

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

G.F., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Long Beach, CA, Employer)

Docket No. 15-1053
Issued: September 11, 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 April 6, 2015 appellant filed a timely appeal from an October 9, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated September 16, 2013 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 to review the merits of her claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 29, 2003 appellant, then a 35-year-old nursing assistant, filed an occupational disease claim alleging depression, stress, and headaches as a result of harassment by her supervisors and assaults and racial slurs by patients. OWCP accepted her claim for acute stress disorder, anxiety, post-traumatic stress disorder (PTSD), panic attacks, double depression, and an acceleration of bulimia.² It found that appellant had established as compensable work factors that patients verbally and/or physically abused or threatened her on various occasions from August 2001 to May 2003. OWCP paid her compensation for total disability from July 15 to 29, 2003 and for intermittent time lost from February 21, 2004 through April 17, 2005.

On June 21, 2007 appellant accepted a position working as a program support assistant. The position did not require contact with patients. By letter dated March 30, 2009, the employing establishment advised that it had removed appellant for cause effective February 7, 2009. Appellant filed claims for compensation for time lost from work beginning January 26, 2009.

By decision dated February 25, 2010, OWCP found that appellant had not established a recurrence of disability beginning January 26, 2009. It noted that the employing establishment removed her for cause on February 7, 2009 for reasons unrelated to her work injury.

On February 23, 2011 appellant requested reconsideration. In a decision dated May 26, 2011, OWCP denied modification of its February 25, 2010 decision. It considered appellant's allegation that the employing establishment terminated her because she was a possible witness in a Merit Systems Protection Board (MSPB) case and because of absences from work as a result of her work injury. OWCP also reviewed November 16 and December 23, 2009 reports from Dr. David Van Zak, an attending licensed clinical psychologist, but found that the reports were insufficient to show that she was totally disabled as the result of her accepted employment injury.

On May 25, 2012 appellant again requested reconsideration. By decision dated September 16, 2013, OWCP denied modification of its May 26, 2011 decision. It noted that the employing establishment removed appellant for excessive absences after granting her 1,344 hours of leave without pay from October 1, 2007 to December 2, 2008. OWCP also indicated that she had not claimed any compensation for disability during that period. It reviewed additional medical reports from Dr. Van Zak and evidence regarding appellant's claim for benefits from the Social Security Administration (SSA). OWCP further considered her allegation that the employing establishment terminated her because she missed work in 2007 and 2008 due to her work injury and as she was a potential witness before MSPB and participated in Equal Employment Opportunity (EEO) activity.

² On January 30, 2004 OWCP accepted appellant's claim for an acute stress disorder. It found that she had established disability only for the period July 15 through 29, 2003. By decision dated January 3, 2005, an OWCP hearing representative vacated the January 30, 2004 decision and remanded the case for further development. On March 9, 2005 OWCP expanded acceptance of appellant's claim to include anxiety, PTSD, double depression, and an acceleration of bulimia. In a decision dated October 27, 2005, it found that she had not established a recurrence of disability. In decisions dated October 27, 2005, May 18, June 7 and July 31, 2006, and January 5 and April 12, 2007, OWCP denied appellant's claims for compensation for intermittent periods of disability from work.

In a January 22, 2013 work restriction evaluation, Dr. Van Zak advised that appellant was disabled from employment.

On September 17, 2014 appellant requested reconsideration. She related that she did not file claims for disability compensation between October 1, 2007 and December 2, 2008 because OWCP had denied her previous compensation claims. Appellant maintained that she had submitted evidence showing that the employing establishment did not adhere to her work restrictions. She questioned why OWCP accepted her employing establishment account of events. Appellant contended that the employing establishment assigned her to departments with patients even though there were other areas she could have worked. She argued that she was not provided with the appropriate training. Appellant again attributed her termination from the employing establishment to absences due to her work injury and the possibility that she would be a witness in an MSPB case. She related that Dr. Van Zak's disability certificates were for the employing establishment rather than OWCP and thus did not require rationale. Appellant summarized the list of evidence that she submitted with her request for reconsideration. She advised that she did not request an afternoon shift at her work assignment, but instead requested a change to another department.

Appellant resubmitted reports from Dr. Van Zak dated July 19, 2008 and January 30, 2013. She also resubmitted April 2008 e-mails between herself and the employing establishment regarding her request for additional training, matters involving timekeeping, and her request for a change in duty hours to an afternoon shift.³ Appellant further resubmitted a March 20, 2009 letter regarding an EEO complaint against the employing establishment for harassment and discrimination.

In a statement dated March 25, 2005, appellant summarized incidents of alleged harassment. On July 26, 2007 she described the basis of her EEO claim. Appellant contended that the employing establishment harassed and discriminated against her, failed to train her, did not provide accommodation, and found her absent without leave even though she submitted documentation.

In a November 30, 2007 letter to the employing establishment, appellant described the issues in her EEO claim and requested that it review the issues "at the formal stage." She asserted that stress at work affected her emotional condition.

On September 23, 2014 appellant resubmitted numerous 2007 and 2008 reports from Dr. Van Zak. In reports dated November 2007, Dr. Van Zak recommended that she work a "swing shift" as her depression reduced her energy in the morning. On March 17, 2008 he recommended that appellant work the evening shift. Dr. Van Zak noted that there were periods when she could work only a few days a week.

