United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 16-0154**
	)	**Issued: August 9, 2016**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Hampton, GA, Employer	)	

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 November 3, 2015 appellant filed a timely appeal from a May 21, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated May 6, 2014, to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 20, 2014 appellant, then a 50-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained anxiety when two aircraft lost standard separation. He stopped work on March 20, 2014.

In a statement received April 28, 2014, appellant related that on March 20, 2014 he mistakenly instructed an aircraft to descend to 30,000 feet instead of 33,000 feet.[2] The aircraft descended through 33,000 feet "narrowly missing the other aircraft that was level at 32,000 [feet]. I immediately asked the pilot if he was level at 33,000 [feet] hoping there was some sort of equipment malfunction. My worst fears were realized when he quickly responded negative we are descending to 30,000 which we were assigned." Appellant had to immediately address the situation as there were other aircraft in the area. He stated:

> "It was [not] until further investigation that I was told I had in fact issued 30,000 [feet] to the delta jet initially and not 33,000 [feet] that I intended and was sure I had given. After hearing this news I became very stressed and emotional about the crucial error I had made which could have caused a catastrophic event that would have resulted in the loss of hundreds of lives because three planes avoided collision by mere seconds. I was unable to continue working that day due to my emotional and mental state caused by the event."

Appellant related that it was his first error that resulted in the loss of standard separation. He could not stop replaying the event in his mind.

In a statement from the employing establishment, Cicely Drummer, a manager, and Alton Reddick, an operations supervisor, related that the aircraft came within 800 feet and 2.4 miles of each other and that standard separation was "1,000 feet vertically and 5 miles laterally." Ms. Drummer and Mr. Reddick advised that the aircraft were in close proximity, but that there was no "potential for a midair collision" based on their flight path. They confirmed that appellant was working in the radar position and related that by the time he instructed the aircraft that he had assigned to 30,000 feet instead of 33,000 feet to stop its descent, the aircraft had already lost standard separation.

By decision dated May 6, 2014, OWCP denied appellant's claim after finding that he had not factually established the occurrence of the claimed work incident. It noted that the employing establishment advised that there was no possibility of a midair collision based on the flight patterns and trajectory of the aircraft. OWCP thus found that appellant had not substantiated his allegation that three aircraft missed a collision by seconds.

On May 8, 2015 appellant requested reconsideration. He asserted that the employing establishment confirmed that a loss of separation occurred. Appellant maintained that OWCP erred in finding that the aircraft did not avoid a collision by seconds. He related that it was "a matter of seconds either way from being an operational error or a potential tragedy." Appellant noted that aircraft travelling at 460 miles an hour were 2.4 miles apart, a distance that could be

[2] Appellant also submitted supporting medical evidence.

covered with crossed flight paths in 9.6 seconds. The airplanes became close enough that radar was not able to discern which signal came from which aircraft. Appellant asserted, "Two targets converging toward each other with approximately 900 mph closing rate, after a critical error was realized is an incredibly intense situation. Now that a more complete review of the event has been presented, I would ask that the phrase 'mere seconds' be given some practical latitude. This was a very close and traumatic event."

By decision dated May 21, 2015, OWCP denied appellant's claim after finding that the request was untimely and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.[3] An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[4] 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.[5]

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.[6] 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.[7]

ANALYSIS

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 from which review is sought.[8] A right to

[3] *Supra* note 1.

[4] *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).

[5] 20 C.F.R. § 10.607(b).

[6] *Supra* note 4 at Chapter 2.1602.5(a) (October 2011).

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

[8] 20 C.F.R. § 10.607(a).

reconsideration within one year also accompanies any subsequent merit decision on the issues.[9] As OWCP received appellant's request for reconsideration on May 8, 2015, more than one year after the last merit decision of record dated May 6, 2014, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.[10]

The Board finds that appellant has not established clear evidence of error. In its May 6, 2014 decision, OWCP denied his emotional condition claim because the employing establishment indicated that the aircraft were not in danger of a collision due to their trajectory. On reconsideration appellant contended that the employing establishment verified that a loss of separation occurred between aircraft that he was controlling in the performance of his job duties. He maintained that OWCP erred in finding that the aircraft were not seconds apart from "being an operational error or potential tragedy." Appellant provided a more detailed description of the incident, noting that the aircraft were extremely close to each other given their velocity.

The Board finds that the arguments raised by appellant in support of his request for reconsideration do not raise a substantial question as to the correctness of OWCP's May 6, 2015 decision or shift the weight of the evidence in his favor. OWCP denied his claim finding that he had not established a compensable work factor. To establish clear evidence of error, it is insufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.[11] None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Consequently, he has failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

[9] *Robert F. Stone*, *supra* note 7.

[10] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[11] *See Dean D. Beets*, 43 ECAB 1153 (1992).

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2016
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