

FACTUAL HISTORY

This case was previously before the Board. Appellant, a 70-year-old cook foreman, last worked for the employing establishment in August 1978.² Prior to his federal civilian service, he served on active duty with the U.S. Army from October 1967 through February 1976. Medical records from the Department of Veterans Affairs note that, in July 1997, appellant was diagnosed with delayed onset post-traumatic stress disorder (PTSD). It paid disability benefits for his service-connected PTSD.³

On November 20, 2008 appellant filed an occupational disease claim (Form CA-2) for PTSD. He attributed his condition to a constructive termination in August 1978.⁴ Appellant first became aware of the employment-related nature of his PTSD on February 15, 2004. He claimed to have promptly notified the employing establishment of his condition at that time.

Dr. Martin L. Boone, Ph.D., a neuropsychologist, evaluated appellant on July 7, 2004. He diagnosed delayed onset PTSD. Dr. Boone indicated that appellant had likely been experiencing some level of PTSD since returning from Vietnam in 1968. He also noted that appellant reported experiencing a substantial increase in symptoms after a very stressful occupational experience associated with his employment at the employing establishment in Morgantown in the late 1970s. Appellant told Dr. Boone that he was forced to resign or be fired, without any apparent justification. Consequently, he was extremely worried about his finances. Dr. Boone explained that anxiety disorders were known to exacerbate at times of increased stress.

By decision dated July 10, 2009, OWCP denied appellant's November 20, 2008 claim as untimely filed pursuant to 5 U.S.C. § 8122. It determined that Dr. Boone's July 2004 evaluation put appellant on notice of the possible relationship between his PTSD and his federal employment; but he waited four years before filing his occupational disease claim. Consequently, appellant failed to meet the three-year filing requirement under 5 U.S.C. § 8122. On December 14, 2009 the Branch of Hearings and Review affirmed the July 10, 2009 decision. On November 22, 2010 the Board affirmed the hearing representative's decision.⁵

Appellant sought reconsideration before OWCP, which was denied by decision dated January 5, 2011. He then sought review before the Board; however, his September 13, 2011 appeal was untimely. By order dated January 25, 2012, the Board dismissed the appeal.⁶ On

² Between July 1976 and August 1978, appellant worked approximately 18 months at the Robert F. Kennedy Youth Center, Federal Correctional Institution (FCI), Morgantown, WV. Personnel records (Standard Form 52) indicate that he resigned effective August 18, 1978.

³ Appellant also received disability benefits from the Social Security Administration for anxiety disorders.

⁴ Appellant claimed that he was forced to quit.

⁵ Docket No. 10-673 (issued June 10, 2011) (the Board issued an order denying appellant's petition for reconsideration).

⁶ Docket No. 12-4 (issued January 25, 2012) (the Board's prior decision and orders are incorporated herein by reference).

July 11, 2012 appellant petitioned the Board to reconsider its January 25, 2012 order, but his petition was also untimely. He sought further review in U.S. District Court; however, on March 21, 2013 the court dismissed his civil complaint for lack of subject matter jurisdiction.

On April 8, 2013 appellant requested reconsideration before OWCP. He argued that he timely notified the employing establishment of his injury in 2004 when he filed an Equal Employment Opportunity (EEO) discrimination complaint.⁷ Appellant contended that the employing establishment failed to inform OWCP of his injury or to inform him that he had to file a FECA claim for PTSD instead of an EEO complaint. He submitted a copy of two statutory provisions (5 U.S.C. §§ 8120 and 8122), an April 13, 2004 EEO complaint, an EEO counselor's report and employee personnel records listing his hourly wages as a cook foreman effective May 7, 1978.

By decision dated July 12, 2013, OWCP denied appellant's April 8, 2013 request for reconsideration. It found that the request was untimely and he failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ One such limitation is that the application for reconsideration must be received within one year of OWCP decision for which review is sought.¹⁰ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its

⁷ In an April 13, 2004 EEO complaint (Form DOJ-201A), appellant alleged discrimination based on mental disability (PTSD and alcoholism). The discrimination allegedly occurred on August 9, 1978. Appellant believed that he was discriminated against when he was forced to resign from FCI Morgantown. The employing establishment dismissed the EEO complaint as untimely. There was a 45-day time limitation within which to initiate an EEO complaint. In appellant's case, he waited more than 25 years before contacting an EEO counselor regarding discriminatory activity that allegedly occurred in August 1978. The Equal Employment Opportunity Commission subsequently upheld the dismissal of appellant's EEO complaint, as did the U.S. District Court.

