

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

I.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 15-0523
Issued: November 6, 2015**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 5, 2015 appellant filed a timely appeal from a September 26, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between February 26, 2010, the date of the most recent merit decision, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of appellant's claim.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

This matter has previously been before the Board. On September 21, 2009 appellant, then a 32-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging an emotional condition due to various incidents and conditions at work. He claimed that management improperly failed to select him to fill several job vacancies, neglected to provide him proper relocation notice when his job was being moved to another state in August 2009, and wrongly failed to credit him for time spent during the relocation process. Appellant also alleged that management subjected him to harassment, discrimination, threats, and retaliation with regard to the job bidding and relocation processes.³

In support of his claim, appellant submitted numerous e-mails and letters regarding the bidding process for several job vacancies and the circumstances of his relocation in August 2009.⁴ He also submitted documents relating to Equal Employment Opportunity (EEO) claims he had filed on these issues. Appellant submitted medical evidence in support of his claim.

In a February 26, 2010 decision, OWCP denied appellant's emotional condition claim because he had failed to establish any compensable work factors. It found that he did not submit sufficient evidence to show that management committed error or abuse with respect to administrative matters or that management subjected him to harassment and discrimination.

Appellant filed an October 15, 2012 request for reconsideration of OWCP's February 26, 2010 decision. He provided argument regarding why he felt that management had committed error or abuse with respect to administrative matters and subjected him to harassment and discrimination. In support of his reconsideration request, appellant submitted numerous documents which he felt established his claim for a work-related emotional claim. A number of the documents relate to EEO claims he filed, including claims in which he alleged that management wrongly denied his applications for job vacancies and mishandled the relocation of his job to another state in August 2009.⁵ Appellant also submitted numerous e-mails and letters which contained discussions of these matters.

In a January 2, 2013 decision, OWCP denied appellant's reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. Appellant's reconsideration request was determined to have been filed on October 15, 2012, *i.e.*, more than one year after OWCP's February 26, 2010 merit decision denying his emotional condition claim. OWCP further found that he had not established clear evidence of error in the February 26, 2010 decision.

³ Appellant asserted that he was wrongly threatened with placement on leave without pay status or with termination in connection with the relocation matter.

⁴ Appellant expressed his belief that the job bidding and relocation matters had been mishandled.

⁵ The EEO documents included various grievance summaries, investigative affidavits, and lists of employees that appellant felt had wrongly been given preferential treatment in the job bidding process.

In a May 13, 2013 decision,⁶ the Board found that OWCP had properly determined, in its January 2, 2013 decision, that appellant had filed an untimely request for reconsideration of OWCP's February 26, 2010 decision,⁷ however, the Board further found that OWCP had not presented adequate facts and findings, in its January 2, 2013 decision, supporting its determination that his untimely reconsideration request failed to demonstrate clear evidence of error in the February 26, 2010 decision. The Board remanded the case to OWCP and directed it to issue a decision which contained adequate facts and findings regarding whether appellant had established such clear evidence of error.

In a September 26, 2014 decision, OWCP denied appellant's request for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error. Appellant's reconsideration request was determined to be untimely because it was filed on October 15, 2012, *i.e.*, more than one year after OWCP's February 26, 2010 merit decision denying his emotional condition claim. OWCP provided an extensive discussion of the argument and evidence he submitted in connection with his reconsideration request and explained how he had not shown clear evidence of error in the February 26, 2010 OWCP decision.

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.⁸ 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.⁹

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."¹⁰ OWCP regulations and procedure provide that OWCP 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.¹¹

⁶ Docket No. 13-527 (issued May 13, 2013).

⁷ The Board found that appellant filed his reconsideration request on October 15, 2012, *i.e.*, more than one year after OWCP's February 26, 2010 merit decision.

⁸ 20 C.F.R. § 10.607(a).

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

¹⁰ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provides, "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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.¹⁷ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁸

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹⁹ However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.²⁰ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.²¹ To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from a claimant's performance of his or her regular duties, these could

¹² See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹³ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁸ *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁹ *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

²⁰ *William H. Fortner*, 49 ECAB 324 (1998).

²¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

constitute employment factors.²² However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.²³

ANALYSIS

In its September 26, 2014 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on October 15, 2012, more than one year after OWCP's February 26, 2010 decision, and therefore he must demonstrate clear evidence of error on the part of OWCP in issuing this decision.²⁴

Appellant has failed to establish clear evidence of error in the February 26, 2010 OWCP decision.

In support of his untimely reconsideration request, appellant submitted argument as to why he felt that management had committed error or abuse with respect to administrative matters and subjected him to harassment and discrimination. He also submitted numerous documents which he felt established his claim for an emotional condition, including EEO claims he had filed in which he alleged management engaged in harassment and discrimination and committed wrongdoing in connection with administrative matters.²⁵ The Board has reviewed the argument and evidence and finds them of limited relevance to the underlying claim. None of the documents submitted by appellant even supported his assertion that OWCP had wrongly denied to accept any compensable employment factors. Appellant submitted numerous documents concerning EEO claims, but none of these documents contain a final EEO decision regarding these matters or otherwise establish the existence of an employment factor. Some of these documents had been previously submitted and considered by OWCP, and they would not have probative value on the relevant merit issue of this case.²⁶

²² *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

²³ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²⁴ On appeal, appellant alleged that he actually filed a request for reconsideration of OWCP's February 26, 2010 decision at a time prior to October 15, 2012, such that his request was timely filed within a year of the February 26, 2010 decision. However, the Board has already determined, in its May 13, 2013 decision, that he filed an untimely request for reconsideration. It is noted that the Board's decisions and orders are final upon the expiration of 30 days from the date of their issuance and, in the absence of new review by OWCP, the subject matter is *res judicata* and not subject to further consideration by the Board. See 20 C.F.R. § 501.6(d); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

²⁵ Most of appellant's claimed employment factors concerned the job relocation process in 2009 and his nonselection for job vacancies.

²⁶ On appeal, appellant argued that OWCP had not adequately reviewed all the relevant evidence he had submitted in support of his reconsideration. However, he did not identify the specific evidence he felt had not been reviewed or otherwise establish that OWCP had not performed an adequate review. Appellant also alleged that the evidence he submitted proved wrongdoing by the employing establishment, but he did not explain how specific evidence of record proved such wrongdoing.

For these reasons, the evidence fails to raise a substantial question concerning the correctness of OWCP's February 26, 2010 decision and OWCP properly denied the claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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