

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

S.S., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Covington, KY, Employer**

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**Docket No. 14-297
Issued: May 27, 2014**

Appearances:
Molly Durso, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 15, 2013 appellant, through her attorney, filed a timely appeal of a May 21, 2013 decision of the Office of Workers' Compensation Programs (OWCP),¹ finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act² (FECA), the Board has jurisdiction over the May 21, 2013 decision. The Board does not have jurisdiction over a decision on the merits of the claim.³

¹ A notice of appeal must be filed within 180 days of OWCP's final decision, which was November 18, 2013. 20 C.F.R. § 501.3(e). The date of filing is the date of receipt by the Board, but if the date of receipt (in this case November 20, 2013) would result in a loss of appeal rights, the postmark date can be used. 20 C.F.R. § 501.3(f). The appeal was postmarked November 15, 2013 and is timely with respect to the May 21, 2013 OWCP decision.

² 5 U.S.C. § 8101 *et seq.*

³ The last merit decision was an OWCP decision dated May 7, 2012.

ISSUE

The issue is whether OWCP properly found that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

On April 14, 2008 appellant, then a 54-year-old tax examiner technician, filed a traumatic injury claim (Form CA-1) due to a slip and fall in the performance of duty on April 10, 2008. On May 21, 2013 OWCP accepted the claim for left knee, lumbar, thoracic and cervical sprains. In a decision dated November 25, 2009, compensation for wage-loss and medical benefits was terminated effective November 30, 2009. The termination was affirmed by an OWCP hearing representative in a decision dated April 15, 2010.

By decision dated August 25, 2010, OWCP vacated the prior decisions and accepted a torn medial meniscus and patellofemoral chondromalacia of the left knee with chronic synovitis. In a decision dated March 16, 2011, it denied wage-loss compensation from November 30, 2009 to April 13, 2010 and September 16 to 22, 2010. This decision was affirmed by an OWCP hearing representative in a decision dated September 22, 2011. By decision dated April 26, 2011, OWCP granted a schedule award for a five percent left leg permanent impairment. In a decision dated August 30, 2011, it found that appellant was not entitled to an additional schedule award. By decision dated April 2, 2012, an OWCP hearing representative affirmed the August 30, 2011 decision.

By letter dated January 10, 2012, appellant, through her representative contended that OWCP should accept depression and anxiety as causally related to the April 10, 2008 employment injury. She submitted a January 9, 2012 report from Dr. Anthony Alvarez, a Board-certified psychiatrist, who reviewed certain factual and medical evidence and opined that she had depression and anxiety "secondary to the physical injuries sustained in her occupational accident on April 10, 2008." Dr. Alvarez arrived at his opinion based on her statements to him regarding stress as a result of her accident.

By letter dated January 26, 2012, OWCP advised appellant that additional medical evidence was required, including a comprehensive medical report addressing the causal relationship of her depression and anxiety. On March 14, 2012 appellant submitted a brief note from Dr. Alvarez dated March 5, 2012. Dr. Alvarez advised that her depression was caused by her work injury and referenced an April 26, 2010 evaluation.⁴ By letter dated March 20, 2012, OWCP again advised appellant that additional medical evidence was required.

On April 24, 2012 Dr. Eric Puestow, an OWCP medical adviser, stated that the medical evidence revealed that appellant had a preexisting history of anxiety and depression that should

⁴ On April 26, 2012 appellant resubmitted a generally illegible handwritten psychiatric evaluation dated August 26, 2010 from Dr. Alvarez.

not be accepted as related to the employment injury. He indicated that an original evaluation on April 11, 2012 showed that she was on Lexapro, antidepressant.⁵

In a decision dated May 7, 2012, OWCP found that the medical evidence was not sufficient to establish that appellant's depression or anxiety as causally related to the April 10, 2008 employment injury.

By letter dated May 3, 2013, received by OWCP on May 9, 2013, appellant requested reconsideration. She argued that the medical adviser was an internist, not a psychiatrist and she had submitted supporting evidence from Dr. Alvarez, a psychiatrist. Appellant argued that OWCP had an incorrect medical background, referencing an April 11, 2012 date of service that was nonexistent and that it was improper to deny her claim based on the opinion of an internist. She submitted a January 22, 2013 report from Dr. Alvarez noting that she continued to be treated for depression.

In a decision dated May 21, 2012, OWCP found that the application for reconsideration was untimely. It further denied merit review of the claim on the grounds that the untimely application for reconsideration did not show clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁶ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁷

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁰ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.¹¹ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The

⁵ The medical adviser apparently was referring to an April 11, 2008 report from Dr. Charles Whelan, an emergency medicine specialist, who noted medications included Lexapro.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.605 (2012).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ Under section 8128 of FECA, "[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."

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ 20 C.F.R. § 10.607 (2012).

evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹²

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

ANALYSIS

OWCP accepted that appellant sustained left knee, lumbar, thoracic and cervical sprains, as well as left knee torn medial meniscus and left knee patellofemoral chondromalacia with chronic synovitis, in the performance of duty on April 10, 2008. Appellant sought to expand acceptance of her claim for depression and anxiety as consequential injuries. OWCP found that the medical evidence was not sufficient to establish the claimed psychiatric conditions as causally related to her accepted injury.

A timely application for reconsideration must be received by OWCP within one year of the date of the decision. According to OWCP's procedures, timeliness is determined by the "received" date in the Integrated Federal Employees' Compensation System.¹⁷ In this case, the received date was May 9, 2013. Since this is more than one year after the May 7, 2012 merit decision, the application for reconsideration is untimely.

With an untimely application for reconsideration, appellant must establish clear evidence of error by OWCP to establish entitlement to a merit review of the claim for compensation. She argued that OWCP had improperly denied the claim by relying on the opinion of an OWCP medical adviser, who was not a psychiatrist and did not have an accurate medical history. The Board notes that the May 7, 2012 decision was based on a determination that the medical evidence, including the reports from attending psychiatrist, Dr. Alvarez, were not sufficient to establish depression or anxiety as employment-related conditions.¹⁸ The argument that the

¹² *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁴ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁵ *Id.*

¹⁶ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011).

¹⁸ It is appellant's burden of proof to establish a consequential injury. *J.A.*, Docket No. 12-603 (issued October 10, 2012).

medical adviser was not a psychiatrist does not establish clear evidence of error by OWCP in the denial of the claim on May 7, 2012.¹⁹

With respect to the medical evidence submitted with the application for reconsideration, appellant did not establish clear evidence of error by OWCP. The evidence from Dr. Alvarez did not discuss the issue of causal relationship between her depression and anxiety to the employment injury. Appellant's belief that the reports from him are sufficient to establish that the claim does not show clear evidence of error. As noted, contending that the evidence could be construed as to produce a different conclusion is not clear evidence of error.

On appeal, appellant states that OWCP did not properly consider relevant legal arguments and evidence on reconsideration. For the reasons noted, the Board finds that she did not establish clear evidence of error. Pursuant to 20 C.F.R. § 10.607, OWCP properly denied the application for reconsideration without merit review of the claim.

CONCLUSION

The Board finds that OWCP properly found that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹⁹ The Board also notes that the medical adviser's reference to an April 11, 2012 report does not establish an inaccurate medical history, as it is evident the medical adviser was referring to an April 11, 2008 report from Dr. Whelan.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 21, 2013 is affirmed.

Issued: May 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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