

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances of the case as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On April 21, 2011 appellant, then a 63-year-old health systems specialist, filed an occupational disease claim (Form CA-2) alleging stress and aggravation from a preexisting diabetes condition as a result of adverse working conditions. In a narrative statement, he alleged that commencing in August 2008 he had been stripped of all meaningful work assignments by his supervisors and given only limited and menial tasks to perform that were not commensurate with his position. Appellant also alleged that he had been prevented from having any meaningful interaction with coworkers, making him feel as if he were in solitary confinement. He also alleged that he had been placed in a noisy work area and the employing establishment had refused his requests for accommodation. Appellant stopped work as of November 23, 2010.

In a November 16, 2011 letter, the employing establishment responded to an OWCP request for information. It controverted appellant's allegations and submitted witness statements regarding various incidents involving appellant, who had a history of conflict with his coworkers and supervisors. The employing establishment asserted that it made a good faith effort to engage appellant in meaningful duties, but was unsuccessful due to appellant's behavior and personality traits.

By decision dated December 20, 2011, OWCP denied appellant's claim for compensation. It found that he had not established any compensable work factors.

Counsel requested reconsideration by letter dated December 12, 2012. He argued that appellant was reacting to requirements of his work: (1) that he remain on the premises without being assigned any work for most of the time; and (2) that he not interact or socialize with coworkers.

In a decision dated April 8, 2013, OWCP denied appellant's reconsideration request. It found that he did not meet the requirements for merit review of the claim.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Appellant timely requested an oral argument before the Board. By order dated November 4, 2016, the Board exercised its discretion and denied the request, finding the issue presented could be addressed based on review of the case record. *Order Denying Oral Argument*, Docket No. 16-1301 (issued November 4, 2016).

⁵ Docket No. 14-0018 (issued June 24, 2014).

Appellant appealed to the Board. On appeal the Board remanded the case for a merit review.⁶ The Board found that appellant had raised a new and relevant legal argument, and therefore was entitled to a merit review.

By decision dated August 28, 2014, OWCP reviewed the merits and denied modification. It found the assignment and monitoring of work duties was an administrative function, and no evidence of error or abuse was established. As to requiring appellant not to interact with any other employee, OWCP found this was vague and not supported by the record. It indicated that the employing establishment had explained that limitations had been placed on appellant to minimize disruptions and this was a reasonable managerial action.

On September 3, 2015 OWCP received an August 28, 2015 letter from appellant's counsel requesting reconsideration. Counsel again argued that appellant was reacting to an actual assigned duty -- of doing little or no work. In addition, he argued that OWCP had improperly ignored medical evidence. Counsel indicated that he was submitting testimony from treating physicians and a social worker, as well as from a supervisor, Dr. Carethers.

The evidence submitted on reconsideration consists of partial transcripts from a U.S. District Court case, with appellant as plaintiff and the employing establishment as defendant. The transcript records are dated May 5 to 7, and 11, 2015, and include testimony from physicians, psychologists, and a social worker regarding appellant's treatment. The testimony from a Dr. Carethers indicated that appellant reported having no work was causing him stress, and after January 2013 appellant was assigned more complex work.

By decision dated November 27, 2015, OWCP found the reconsideration request was untimely filed. It denied the reconsideration request without merit review, finding it did not demonstrate clear evidence of error by OWCP.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁷ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁸

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁹ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁰ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C.

⁶ *Id.*

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.605 (2012).

⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

§ 8128(a) of FECA.¹¹ As 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's decision for which review is sought.¹² 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 evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁷

ANALYSIS

In the present case, the last decision on the merits was dated August 28, 2014. As noted above, a timely reconsideration request must be received by OWCP within one year of the merit decision. Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System (iFECS)).¹⁸ If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹⁹ Although the reconsideration request was dated August 28, 2015, it was not received until September 3, 2015. It was therefore untimely with respect to the August 28, 2014 OWCP decision.

As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP. The Board finds that the reconsideration request and the evidence do not demonstrate clear evidence of error in this case.

¹¹ *Supra* note 3.

¹² 20 C.F.R. § 10.607 (2012).

¹³ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁶ *Id.*

¹⁷ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011).

¹⁹ *T.E.*, Docket No. 16-0574 (issued August 18, 2016).

In the merit decision, OWCP found that appellant had not established compensable work factors. Appellant had alleged that he had an emotional condition from what he felt was a job requirement: that he perform little or no work. OWCP found that work assignments, and the monitoring and direction of such assignments, were administrative functions and no error or abuse was established.

The reconsideration request does not demonstrate clear evidence of error by OWCP. On reconsideration appellant again argued that he felt there was a compensable work factor, but he did not clearly demonstrate evidence of error. OWCP found that he had reacted to administrative actions of the employing establishment, and correctly noted that such actions are compensable only if error or abuse is shown.²⁰

The nonmedical evidence submitted on reconsideration does not demonstrate clear evidence of error. 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. Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's 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 a case.²¹ The brief portion of May 2015 transcripts from a supervisor, Dr. Carethers, indicated only that appellant had reported he was feeling stressed from a lack of work. The transcripts from medical providers also do not demonstrate clear evidence of error. A medical issue is only presented once a compensable work factor is established.²²

On appeal counsel again argues that appellant established a compensable work factor based on lack of work. As indicated above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²³

Appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error by OWCP. OWCP properly declined to review the merits of the claim.

CONCLUSION

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

²⁰ The Board has found that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment. See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

²¹ *J.S.*, *supra* note 17; *James R. Mirra*, 56 ECAB 738 (2005); *supra* note 14.

²² See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

²³ *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 27, 2015 is affirmed.

Issued: December 15, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board