

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

P.D., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Gainesville, FL, Employer)

**Docket No. 16-1399
Issued: December 8, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 20, 2016 appellant timely appealed the March 28, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since OWCP issued its latest merit decision on August 5, 2014, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's February 18, 2016 request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 12, 2013 appellant, then a 55-year-old food service worker, filed a traumatic injury claim (Form CA-1) for work-related stress and an anxiety attack. His claimed emotional condition allegedly arose on July 31, 2013 when Dr. Philipp Dahn got in his face and yelled at him. Appellant reportedly felt threatened by the alleged encounter with Dr. Dahn. He stopped work on August 1, 2013. Appellant did not submit any factual or medical evidence with his August 12, 2013 Form CA-1. He also failed to timely respond to an August 23, 2013 claim development letter wherein OWCP advised appellant of the deficiencies in his claim and afforded him at least 30 days to submit the required factual and medical evidence.

By decision dated September 30, 2013, OWCP denied the claim based on appellant's failure to establish that the July 31, 2013 incident occurred as alleged -- "fact of injury." It further noted that he had failed to submit evidence of a medical diagnosis in connection with the alleged incident.

On October 23, 2013 appellant requested reconsideration. He submitted two witness statements regarding the alleged July 31, 2013 incident. Appellant also submitted medical evidence, including emergency room (ER) treatment records from July 31, 2013. Dr. Douglas A. Coran, an emergency medicine specialist, diagnosed anxiety. The ER records noted that appellant was at work and became upset with someone during a disagreement. Additionally, the records noted a history of anxiety. There was also an August 14, 2013 note from Dr. Saji M. Packal, a Board-certified internist, who excused appellant from work on July 31, August 1, 5, and 6, 2013 "due to anxiety and depression." OWCP also received information that appellant was hospitalized for psychiatric evaluation from September 19 to 26, 2013.

Based on witness accounts, OWCP accepted that on July 31, 2013 at approximately 4:50 p.m., appellant approached a patient's room while delivering a patient tray and a doctor was standing in the room talking with the patient. Appellant stated excuse me to the doctor five times while attempting to pass him; however, the doctor ignored appellant. Consequently, appellant walked around the doctor, put the patient tray down, and walked back into the hallway to finish delivering trays. The doctor then approached appellant and stated to him in a very rude manner "You know who I am?" He also asked appellant's name and demanded an apology. OWCP found that the aforementioned July 31, 2013 incident was a factor of employment, and incorporated this information in its December 6, 2013 statement of accepted facts (SOAF).

On December 9, 2013 OWCP referred appellant for evaluation by Dr. Eduardo Sanchez, a Board-certified psychiatrist. The examination was scheduled for January 3, 2014. However, on January 8, 2014 OWCP learned that appellant did not attend the appointment with Dr. Sanchez.

In a January 15, 2014 decision, OWCP accepted that the July 31, 2013 incident occurred as alleged and that appellant had been diagnosed with anxiety and depression. However, it denied appellant's traumatic injury claim because the medical evidence of record was insufficient to establish a causal relationship between the July 31, 2013 employment incident and appellant's current psychiatric condition(s). OWCP also noted that it had arranged a psychiatric evaluation for appellant, but that he failed to attend.

On May 27, 2014 appellant requested reconsideration. He submitted psychiatric treatment records from August and September 2013, including information pertaining to his eight-day hospitalization for alcohol dependence and depression. There was also a March 10, 2014 letter from James Ossa, an advanced registered nurse practitioner (ARNP), who indicated that appellant had been experiencing exacerbation of anxiety and depression due to his reports of psychosocial stressors at work. OWCP once again referred appellant to Dr. Sanchez, who examined him on July 9, 2014.

In a July 10, 2014 report, Dr. Sanchez diagnosed major depressive episode, delusional disorder, alcohol use disorder (currently sober), and history of stimulant use (cocaine/marijuana) opportunistically. He indicated that it appeared quite unlikely that the accepted event/incident described in the SOAF could cause such devastating and profound psychological changes in an individual. Dr. Sanchez further commented that appellant's psychiatric diagnosis did not meet the criteria for post-traumatic stress disorder (PTSD) or any trauma-related diagnosis. As such, he found that appellant's condition was not a consequence of the accepted incident.

By decision dated August 5, 2014, OWCP denied the claim. It found that Dr. Sanchez's July 10, 2014 report represented the weight of the medical evidence. OWCP found that Dr. Sanchez had expressly denied a causal relationship between the accepted employment event of July 31, 2013 and appellant's current emotional condition(s). It further found that appellant's treating psychiatrists had not provided any rationalized medical opinion evidence linking appellant's condition(s) to the accepted employment event. OWCP explained that the nurse practitioner's March 10, 2014 letter regarding causal relationship was insufficient to support appellant's claim as a nurse practitioner is not considered a physician under FECA.

