

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

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**L.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Riverdale, GA, Employer**

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**Docket No. 15-1032  
Issued: September 1, 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  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 17, 2015 appellant filed a timely appeal from a September 19, 2014 nonmerit decision of the Office of Workers' Compensation Programs<sup>1</sup> (OWCP). Because more than 180 days elapsed between the last relevant OWCP merit decision dated September 29, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup> Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.<sup>4</sup>

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<sup>1</sup> On May 12, 2015 appellant appealed OWCP's March 24, 2015 nonmerit decision. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), OWCP's March 24, 2015 nonmerit decision, issued while the Board had jurisdiction to review the same subject matter, is null, and void.

<sup>2</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).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Appellant submitted evidence to OWCP after September 19, 2014. The Board's review of a case is limited to evidence in the case record that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c).

## ISSUE

The issue is whether OWCP properly determined that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error.

## FACTUAL HISTORY

On April 30, 2008 appellant, then a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that her emotional condition was caused by retaliation from her manager, R.B., on April 28, 2008 which resulted in a hostile work environment. She stopped work on April 28, 2008 and returned on May 5, 2008. The employing establishment controverted the claim. Appropriate development followed.

By decision dated June 25, 2008, OWCP denied the claim because appellant had not established a compensable work factor. Appellant disagreed with this decision and requested an oral hearing. By decision dated October 2, 2008, an OWCP hearing representative vacated the June 25, 2008 OWCP decision and remanded the case for further development. The hearing representative noted that while appellant had filed a traumatic injury claim, her statement indicated that her condition had occurred over the course of many weeks and years which indicated an occupational disease claim. OWCP was directed to request comments from the employing establishment regarding appellant's allegations and to make a finding on whether the evidence supported any of her allegations, not just these concerning the April 28, 2008 incident.

Following further development and the submission of additional evidence, by decision dated March 2, 2009, OWCP denied the case and found that appellant had not established sufficient evidence to support that her emotional condition was caused by compensable work factors.

Appellant submitted two decisions from the Merit Systems Protection Board (MSPB) dated March 6 and June 23, 2009 relating to her demotion from a supervisor to a part-time flexible clerk. The demotion was based on time and attendance, her failure to follow instructions, and unacceptable performance.<sup>5</sup>

By decision dated September 29, 2009, an OWCP hearing representative affirmed the March 2, 2009 decision.

On September 12, 2014 OWCP received appellant's July 31, 2014 request for reconsideration. Appellant asserted that, when OWCP issued its decision, her Equal

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<sup>5</sup> The March 6, 2009 MSPB decision found that the employing establishment's penalty selection was not reasonable and appropriate and that a suspension for 30 days was the maximum reasonable penalty to be imposed. The MSPB mitigated the employing establishment's action to a 30-day suspension and ordered the employing establishment to restore appellant to her former position effective October 25, 2008 and pay back pay with interest. The June 23, 2009 MSPB decision found that the employing establishment only substantiated one of the two charges related to her unsatisfactory performance, which was the basis for her demotion. This decision further found that the initial administrative law judge's penalty determination could not be sustained and appellant's demotion should not have been mitigated to a 30-day suspension as the employing establishment had provided reasonable explanation for its penalty determination. Therefore, appellant's demotion was sustained.

Employment Opportunity (EEO) complaint had not been decided and that on May 8, 2014 she received an EEO complaint decision regarding the adverse actions of the employing establishment's management. Submitted, was a May 8, 2014 letter from the employing establishment notifying appellant that a check in the amount of \$60,000.00 for compensatory damages was a settlement award in her EEO complaint case.

By decision dated September 19, 2014, OWCP denied appellant's reconsideration request as it was untimely filed and did not present 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. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.<sup>6</sup> Its regulations state that OWCP 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.<sup>7</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that 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 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>9</sup>

OWCP 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, would have created a conflict in medical opinion requiring further development, is not clear

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<sup>6</sup> 20 C.F.R. § 10.607(a) (2011).

<sup>7</sup> *Id.* at § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>8</sup> *See Alberta Dukes*, 56 ECAB 247 (2005).

<sup>9</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

evidence of error.<sup>10</sup> The Board makes an independent determination of whether a claimant has submitted, clear evidence of error on the part of OWCP.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for a merit review of her claim. The most recent OWCP merit decision in this case was issued on September 29, 2009. Appellant's request for reconsideration was received on September 12, 2014, more than one year after the September 29, 2009 merit decision. Therefore, it was not timely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her request for a merit review of her claim.

Appellant's emotional condition claim was denied on the grounds that she had not established a compensable employment factor. She requested reconsideration alleging that she received an EEO decision in her favor and that she would receive a \$60,000.00 settlement award as compensation. However, a copy of the EEO complaint decision was not submitted as evidence. The Board can make no finding on the weight of evidence which is not found in the record. Absent such evidence, appellant's mere statement is insufficient to support a finding of clear evidence of error.<sup>12</sup> Consequently, OWCP properly found that the untimely reconsideration request did not establish clear evidence of error.

On appeal, appellant stated that she received a settlement from her EEO complaint. Her EEO complaint case was filed in 2008 and settled in 2014. Appellant stated that on September 24, 2014 OWCP requested a copy of her EEO complaint decision, which she mailed on October 31, 2014. On March 13, 2015 she called OWCP to see why she had not received a response to the documentation she sent, but her case manager was not available. Appellant indicated her frustration with OWCP's handling of her case and asserted that she was not at fault that she had to wait six years to send in new information.

Appellant has requested that the Board consider all of her information. The Board notes that she discusses information which was received into the record after OWCP issued its September 19, 2014 decision. The Board lacks jurisdiction to review evidence submitted after OWCP issued its September 19, 2014 decision.<sup>13</sup> Appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

<sup>11</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>12</sup> *See supra* note 7.

<sup>13</sup> 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2015  
Washington, DC

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

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

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