By decision dated October 9, 2014, OWCP denied appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error. It found that her September 17, 2014 request for reconsideration raised issues previously considered.

³ Appellant's supervisor advised that her location did not have an afternoon shift, but that she could request a tour of duty that began later each day.

On appeal appellant maintains that she timely requested reconsideration as demonstrated by tracking information submitted with her appeal. She questions why OWCP believed the employing establishment. Appellant maintains that there were other places in the employing establishment that she could have worked, that she was not properly trained, and that she experienced harassment. She contends that she was terminated in retaliation for having a work injury. Appellant asserts that Dr. Van Zak provided rationale and opinions on causation. She was listed as a witness in an MSPB case.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁴ One such limitation, 20 C.F.R. § 10.607, provides that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.⁵ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁷ 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 it committed an error.⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁰

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁶ 20 C.F.R. § 10.607(b).

⁷ Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5(a) (October 2011).

⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ Federal (FECA) Procedure Manual, *supra* note 5.

¹⁰ *Robert F. Stone*, *supra* note 8.

As OWCP received appellant's September 12, 2014 request for reconsideration on September 17, 2014, more than one year after the last merit decision of record dated September 16, 2013, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹¹

On appeal appellant argues that OWCP timely received her request for reconsideration on September 16, 2014 as evidenced by the tracking receipt. She submitted evidence on appeal in support of her contention. The Board, however, cannot review this evidence for the first time on appeal.¹² Further, according to OWCP procedures, the date received is determined by the document received date in the Integrated Federal Employees' Compensation System.¹³

The Board finds that appellant has not established clear evidence of error. The underlying issue in this case is whether she sustained a recurrence of disability beginning January 26, 2009 as a result of her accepted employment injury. OWCP accepted appellant's claim for acute stress disorder, anxiety, PTSD, panic attacks, depression, and acceleration of bulimia as a result of being physically and verbally abused by patients on various occasions from 2001 to 2003.

In support of her request for reconsideration, appellant asserted that the employing establishment did not comply with her work restrictions. She did not, however, submit any evidence supporting her allegation and thus has not established error in OWCP's finding that she did not establish a recurrence of disability.

Appellant further contended that the employing establishment wrongly terminated her, in part, for being a potential witness in an MSBP case. She also contends that her employing establishment harassed and retaliated against her, failed to properly train her, and did not provide her with an appropriate work schedule. Appellant resubmitted e-mails she wrote to the employing establishment regarding her training request, timekeeping matters, and a request for a change in duty hours. She also submitted evidence regarding an EEO complaint alleging harassment and discrimination. As discussed, however, the issue is whether appellant sustained a recurrence of disability due to her accepted employment injury. Her contentions relate to new work factors and thus are not relevant to the issue at hand.¹⁴

Appellant additionally contended that the employing establishment terminated her employment due to absences as a result of her work injury. She submitted 2007, 2008 and 2013 reports from Dr. Van Zak in support of her contention, most of which had been previously considered by OWCP. Appellant asserted that his reports contained some causal relationship. In Dr. Van Zak's resubmitted reports, he did not explain how the evidence manifested on its face that OWCP committed an error in finding that appellant did not establish a recurrence of

¹¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹² *Id.* at § 501.2(c)(1).

¹³ Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.4(b) (October 2011).

¹⁴ See *Howard Y. Miyashiro*, 51 ECAB 253 (1999) (in order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP).

disability. Consequently, the resubmission of his reports is insufficient to raise a substantial question as to the correctness of OWCP's decision.¹⁵ Appellant also submitted reports dated November 2007 and March 2008 from Dr. Van Zak advising that she should change duty shifts and a January 22, 2013 form report indicating that she was disabled. Again, such reports are not positive, precise, and explicit evidence of error by OWCP.

The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of a detailed and 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.¹⁶

On appeal appellant asserts that she was not properly trained and that the employing establishment could have transferred her to another location. She also contends that her employing establishment harassed and terminated her in retaliation for her work injury and for being a witness before MSPB. As discussed, however, the relevant issue is whether appellant experienced a recurrence of disability as a result of her accepted employment injury. Her assertions regarding harassment, training, a transfer, and being a potential MSBP witness are not relevant to the issue of whether she sustained an employment-related recurrence of disability as they relate to intervening events rather than a spontaneous change in her condition.¹⁷ Appellant also has not shown that she was terminated due to absences resulting from her accepted condition.

Appellant additionally alleges that Dr. Van Zak provided rationale for his opinion. She did not, however, identify any specific error by OWCP in evaluating the medical evidence. It is not enough to merely allege that the evidence could be construed to produce a different conclusion. Appellant must submit evidence or raise an argument that manifests on its face that OWCP committed an error in finding that she did not establish a recurrence of disability.¹⁸

In order to establish clear evidence of error, the evidence submitted must raise a substantial question as to the correctness of OWCP's decision.¹⁹ The evidence submitted by appellant on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

¹⁵ See *C.S.*, Docket No. 15-484 (issued April 20, 2015); *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

¹⁶ See *J.F.*, Docket No. 14-1938 (issued February 6, 2015); *D.G.*, 59 ECAB 455 (2008).

¹⁷ A recurrence of disability is a work stoppage caused by "a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. 20 C.F.R. § 10.5(x).

¹⁸ See *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 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