

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

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A.B., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, O'HARE )  
INTERNATIONAL AIRPORT, Chicago, IL, )  
Employer )

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**Docket No. 15-531  
Issued: June 18, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 20, 2015 appellant filed a timely appeal from a July 29, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed between the most recent OWCP merit decision, dated May 7, 2013 and the filing of this appeal on January 20, 2015, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 not timely filed and failed to present clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 4, 2003 appellant, then a 54-year-old transportation security screener, injured his right shoulder when a police officer pushed his arm. OWCP initially accepted his claim for right shoulder and upper arm sprain. Appellant did not stop work.

Appellant was treated by Dr. Tais Crawford, a Board-certified family practitioner, from November 17, 2003 to February 16, 2004, for a right arm injury. He reported injuring his right arm while checking the identification of an officer. Dr. Crawford diagnosed right shoulder strain and recommended physical therapy and light-duty work. A magnetic resonance imaging (MRI) scan of the right shoulder dated February 18, 2014 revealed clinical findings of impingement with no evidence of a rotator cuff tear.

Appellant was also treated by Dr. Robert C. Evans, a psychologist, from January 20 to March 30, 2004, for clinical depression. Dr. Evans noted that appellant displayed moderate depressive symptoms which appeared to be job related. Appellant reported sustaining a shoulder injury that interfered with his ability to pick up bags which was part of his job description. Dr. Evans noted appellant's recurring episodes of stress which were associated with his fear of being terminated.

On March 9, 2005 OWCP expanded appellant's claim to include neurotic depression.

Appellant continued to be treated by Dr. Evans from August 6, 2008 to June 10, 2009, who noted that appellant had clinical counseling for depression after a physical conflict with a police officer on November 4, 2003 where he was injured. On June 10, 2009 Dr. Evans noted treating appellant since 2003 for neurotic depression which was associated with a work-related injury to his right shoulder and upper arm. He noted that appellant's depression was recurring with symptoms of anxiety.

Thereafter, in the course of developing the claim, OWCP referred appellant to several second opinion physicians.

On May 10, 2010 OWCP issued a notice of proposed termination of medical and compensation benefits. It found that the medical evidence established that the sprain of the shoulder and upper arm and aggravation of neurotic depression had ceased and that he no longer had any disability or residuals due to the accepted work-related conditions.

On June 9, 2010 appellant disagreed with the notice of proposed termination and asserted that he has not adequately recovered from the accepted neurotic depression and continued to receive counseling for depression. He noted that although he returned to work he had not fully recovered from his depressive condition.

By decision dated June 17, 2010, OWCP terminated all of appellant's medical and compensation benefits effective June 16, 2010, finding that the weight of the medical evidence established that he had no continuing disability resulting from his accepted employment conditions. On December 10, 2010 appellant requested reconsideration. In a February 10, 2011 decision, OWCP denied modification its June 17, 2010 decision.

By appeal form dated January 4, 2012, received by OWCP on January 9, 2012, appellant again requested reconsideration. In a letter dated January 3, 2012, he indicated that he had a preexisting medical condition that was worsened by his work injury of November 4, 2003. Appellant referenced a letter from Dr. Joyce Miller, a psychiatrist dated May 5, 2003. He submitted a September 29, 2010 report from Dr. Deborah Spitz, a Board-certified psychiatrist, who treated him from March 18 to April 29, 2009. Dr. Spitz noted that appellant had a history for dysthymic disorder and diagnosed major depressive disorder which contributed to two months of missed work. He noted that people with dysthymia were susceptible to major depressive episodes.

In a decision dated May 7, 2013, OWCP denied modification of the prior decision.

On May 9, 2014 appellant requested reconsideration. In his May 6, 2014 letter, he asserted that his preexisting condition of mild depression worsened into neurotic dysthymia depression as a result of his work injury. Appellant contended that, under Illinois law, if a worker had a preexisting condition that was worsened as a result of a job injury, the preexisting condition was also compensable. He requested compensation for his preexisting depression. Appellant referenced an e-mail from Dr. Spitz who noted dysthymia was a long lasting mild depression. Appellant believed his depression worsened from mild depression into long lasting depression. He noted that prior to the November 4, 2003 work injury his mood and work attendance were better and after the work injury his depression worsened. Appellant submitted a May 5, 2003 statement from Dr. Miller who noted that she saw appellant for mild depression. Also submitted was a May 1, 2014 e-mail from Dr. Spitz who noted dysthymia was a long lasting mild depression and provided two research links for additional information.

By decision dated July 29, 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.”<sup>2</sup>

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

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<sup>2</sup> *Id.* at § 8128(a).

one year of the date of OWCP's decision for which review is sought.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>6</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>7</sup> 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.<sup>8</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>9</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>10</sup> As appellant's request for reconsideration was not received by OWCP until May 9, 2014, more than one year after issuance of the May 7, 2013 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its May 7, 2013 decision.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his May 6, 2014 reconsideration request, appellant disagreed with OWCP's decision terminating his compensation and medical benefits for his accepted conditions. He asserted that his preexisting condition of mild depression worsened into neurotic dysthymia depression as a result of his work injury. Appellant referenced an Illinois law which provided that a preexisting

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>5</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>6</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>10</sup> *Supra* note 3.

condition that worsened as a result of a job injury was also compensable.<sup>11</sup> While appellant explained his disagreement with OWCP's decision terminating his compensation benefits, this statement does raise a substantial question as to the correctness of OWCP's decision.

The Board notes that the issue is medical in nature and that, on reconsideration, appellant submitted additional medical evidence. Appellant submitted a May 5, 2003 statement from Dr. Miller, who saw appellant for mild depression. Also submitted was a May 1, 2014 e-mail from Dr. Spitz who diagnosed dysthymia and defined it as a long lasting mild depression. However, this evidence does not raise a substantial question as to the correctness of OWCP's decision. 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.<sup>12</sup>

On appeal, appellant reiterated his assertions before OWCP that his preexisting condition of mild depression worsened into neurotic dysthymia as a result of his November 4, 2003 injury.

### **CONCLUSION**

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

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<sup>11</sup> An employee's rights or remedies under other statutory authority does not establish entitlement to benefits under FECA. The laws of the state of Illinois are not determinative of appellant's entitlement to benefits under FECA. See *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>12</sup> *D.G.*, 59 ECAB 455 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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