

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

C.B., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
LANGLEY AIR FORCE, Langley, VA, Employer)

**Docket No. 14-1232
Issued: October 8, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2014 appellant filed a timely appeal from an April 8, 2014 decision of the Office of Workers' Compensation Programs (OWCP), which denied his 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 OWCP merit decision, dated March 5, 2013 and the filing of this appeal on May 5, 2014 the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 59-year-old supervisor, filed a Form CA-2 claim for benefits on May 23, 2012 alleging an emotional condition causally related to employment factors.

In a report dated March 28, 2012, Dr. Howard J. Bierenbaum, Ph.D. in clinical psychology, stated that appellant had encountered increasing difficulties over the previous five months since being transferred to his current position. He advised that appellant had experienced depression, insomnia, loss of concentration, persistent worry, episodes of panic, social withdrawal and concerns of losing control. Dr. Bierenbaum advised that appellant was concerned about his ability to manage these symptoms, perform in the workplace and the fear that he might lose his job in his last year of civil service employment prior to retirement. He asserted that there was evidence for an acute major depressive episode, characterized by some agitation and erratic behavior, in addition to an anxiety disorder. Dr. Bierenbaum recommended treatment with a physician or psychiatrist, to reduce appellant's symptoms of anxiety, irritability and depression and psychotherapy, to examine the sources of his distress. He also recommended removal from the sources of appellant's acute distress, to reduce his acute agitation.

In a statement dated November 1, 2012, appellant denied management's accusations that he used offensive language to his subordinates. He alleged that he had been being singled out by management for investigation and unfairly accused of abusive behavior. Appellant felt that he had received an unfair performance appraisal and was the target of unfounded accusations. The accusations were unreasonable not based on actual facts and they resulted in his stress, major depression and anxiety. Appellant believed that he might "snap" under the pressure and tension caused by interacting with his immediate supervisor and work demands. Management denied his reassignment request. Appellant worried about managing his symptoms and his assigned duties. He alleged that his supervisor placed pressure on him because of a lack of concern and comments unreasonable demands. Appellant further alleged that management's demands did not take into account his advanced age.

By decision dated March 5, 2013, OWCP denied the claim, finding that appellant failed to establish compensable factors of employment.

In a report dated November 6, 2013, Dr. Bierenbaum reiterated the findings, diagnoses and conclusions contained in his March 28, 2012 report. He stated that appellant's history suggested vulnerabilities to depression, generalized anxiety and post-traumatic stress, exacerbated by his October 2011 transfer to his current work assignment. Dr. Bierenbaum related an acceleration in these symptoms over the past six months, which left appellant unable to meet his work responsibilities. He advised that appellant showed a positive response to psychotherapy and sick leave, however, he experienced anxiety when anticipating the stresses associated with a return to the work setting. Dr. Bierenbaum reported that management was not able to offer appellant a less stressful work assignment and had offered him medical retirement.

In a report dated May 14, 2012, received by OWCP on March 13, 2013, it was indicated recent treatment by a psychiatrist and psychologist for various mental issues, including anxiety and panic attacks. However, report was incomplete, with pages missing and was not signed by a

physician. Appellant related that his medical providers had encouraged him not to return to work.

By letter dated March 5, 2014, received by OWCP on March 13, 2014 appellant requested reconsideration.

By decision dated April 8, 2014, OWCP denied appellant's application for review on the grounds that it was untimely received on March 13, 2014 and did not establish clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.² 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.³ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁴ It will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which 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.⁷

OWCP's 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,

² See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

³ 20 C.F.R. §10.607(a); *S.S.*, Docket No. 13-2151 (April 1, 2014).

⁴ *D.G.*, 59 ECAB 455 (2008).

⁵ 20 C.F.R. § 10.607.

⁶ See *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB713 (2007).

⁷ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006).

would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁰ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues. The Board notes that, as of August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP.¹¹

In the present case, the last merit decision was issued in this case on March 5, 2013. As appellant's March 5, 2014 request for reconsideration was not received by OWCP until March 13, 2014 and it was therefore untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.

The underlying claim for compensation was denied on the grounds that appellant had not established a compensable factor of employment. In the last merit review of this case, OWCP determined that he had not established that his allegations regarding his work factors, including that the employing establishment's investigation was instigated by someone who had a vendetta against him or that during the investigation individuals were coerced into giving statements or that the investigation prejudged him or that he was undermined in favor of subordinates. It also determined that appellant had not established or abuse error by the employing establishment in initiating its investigation based a suggestion of inappropriate conduct. Reassignment of appellant to a new position, denial of an alternate work schedule and denial of authorization of physical training likewise were not sufficient.

On reconsideration appellant submitted the November 6, 2013 report from Dr. Bierenbaum and the unsigned, partial copy of a May 14, 2012 report. These reports do not address the basis upon which the claim was denied. Appellant did not submit evidence which, on its face, establishes a compensable factor of employment. The evidence submitted on reconsideration therefore does not establish clear evidence of error in the denial of appellant's claim.

⁸ *James Mirra*, 56 ECAB 738 (2005).

⁹ *See S.S.*, *supra* note 4.

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Supra see* also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (August 29, 2011).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and insufficient to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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