

On appeal, appellant's attorney asserts that OWCP erred because it had not adjudicated a claimed work incident that occurred on December 4, 2013 when appellant claims he was inappropriately monitored by microphone.

FACTUAL HISTORY

On July 22, 2005 appellant, then a 41-year-old firefighter, filed one page of an occupational disease claim alleging that factors of his employment caused an emotional condition. OWCP initially designated the claim as a duplicate of an occupational disease claim, case adjudicated under file number xxxxxx758, but on July 14, 2009 determined it was a new claim and forwarded it to the employing establishment to complete the form and return it to OWCP for processing.³

In a letter dated September 23, 2010, OWCP asked the employing establishment to respond to appellant's allegation that on December 4, 2003 he was secretly microphoned and baited into a confrontation with firefighter Traci Grant. On October 4, 2010 the employing establishment forwarded Equal Employment Opportunity Commission (EEOC) documentation including decisions dated June 2, 2006, February 12, 2007 and January 14, 2008, none of which were favorable to him.

By decision dated May 13, 2011, OWCP found that appellant did not establish any additional factors of employment and denied his claim. It noted that his allegation that he was improperly monitored by microphone on December 4, 2003 had been properly and thoroughly adjudicated under his other claim.

On July 26, 2013 appellant, through his attorney, requested reconsideration. He alleged clear evidence of error in this case because, contrary to the assertion in its May 13, 2011 decision in this claim under file number xxxxxx880, OWCP did not adjudicate the claimed December 4, 2003 microphoning incident in case file number xxxxxx758.

In an October 17, 2013 decision, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ When an application for review is untimely, OWCP undertakes a limited review to determine

³ Claim file number xxxxxx758 was accepted for adjustment reaction. In a January 29, 2008 decision, Docket No. 07-1437, the Board affirmed a February 6, 2007 OWCP's decision that found that appellant did not meet his burden of proof to establish that his claimed disability on or after July 15, 2005 was causally related to the accepted employment injury. On October 20, 2008 the Board denied appellant's petition for reconsideration. Claim file number xxxxxx758 is not presently before the Board.

⁴ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

whether the application presents clear evidence that its final merit decision was in error.⁵ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of OWCP regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁶ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To show clear evidence of error, the evidence submitted 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.⁸

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as 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.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The only decision before the Board is the October 17, 2013 decision in which OWCP denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Appellant requested reconsideration with OWCP on July 26, 2013, alleging that it committed clear evidence of error by not adjudicating a claimed factor of employment. The Board finds that as more than one year has elapsed between the most recent merit decision on this issue, an OWCP decision dated May 13, 2011 and

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ 20 C.F.R. § 10.607.

⁷ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁰ *Nancy Marcano*, 50 ECAB 110 (1998).

appellant's request for reconsideration dated July 26, 2013, the request for reconsideration was untimely.¹¹

The Board, however, finds that appellant has established clear evidence of error. Appellant, through counsel, asserted on appeal that OWCP erred because it had not adjudicated a claimed work incident -- that on December 4, 2013 he was inappropriately monitored by microphone. The Board has carefully reviewed both the xxxxxx758 and xxxxxx880 case records and there is no evidence that the claimed December 4, 2003 monitoring incident has been properly and thoroughly adjudicated by OWCP.

In the October 17, 2013 decision, OWCP denied appellant's claim of error by stating that the incident had been explained in a May 13, 2011 decision and in a February 6, 2007 hearing representative decision. While the incident is mentioned, it merely stated, "Though he alleged he was being monitored by a microphone and baited into a confrontation, this allegation was identified and adjudicated under his previous claim as noted in the [February 6, 2007] decision from the Branch of Hearings and Review.... Consequently, we will not readdress this allegation since it occurred prior to [January 23, 2004] and was properly and thoroughly adjudicated under appellant's previous claim."

In the February 6, 2007 decision, adjudicated under file number xxxxxx758, OWCP's hearing representative indicated that appellant testified at a December 6, 2006 hearing regarding the claimed allegation that on December 4, 2003 he was secretly monitored "in a deliberate attempt to bait him into violating a direct order not to speak with Firefighter Grant." The hearing representative stated that OWCP did not find this allegation factual and referred to a January 12, 2006 decision and statement of accepted facts in claim file number xxxxxx758. The hearing representative stated that the seven factors of employment accepted by OWCP were clearly outlined in the statement of accepted facts, the details of which were incorporated into the decision by reference. The June 3, 2005 statement of accepted facts, however, does not reference the taping incident.

The January 12, 2006 OWCP decision referenced the monitoring allegation, stating that during a November 24, 2005 conference, appellant maintained that he was being secretly taped and was advised by OWCP that this and perceived problems with his captain would be considered new work factors and he should file a new Form CA-2 claim for these work incidents. Appellant subsequently filed claim number xxxxxx880. The January 12, 2006 decision found that, although employment factors had been accepted on July 18, 2005, the medical evidence did not establish that the claimed emotional condition was caused by the accepted factors. Again, a review of the June 3, 2005 statement of accepted facts does not reference the taping incident.

The Board finds that under these specific facts and circumstances, it is clear that appellant's allegation that he was secretly monitored has not previously been appropriately adjudicated by OWCP with a statement of reasons in its final decision and therefore appellant has established OWCP error. OWCP's incomplete adjudication of the specific and clearly enunciated employment factor does not satisfy its obligation to provide a decision with

¹¹ 20 C.F.R. § 10.607(a).

appropriate findings and clearly stated reasons.¹² The case will be remanded to OWCP for an appropriate decision on appellant's claimed factor that he was secretly monitored.

CONCLUSION

The Board finds that appellant established clear evidence of error as OWCP failed to properly address a claimed employment factor.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: October 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² *Tonja R. Hiebert*, 55 ECAB 706 (2004).