

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gaithersburg, MD, Employer**

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**Docket No. 14-1223
Issued: November 7, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On May 2, 2014 appellant, through her attorney, filed a timely appeal of a March 14, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA), the Board has jurisdiction over the March 14, 2014 nonmerit decision. The Board lacks jurisdiction over the merits of the claim.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² The last merit decision was an OWCP decision dated November 13, 2012, finalizing an overpayment of compensation. The record also contains an August 10, 2012 OWCP merit decision, denying modification of a May 17, 2012 OWCP decision terminating compensation. For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

The case was previously before the Board on a prior appeal. Appellant had filed a claim on December 5, 1990 alleging an emotional condition resulting from harassment by her supervisor.³ OWCP initially accepted the claim for major depressive episode and on March 29, 2011 stated that the claim was accepted for aggravation of major depressive disorder. By decision dated May 17, 2012, it terminated compensation effective May 18, 2012. OWCP found that appellant was receiving Veterans Administration (VA) benefits for the same employment injury and had failed to elect FECA benefits. By decision dated August 10, 2012, it reviewed the merits of the claim and denied modification.

The Board reviewed a June 4, 2013 OWCP decision denying merit review of the August 10, 2012 decision. The Board found, in its February 10, 2014 decision, that OWCP had properly denied merit review of the claim as the evidence submitted from Attending Physician Dr. Celeste Good, did not provide any new and relevant evidence on the medical issue presented. The Board indicated that the April 18, 1994 VA rating decision had specifically referenced Dr. Good's December 15, 1993 report, stating that appellant was disabled due to major depression. The history of the case provided by the Board is incorporated herein by reference.

By letter to OWCP dated March 3, 2014, appellant, through her representative, again requested reconsideration. She submitted a January 29, 2014 brief stating that, if a claimant is receiving FECA and VA benefits, OWCP must determine whether the benefits are for the same injury. According to appellant, OWCP did not properly analyze the medical evidence and there was no specific report stating that the benefits were for the same injury. Appellant referred to a 2005 "Harvard Mental Health Letter" and argued that, while dysthymia and major depression have symptoms in common, they are not identical.⁴ She also cited provisions of OWCP's procedure manual with respect to the prohibition of dual benefits from FECA and the VA.

With respect to additional evidence, appellant submitted hospital treatment notes from January 19 and 20, 2014 indicating that she complained of suicidal thoughts. In a report dated January 19, 2014, Dr. Gregory Ledbetter, Board-certified in emergency medicine, diagnosed depression.

By decision dated March 14, 2014, OWCP found that appellant's application for reconsideration was untimely and failed to 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.⁵ The

³ Docket No. 13-1931 (issued February 10, 2014).

⁴ Appellant also discussed a finding of fault with respect to an overpayment of compensation. The November 13, 2012 decision with respect to an overpayment found that she was not at fault in creating an overpayment.

⁵ 5 U.S.C. § 8128(a).

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.”⁶

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.⁷ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁸ It, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ 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’s decision for which review is sought.¹⁰ 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 evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹

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.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵

ANALYSIS

Appellant submitted a March 3, 2014 application for reconsideration, asserting that it was timely as it was filed within one year of the February 10, 2014 Board decision. The February 10, 2014 Board decision, however, was not a review of the merits of the claim. The Board reviewed

⁶ 20 C.F.R. § 10.605 (2012).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 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.”

⁹ *See supra* note 1.

¹⁰ 20 C.F.R. § 10.607 (2012).

¹¹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

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

a June 4, 2013 OWCP decision that denied merit review of the August 10, 2012 OWCP decision. The right to reconsideration within one year after a Board decision only accompanies a merit decision.¹⁶ The March 3, 2014 application is untimely with respect to the August 10, 2012 OWCP merit decision, as well as the November 13, 2012 overpayment decision.

As an untimely application for reconsideration, appellant must show clear evidence of error by OWCP. It is well established that under 5 U.S.C. § 8116 a claimant is prohibited from receiving both FECA and VA benefits if the benefits are for the same injury.¹⁷ Appellant reiterated her arguments that the VA benefits were not for the same injury as the accepted condition was aggravation of major depressive disorder. As the Board noted in the prior appeal, the VA rating decision had referred to major depression as a diagnosis from appellant's attending physician, Dr. Good. It is appellant who must show clear evidence of error by OWCP and her general argument that OWCP did not properly analyze the medical evidence does not show clear evidence of error. As noted above, even if evidence could be construed to produce a contrary result, this is not clear evidence of error. The reference to a medical newsletter is of little probative value, as it is not from a physician under FECA discussing the specific facts of the case at hand.¹⁸ The medical evidence submitted on reconsideration does not address the relevant issue. The hospital reports and the January 19, 2014 report from Dr. Ledbetter do not discuss the issue presented.

For the above reasons, the Board finds that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error by OWCP. The application for reconsideration was therefore properly denied without merit review of the claim.

CONCLUSION

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

¹⁶ See also *E.C.*, Docket No. 13-1937 (issued February 6, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

¹⁷ *R.M.*, Docket No. 14-428 (issued June 25, 2014).

¹⁸ See *C.M.*, Docket No. 11-284 (issued September 14, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 14, 2014 is affirmed.

Issued: November 7, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board