factor of employment and her claim should be reevaluated. The August 10, 2012 EEOC decision, however, found that appellant established that she was discriminated against because of her disability when she was terminated from her employment as a health technician. The judge specifically determined that appellant showed that she was a qualified individual with a disability noting that she had many physical and medical impairments, including a back condition and depression and showed her absences were related to her disability and that her use of leave without pay was not excessive. None of this evidence is relevant to her allegations under the workers' compensation claim, specifically that she was improperly transferred to the eye clinic to accommodate her restrictions in another claim, that coworkers stated that she did not belong in the urology department so she was transferred to the eye clinic where she also felt as though she did not belong, that her assignments had changed, that her access to rooms and supplies was stopped, that she was not involved in meetings in her prior department or the eye clinic and that she was underutilized. The EEOC decision does not address the cause of the disability which is the issue in the underlying workers' compensation claim.

The term clear evidence of error is intended to represent a difficult standard and the arguments provided here is 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.¹³ The EEOC decision, in the circumstances of this case, is not explicit evidence that OWCP erred when it denied her claim.¹⁴ 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 December 29, 2009 OWCP decision.¹⁵ Thus, the Board finds that OWCP properly denied appellant's request for reconsideration as the evidence is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration dated December 3, 2012 was untimely filed and did not demonstrate clear evidence of error.

¹³ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *See A.D.*, Docket No. 12-1656 (issued March 21, 2013).

¹⁵ *Jimmy L. Day*, *supra* note 7.

ORDER

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

Issued: January 10, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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