

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

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|--|---|-------------------------------|
| L.W., Appellant                            | ) |                               |
|  | ) |                               |
| and  | ) | <b>Docket No. 14-1242</b>     |
|  | ) | <b>Issued: March 19, 2015</b> |
| <b>DEPARTMENT OF HEALTH &amp; HUMAN</b>    | ) |                               |
| <b>SERVICES, CENTER FOR MEDICARE &amp;</b> | ) |                               |
| <b>MEDICAID SERVICES, Baltimore, MD,</b>   | ) |                               |
| <b>Employer</b>                            | ) |                               |
|  | ) |                               |

*Appearances:*  
*Appellant, pro se*  
*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 5, 2014 appellant filed a timely appeal from an April 1, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Since more than 180 days elapsed from the last merit decision of September 17, 2009 and the filing of this appeal and pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Included with appellant's appeal was a timely request for oral argument. On January 5, 2015 the Board issued an Order Denying Request for Oral Argument in this case. Docket No. 14-1242 (issued January 5, 2015).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for further review of the merits as his request for reconsideration was not timely filed and failed to establish clear evidence of error.

## **FACTUAL HISTORY**

On June 5, 2007 appellant, then a 42-year-old health insurance specialist, filed both traumatic injury and occupational disease claims. On the traumatic injury claim form, he indicated that the date of injury was 1994 and, on the occupational disease claim form, he alleged that he developed a stress-related condition in 1994 and first realized that his condition was caused or aggravated by his employment in 1994. Appellant attributed his condition to harassment and discrimination by the employing establishment, a hostile work environment, and reassignment to a position in which he had limited experience. He was terminated from the employing establishment effective May 6, 1997. In a June 12, 2007 statement, the employing establishment challenged the claim on the grounds that appellant did not file a timely notice of injury within three years of the claimed injury. It noted that none of his former supervisors were available to confirm or refute the claim.

By letter dated June 15, 2007, OWCP requested that appellant explain the delay to file the claim, address the specific work factors being claimed and provide any documentary evidence regarding any complaints, explain the development of his condition, and provide all medical records, including a detailed medical report addressing causal relationship of the alleged work factors, and his condition. On June 5, 2007 appellant filed a Form CA-7, claiming wage-loss benefits. On July 30, 2007 he also submitted a nine-page statement along with various records, which included notices of disciplinary action, an April 9, 1998 notice of approval for disability retirement, an undated affidavit from Kermit Lee, and personnel records.

By decision dated August 31, 2007, OWCP denied the claim finding insufficient evidence to establish that appellant filed a timely notice of injury.

On October 1, 2007 appellant requested an oral hearing before an OWCP hearing representative. In a December 10, 2007 letter, he requested that subpoenas be sent for testimony and documents. By letter dated July 8, 2008, the request was denied.

A hearing was held on July 29, 2008. Appellant argued that his disabling mental and physical state and the subpoena denial put him at a disadvantage to present evidence and/or arguments regarding his appeal. He testified that he continued to be subjected to employing establishment retaliation. Appellant stated that he initially requested assistance about his rights and mental disability in 1998 and argued the employing establishment was aware of his mental condition and disability in 1998. He stated that he began experiencing problems in the workplace during 1994. Appellant's personnel file was updated for a handicap code in an April 1994 SF-50, which he argued put the employing establishment on notice of his disability. He also sought assistance through the Employee Assistance Program, which also demonstrated his disability to the employing establishment. Appellant elaborated upon the specific work factors claimed, which started in 1994. He stated that, although he was subjected to harassment, and a retaliatory and threatening work environment, he continued performing his job duties and had notified the employing establishment of an injury, explaining that the actions of the

employing establishment and the employees had contributed to his condition at that time. Appellant explained that, during 1996, his condition began to manifest itself as a result of ongoing events in the workplace and provided details of those events.

Appellant testified that, during September 1996, he did not advise the employing establishment of an injury as he did not consider that he was injured at that time. He stated, however, that they knew of the work factors and hostility in the work environment. Appellant referenced various e-mails and discussions with supervisors with regard to work-related events and argued that this put the employing establishment on notice that the situations could have caused or resulted in his condition. He argued that his delay to file the claim should be excused under the equitable tolling rule as the employing establishment was inappropriate and showed misconduct in its actions by not assisting him or providing him with information and allowed the filing deadline to pass. Appellant indicated that he was not allowed to return to the employing establishment's premises after his March 4, 1996 removal and subsequent termination. When he filed his claim for Office of Personnel Management (OPM) benefits in 1997 or 1998, he had made the employing establishment aware that he wanted to file an injury claim at that time and requested OPM information. Appellant submitted evidence in support of his arguments.

