

FACTUAL HISTORY

On November 5, 2012 appellant, then a 49-year-old letter carrier, filed a Form CA-2, occupational disease claim, alleging that he developed an emotional condition at his workplace. He first became aware of his condition on September 27, 2012 and realized it was causally related to his employment on the same day. Appellant stopped work on November 1, 2012.

Appellant submitted reports from Dr. Nancy A. Folks, a Board-certified psychiatrist, and Dr. Arnold Markman, a Board-certified psychiatrist, dated November 2 to 30, 2014. The physicians treated appellant for stress reaction causing mixed disturbance, anxiety, obsessive compulsive disorder, and generalized anxiety disorder. Appellant submitted a letter of warning from the employing establishment dated August 11, 2010 for unacceptable work performance and a September 17, 2012 letter of warning for failure to follow instructions. Also submitted was an Office of the Inspector General report dated December 17, 2012 which noted that appellant received disciplinary action due to performance-related issues and filed an Equal Employment Opportunity (EEO) complaint alleging harassment and mistreatment by management.

On March 7, 2013 OWCP asked appellant to submit additional evidence including a detailed description of the employment incidents that contributed to his claimed illness.

In a statement dated April 12, 2013, appellant indicated that his supervisors yelled at him during the period January 18 to November 1, 2012. He asserted that he worked in a hostile and toxic work environment. Appellant alleged that he received numerous investigative interviews which were unjustified and unwarranted and which were subsequently rescinded through the grievance process. He alleged that he was treated unfairly and disparately and was harassed, retaliated against, and discriminated against by management. Appellant alleged that his supervisors monitored his daily activity and he was shadowed on his route by up to three supervisors who sometimes yelled and screamed at him. He alleged that he was given conflicting instructions from his supervisors who always found fault with him, invaded his personal space, threatened and intimidated him, made false statements and false accusations, and questioned his character, ethics, and integrity.

In a May 2, 2013 decision, OWCP denied appellant's claim for an emotional condition as the evidence did not support that the events occurred as alleged. The decision was sent to appellant's address of record.

In an appeal request form dated September 25, 2013 and postmarked September 26, 2013, appellant requested a review of the written record. In a letter dated September 25, 2013, he indicated that he did not timely file a request for a review of the written record because he never received the May 2, 2013 OWCP decision. Appellant noted contacting OWCP and it then resent the decision on September 4, 2013.² He reasserted that his claim should be accepted for

² The record contains a September 3, 2013 telephone memorandum in which appellant indicated that he never received the May 2, 2013 decision. OWCP confirmed with him that the decision was sent to the correct address. In a September 4, 2013 telephone memorandum, it noted that appellant read from a prepared statement indicating that he never received the decision and wanted the decision resent to him. OWCP noted that it again confirmed his address and advised him that it would send him a copy of the decision.

job-related stress and his condition was the direct result of harassment and retaliation at the employing establishment in the form of management shadowing his work, excessive observation, harassment, discrimination, and disciplinary actions. Appellant submitted grievance settlement agreement forms dated November 8, 2006 to October 26, 2012. He was treated by Dr. Lori Magnusson, a psychologist, from April 12, 2012 to October 23, 2013, for generalized anxiety disorder and opined that appellant was disabled from work. Appellant submitted medical records from Dr. Markman dated April 23 to May 9, 2013 who treated him for obsessive compulsive disorder and occupational problems. On September 25, 2013 he was treated by Dr. David Aycock, a psychologist, for anxiety disorder caused by his work injury of September 27, 2012. Appellant submitted a statement from Ralph Ramsey, a coworker, dated June 11, 2013, who witnessed management harassing appellant. In a September 17, 2013 statement, Betty Cameron, a union representative, stated that she witnessed appellant being harassed by management and singled out in meetings. In an October 1, 2013 statement, Ricardo Guzman, a union steward, noted that appellant was harassed and intimidated by management throughout his career which intensified in 2006. Similarly, a witness statement from Emilie Kothe, a coworker, dated October 3, 2013, noted witnessing management finding fault with appellant's work.

In a decision dated November 29, 2013, OWCP denied appellant's request for a review of the written record. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

Appellant submitted a letter dated December 13, 2013 and disagreed with the November 29, 2013 decision. He alleged that he did not receive the May 2, 2013 OWCP decision denying his claim. Appellant indicated that on September 3, 2013 he learned his claim was denied when he looked at OWCP portal. He contacted OWCP and they resent the decision which he received on September 7, 2013. Appellant indicated that the May 2, 2013 decision had a handwritten note above the decision date noting "resent September 4, 2013." He contends that since the letter stated "resent" on September 4, 2013, this was the new date of the decision and he had 30 additional days to request a review of the written record. Appellant further indicated that when he submitted the appeal request form he incorrectly noted the decision date as May 2, 2013. He asserts that his claim should not be denied as untimely because he did not receive the decision letter of May 2, 2013 until September 7, 2013. Appellant submitted a copy of OWCP decisions dated May 2 and November 29, 2013, a copy of an OWCP decision dated May 2, 2013 resent on September 4, 2013, a September 25, 2013 letter requesting a review of the written record, a September 25, 2013 appeal request form, all previously of record.