On February 18, 2016 appellant, through his then representative, filed a request for reconsideration of the August 5, 2014 decision. OWCP received the request on February 24, 2016. Appellant's representative argued that the SOAF was incorrect as it did not include all of the medical diagnoses provided by appellant's physicians. He further argued that Dr. Sanchez arbitrarily opined that appellant's diagnosis of PTSD was not related to the accepted work incident. OWCP also received additional medical evidence which provided diagnoses of appellant's emotional conditions and information regarding his ability to work.²

In a December 4, 2015 report, Dr. Ramon E. Pino, a Board-certified psychiatrist, noted the accepted employment incident of July 31, 2013 and a history of appellant's emotional reactions/conditions following the employment incident. Dr. Pino indicated that in his October 30, 2015 report, he had found that the July 31, 2013 incident aggravated appellant's preexisting depression, of which he experiences periodic recurrences, especially at work. He also found that several of appellant's other diagnoses were aggravated by the July 31, 2013 incident. Dr. Pino noted his disagreement with Dr. Sanchez's conclusion that there was some other, unnamed factor responsible for appellant's aggravation of depression since July 31, 2013.

Appellant's representative acknowledged that the current request for reconsideration was untimely, but argued that Dr. Sanchez's reliance on an incomplete SOAF, in conjunction with the recent medical evidence demonstrated clear evidence of error on OWCP's part.

² Some of the documents were previously submitted psychiatric progress notes from September 2013.

By decision dated March 28, 2016, OWCP found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."⁶ The request must establish on its face that such decision was erroneous.⁷ Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant's February 18, 2016 request for reconsideration was untimely filed. The most recent merit decision is dated August 5, 2014. OWCP received appellant's request for reconsideration on February 24, 2016, which was more than a year after the August 5, 2014 merit decision.

In the August 5, 2014 decision, OWCP denied appellant's emotional condition claim. It found that the weight of the medical evidence, as represented by Dr. Sanchez, the second opinion psychiatrist, expressly denied a causal relationship between the accepted employment event of July 31, 2013 and appellant's current emotional conditions. Appellant's request for

³ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁶ 20 C.F.R. § 10.607(b).

⁷ *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁸ 20 C.F.R. § 10.608(b).

reconsideration does not demonstrate clear evidence of error. OWCP denied his claim because the medical evidence did not establish that his emotional condition was causally related to compensable work factors. In his untimely request for reconsideration, appellant's then representative argued that the SOAF was incorrect as it did not include all of appellant's medical diagnoses and the second opinion physician arbitrarily opined that his diagnosed medical condition was not related to the accepted work incident.

In an emotional condition claim, appellant's burden of proof is not discharged when a compensable work factor is established. He must also submit rationalized medical evidence to establish that his emotional condition is causally related to the accepted compensable employment factor.⁹ In this case, appellant never discharged his burden of proof to establish that his emotional condition was causally related to the accepted compensable work factor. It is not enough to point out that there may be a theoretical possibility of error. Additionally, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ There is no evidence that OWCP provided inaccurate information about any significant aspects of the claim. While the December 6, 2013 SOAF provided Dr. Sanchez did not reference appellant's various psychiatric diagnoses, OWCP explained that the psychiatric referral physician had access to all of the medical information of record. Accordingly, appellant's assertions do not raise a substantial question concerning the correctness of OWCP's decision. He has not demonstrated clear evidence of error.¹¹

With respect to the medical evidence submitted with the application for reconsideration, appellant has not demonstrated clear evidence of error by OWCP. In his December 4, 2015 report, Dr. Pino indicated his disagreement with Dr. Sanchez on the issue of causal relationship. While it is evident that Dr. Pino believes the July 31, 2013 employment incident aggravated appellant's preexisting depression, appellant has not established how this evidence, as well as the additional progress reports noting his various medical conditions and ability to work, demonstrated clear error on OWCP's part in denying his emotional condition claim. Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹² Thus, the medical evidence submitted with the current request for reconsideration does not demonstrate clear evidence of error or raise a substantial question as to the correctness of OWCP's August 5, 2014 decision.

The evidence and arguments submitted on reconsideration do not raise a substantial question as to the correctness of OWCP's decision denying appellant's emotional condition claim. Consequently, OWCP properly found that the untimely reconsideration request did not demonstrate clear evidence of error.

⁹ *Charles D. Gregory*, 57 ECAB 322 (2006).

¹⁰ *L.F.*, Docket No. 12-91 (issued June 1, 2012).

¹¹ *Id.*

¹² *See Jesus D. Sanchez*, *supra* note 7.

CONCLUSION

The Board finds that OWCP properly denied appellant's February 18, 2016 request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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