By decision dated December 1, 2008, OWCP's hearing representative affirmed the August 31, 2007 decision. She found that, at the time appellant was terminated in May 1997, it was evident from his testimony, the record evidence and argument presented, that he was aware, or by exercise of reasonable diligence should have been aware, of a causal relationship between his employment and the claimed emotional condition to some degree; thus OWCP properly determined that he did not file within three years of his last exposure to the alleged work factors, May 6, 1997. The hearing representative further found that there was no evidence to establish that the immediate supervisor had knowledge of an on-the-job injury or that written notification was provided to advise of such. Further, none of the exceptions which would toll the relevant time limitation provision were applicable.

On August 7, 2009 OWCP received a seven-page request for reconsideration from appellant. In his statement, appellant alleged that the date of injury was March 3, 1997 and that he reported the injury various individuals and union representatives. He noted that 1994 was the date he filed his racial harassment and discrimination complaint. Appellant further argued that he reported his injury to a Mr. Jones and a Mr. Moore on March 4, 1997 and told them he would like to make a claim. He also stated that he had requested to file a claim to several individuals, whom he listed, both before and after his 1997 termination. Appellant also argued that OWCP erred in denying an excusable neglect waiver of the three-year time frame and listed several federal laws and court proceedings in support of his contention. He also argued that the denial of the subpoena for witnesses and production of discovery documents was error.

The new evidence submitted included: court proceedings from 2007 and 2008; Maryland Office of Administrative Hearings certification form completed April 9, 2008 with a statement from appellant attached; Merit Systems Protection Board (MSPB) decision dated August 6, 2008; a social security decision dated July 28, 2008; the Federal Register; and several Supreme Court rulings.

By decision dated September 17, 2009, OWCP reviewed the merits of the claims but denied modification of the prior decision.

On February 9, 2010 OWCP received appellant's request for reconsideration, which included 109 pages of arguments and documents. Appellant argued that his Federal Employees' Retirement System disability retirement application of December 10, 1997 showed that he suffered from paranoia due to harassment and discrimination. He argued that a Mr. Jones and a Mr. Moore and a Dr. McPhillips were notified of his injury and failed to help him complete the claim form. Appellant argued that he was banned from the employing establishment's buildings and denied the right to file for benefits, including workers' compensation. He argued that he was intentionally given incorrect appeal rights to the MSPB and Equal Employment Opportunity Commission by the employing establishment. Appellant also argued that in 1997 he was diagnosed with paranoid delusional disorder and depression and his decision-making ability was seriously limited.

By nonmerit decision dated February 24, 2010, OWCP denied reconsideration of the prior decision, finding that the arguments were either previously considered and addressed or not relevant to the issue of whether the claim was timely filed.

On April 2, 2010 OWCP received an 18-page reconsideration request from appellant, in which he contended that his claim was timely filed. Evidence submitted included duplicate copies of information previously of record.

By nonmerit decision dated July 1, 2010, OWCP denied reconsideration of the prior decision, finding that the reconsideration request neither raised substantive legal questions nor included new and relevant evidence or contentions not previously considered.

On July 19, 2010 OWCP received a July 16, 2010 letter from appellant requesting reconsideration. Arguments and evidence previously considered were submitted. By nonmerit decision dated September 13, 2010, OWCP again denied reconsideration of the prior decision, finding that the reconsideration request neither raised substantive legal questions nor included new and relevant evidence or contentions not previously considered.

On May 9, 2012 OWCP received appellant's letter requesting reconsideration. Appellant contended that his supervisor had timely knowledge of his condition; that his delusional disorder prevented him from filing a timely claim; and that he was discriminated against by officials at the employing establishment.

By nonmerit decision dated July 26, 2012, OWCP denied reconsideration of the prior decision, finding that the reconsideration request neither raised substantive legal questions nor included new and relevant evidence or contentions not previously considered.