⁸ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ *Id.* at § 10.607(a).

most recent merit decision.¹¹ The application must establish, on its face, that such decision was erroneous.¹²

ANALYSIS

OWCP's last merit decision is dated December 14, 2009, which the Board affirmed by decision dated November 22, 2010. It subsequently denied reconsideration in a decision dated January 5, 2011. Appellant filed an untimely appeal of the January 5, 2011 nonmerit decision, which the Board dismissed by order dated January 25, 2012. His latest request for reconsideration was dated April 8, 2013 and received on April 15, 2013.¹³

The April 8, 2013 request for reconsideration was more than one year after the most recent merit decision; therefore, appellant's request is untimely. Consequently, he must demonstrate clear evidence of error on the part of OWCP in finding his November 20, 2008 claim untimely pursuant to 5 U.S.C. § 8122.

Section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.¹⁴ A claim filed outside this timeframe must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.¹⁵ An otherwise untimely claim will also be considered timely if the immediate superior received written notice within 30 days of the date of injury or death.¹⁶ However, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or reasonably should have been aware, of the causal relationship between the disability and the employment.¹⁷ An employee with actual or constructive knowledge of his or her employment-related condition, who continues to be exposed to injurious working conditions, must file his or her claim within three years of the date

¹¹ *Id.* at § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² 20 C.F.R. § 10.607(b).

¹³ The Board's November 22, 2010 decision is the most recent merit decision of record.

¹⁴ 5 U.S.C. § 8122(a).

¹⁵ The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury. *Id.* at § 8112(a)(1).

¹⁶ *Id.* at § 8122(a)(2) (written notice must be in accordance with 5 U.S.C. § 8119).

¹⁷ *Id.* at § 8122(b); 20 C.F.R. § 10.101(c).

of last exposure to the implicated conditions.¹⁸ In this case, the last possible employment exposure was August 18, 1978, the effective date of appellant's resignation.

There is no evidence of record that appellant's immediate superior received written notice or had actual knowledge of appellant's injury PTSD within 30 days of August 18, 1978. Appellant claimed that he was aware of the employment-related nature of his condition as early as February 2004. OWCP determined that Dr. Boone's July 7, 2004 evaluation commenced the three-year filing period under 5 U.S.C. § 8122(b). However, appellant did not file his claim until November 20, 2008, which was more than three years afterwards. As such, his claim was untimely.

Appellant contended that his April 2004 EEO complaint represented timely notice of injury to his employer. As noted, an otherwise untimely claim will be considered timely if the immediate superior had actual knowledge of the injury or received written notice within 30 days of the date of injury.¹⁹ Appellant has not submitted evidence to establish that his immediate superior or another employing establishment official had actual knowledge or received written notice of his PTSD within 30 days of his last employment exposure. The April 2004 EEO complaint filed more than 25 years later does not satisfy the notice requirements under 5 U.S.C. § 8112(a)(1), (2).²⁰

Appellant also argued that the employing establishment should have informed OWCP of his injury. Additionally, he claimed that his employing establishment failed to advise him to file a FECA claim rather than an EEO complaint. The Board previously noted that appellant's unfamiliarity with FECA's filing requirements did not excuse his untimely filing.²¹ Notwithstanding perceived failures on the part of the employing establishment, he is ultimately responsible for filing his FECA claim in a timely fashion.

The Board finds that appellant has not demonstrated clear evidence of error. As such, there is no justification for further merit review. Accordingly, OWCP properly declined to reopen his case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's April 8, 2013 request for reconsideration was untimely and he failed to demonstrate clear evidence of error. Therefore, appellant is not entitled to further merit review.

¹⁸ E.g., *James A. Sheppard*, 55 ECAB 515, 518 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

¹⁹ 5 U.S.C. § 8112(a)(1), (2).

²⁰ An EEO complaint is not a claim for benefits under FECA. See *M.M.*, Docket No. 08-1756 (issued September 23, 2009).

²¹ 5 U.S.C. § 8122(d)(3) ("exceptional circumstances"); see *Ralph L. Dill*, 57 ECAB 248, 253-54 (2005) (ignorance of the law or one's obligations under it does not constitute "exceptional circumstances" that would otherwise excuse an untimely filing).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2014
Washington, DC

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

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

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