In a letter dated May 6, 2014, OWCP indicated that a decision was issued on November 29, 2013 noting appellant's request for a review of the record was untimely and he was provided with appeal rights. It advised that, if he disagreed with the decision he should follow his appeal rights.

In an appeal request form dated May 23, 2014 and received by OWCP on May 28, 2014, appellant requested reconsideration. On May 26, 2014 he requested reconsideration and asserted that there had been clear evidence of error in his case. Appellant indicated that he did not receive the May 2, 2013 decision which denied his claim and only learned that his claim was

denied when he accessed an OWCP portal on September 3, 2013. He indicated that he contacted OWCP and spoke to his claims examiner on September 4, 2013. Appellant informed her that he did not receive the May 2, 2013 decision and she resent the decision to him. He noted receiving the May 2, 2013 decision on September 7, 2013 which had a handwritten note over the date stating “resent September 4, 2013.” Appellant believed the new time frame for his appeal rights was September 4, 2013. He submitted a notarized statement dated May 23, 2014 which stated that he did not receive the letter from OWCP dated May 2, 2013 until he called his claims examiner on September 3, 2013. Appellant submitted a copy of OWCP’s decision dated November 29, 2013, and a copy of OWCP’s letter dated May 6, 2014, previously of record.

By decision dated August 22, 2014, OWCP denied appellant’s request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.⁴ However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁵

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.⁶ Evidence that does

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, 50 ECAB 210 (1998).

not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹¹ As appellant's request for reconsideration was not received by OWCP until May 28, 2014, more than one year after issuance of the May 2, 2013 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its May 2, 2013 decision denying his claim for an emotional condition.

The Board further notes that appellant has alleged that he never received OWCP's May 2, 2013 decision denying his claim for an emotional condition and that the first time he received the decision was when OWCP resent it to him on September 7, 2013. However, the record supports that OWCP's May 2, 2013 decision was sent to appellant at the address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹² Thus, it is presumed that appellant received the May 2, 2013 decision. Furthermore, while the record supports that OWCP resent the May 2, 2013 decision to appellant on or about September 4, 2013, there is no indication in the record that OWCP reissued the decision on or about that date.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. On May 26, 2014 appellant requested reconsideration and asserted that there has been clear evidence of error. He indicated that he did not receive the May 2, 2013 decision which denied his claim and only learned that his claim was denied when he accessed OWCP's portal on September 3, 2013. Appellant indicated that his claims examiner contacted him on September 4, 2013 and he informed her that he did not receive the May 2, 2013 decision and she resent the decision to him. He noted receiving the May 2, 2013 decision on September 7, 2013 which had a handwritten note over the date stating "resent September 4, 2013." Appellant believed the new

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ *Supra* note 4.

¹² *A.C. Clyburn*, 47 ECAB 153 (1995).

time frame for his appeal rights was September 4, 2013. There is no evidence that OWCP reissued the May 2, 2013 decision at a later date. While appellant addressed his disagreement with OWCP's decision which found his reconsideration request untimely filed, his allegations about the receipt of the May 2, 2013 decision do not raise a substantial question as to the correctness of OWCP's decision denying his claim for an emotional condition.

In support of his reconsideration request, appellant also submitted evidence. He submitted a notarized statement dated May 23, 2014 which stated that he did not receive the letter from OWCP dated May 2, 2013 until he called his claims examiner on September 3, 2013. However, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. The Board notes that appellant's claim for an emotional condition was denied because he had not attributed his claimed emotional condition to any compensable employment factors. This notarized statement does not address the deficiency in appellant's claim, specifically that he did not attribute his condition to a compensable employment factor. Therefore, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of 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.¹³

Appellant submitted a copy of OWCP decisions dated May 2 and November 29, 2013, a copy of OWCP's decision dated May 2, 2013 resent on September 4, 2013, a September 25, 2013 letter requesting a review of the written record, a September 25, 2013 appeal request form, a copy of OWCP's letter dated May 6, 2014, all previously of record. OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. Resubmission of this evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, this resubmitted evidence is insufficient to show clear evidence of error.

Thus, appellant has not established clear evidence of error by OWCP in its August 6, 2010 decision.

On appeal, appellant reiterated assertions that he made before OWCP indicating that he did not receive the May 2, 2013 decision, that he timely pursued his review rights, and that he established that he developed an emotional condition in the performance of duty. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained above appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹³ *D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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