On August 15, 2012 OWCP received appellant's August 8, 2012 reconsideration request. Appellant argued that he timely filed the claim. He stated that the date of injury was March 4, 1997, not January 1, 1994, and his immediate supervisors were reasonably put on notice of an on-the-job injury. Appellant also argued that he was diagnosed with paranoia delusional disorder from 1997 to 2008 and was incompetent. Evidence previously of record was resubmitted.

By nonmerit decision dated August 31, 2012, OWCP denied reconsideration of the prior decision, finding that the reconsideration request neither raised substantive legal questions nor included new and relevant evidence or contentions not previously considered.

On June 20, 2013 OWCP received appellant's June 20, 2013 reconsideration request. Appellant continued to argue that the injury occurred in 1997 and that he qualified for tolling the time for filing a claim provided by 5 U.S.C. § 8122 because of his psychiatric incompetence and no representation. Evidence submitted included copies of 1997 to 1998 paperwork regarding applying for benefits from OPM, MSPB paperwork from 2008, photocopies of pages from Title 5, copies of paperwork from 1997 regarding his request for documentation, copies of previously received letters from him to his employing establishment, and medical records.

By decision dated June 27, 2013, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On February 26, 2014 OWCP received appellant's February 26, 2014 letter requesting reconsideration. Appellant argued that it was inconsistent that the Secretary of the U.S. Department of Labor approved his disability claim *via* The UnumProvident Settlement while OWCP continued to deny his workers' compensation claim. Two pages of frequently asked questions about The UnumProvident Settlement were provided.

By decision dated April 1, 2014, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>5</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>6</sup> OWCP regulations and procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise, and explicit and must

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>6</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>7</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (October 2011). OWCP procedures further provide 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. *Id.* at Chapter 2.1602.3(c).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that OWCP committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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.<sup>13</sup>

### ANALYSIS

In the last merit review of appellant's case on September 17, 2009, he testified to knowledge of his condition and its possible work relatedness at least by 1997, at the July 2008 hearing. As he did not file his claim until 2007, he was clearly outside the three-year limitation period of 5 U.S.C. § 8122(b). Further, there was no evidence that appellant's immediate supervisor had knowledge of any injury within 30 days and that there were no exceptional circumstances which would excuse his failure to comply with the applicable time limitation provision.

Thus, OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>14</sup> As appellant's February 26, 2014 request for reconsideration was received by OWCP on February 26, 2014, more than one year after the last merit decision of September 17, 2009, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>15</sup>

Appellant argued that the denial of his claim was inconsistent as the Secretary of the U.S. Department of Labor approved his disability claim *via* The UnumProvident Settlement while OWCP continued to deny his workers' compensation claim. In support of his contention, two pages of frequently asked questions about The UnumProvident Settlement were provided. The Board initially notes that there is no evidence that appellant's disability claim was approved under The UnumProvident Settlement. The evidence submitted, two pages of frequently asked questions about The UnumProvident Settlement, is not evidence that appellant's claim had been approved and is informational in nature. Furthermore, even if appellant's claim was approved

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<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>11</sup> See *Leona D. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> See *Robert F. Stone*, 57 ECAB 292 (2005); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

under The UnumProvident Settlement, this does not establish that he filed a timely claim for FECA compensation, or that the employing establishment had timely notice of his injury. This evidence and his argument is not relevant to the issue of whether he submitted his claim in a timely manner and does not raise a substantial question as to the correctness of the last merit decision. Therefore, appellant has not established clear evidence of error.

On appeal, appellant contends that the Federal Government placed barriers on his filing for benefits, such as denying his request for information and denying his request for subpoena of witnesses at his hearing. OWCP, however, previously considered these arguments in its prior decisions. Furthermore, some of the arguments raised by appellant on appeal are outside the jurisdiction of the Board.<sup>16</sup> As noted, none of the evidence submitted on reconsideration raises a substantial question concerning the correctness of OWCP's decision.<sup>17</sup>

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits as his request was untimely filed and failed to establish clear evidence of error.

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<sup>16</sup> To the extent that appellant asserts that he was denied due process by his employing establishment, the Board notes that this argument would be related to a constitutional question. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures. See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein. See also *Robert F. Stone, id.*; *Diana L. Smith*, 56 ECAB 524 (2005).

<sup>17</sup> A.S., Docket No. 11-356 (issued September 16, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2015  
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