

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

W.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Palatine, IL, Employer**

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**Docket No. 15-1842
Issued: January 14, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 8, 2015 appellant filed a timely appeal from a March 16, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of January 23, 2014 to the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

ISSUE

The issue is whether OWCP properly denied appellant's January 28, 2015 reconsideration request under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 20, 2013 appellant, then a 32-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he experienced an anxiety attack at work when he was given

¹ 5 U.S.C. § 8101 *et seq.*

instructions contradictory to what he was previously taught. He explained that he was frustrated because a supervisor, Jill Lipovsek, would get on the intercom before everyone's start time of 8:00 a.m. and issue instructions to punch in, do a vehicle check, and attend a meeting. Appellant related that, often when he would return from vehicle check, Ms. Lipovsek had already begun the meeting. He reported that management then instructed them not to clock-in prior to the meeting, he alleged that he was unable to complete eight hours on a route. Appellant provided a detailed timeline of dates and the interactions he had with management from June 11 to 15, 2013. He first became aware of his condition and realized it resulted from his employment on June 15, 2013. Appellant stopped work on June 15, 2013 and returned on July 1, 2013.

In a June 15, 2013 e-mail, Elizabeth Wolf, an operations manager, stated that she had observed appellant on June 14, 2013 writing down all the addresses on his route that had parcels. She advised him that practice was unacceptable. Ms. Wolf related that on June 15, 2013 a supervisor took the collection portion of appellant's route away, but he stated that he could not get an eight-hour day completed. She observed him screaming, shaking, and crying that he had been harassed for the past five days. An ambulance was called and transported appellant to the hospital.

In an undated statement, Kathleen Larsen, customer service supervisor, reported that on June 15, 2013 she approached appellant and informed him that he would not do the collection part of his route that day, but had a 45-minute auxiliary on route 1621. She told him that she expected him to work eight hours that day. Ms. Larsen related that appellant began shaking his head, took his arrow key, and threw it down in his hamper. She explained that he became very belligerent and loud and stated that he could not deal with this anymore. Ms. Larsen reported that appellant was escorted out the back door and was transported to the hospital for treatment.

In a handwritten July 12, 2013 report, Dr. Mark Weisberg, a Board-certified internist, related that he examined appellant on June 15 and 17 and July 12, 2013. He reported that appellant suffered an anxiety attack at work caused by work-related stress. Dr. Weisberg explained that appellant developed uncontrollable shaking, uncontrolled body movements, and significant rise in blood pressure. He indicated that appellant was evaluated in the emergency room and diagnosed with an acute anxiety attack. On June 15 and 17, 2013 Dr. Weisberg evaluated appellant and observed that his blood pressure was still elevated. He instructed appellant to remain on his medications and to remain off work until the stressors at work resolved. Dr. Weisberg noted that appellant returned to work on July 1, 2013. He diagnosed uncontrolled hypertension requiring additional medications along with anxiety attack due to overwhelming work-related stress. Dr. Weisberg opined that appellant's illness was directly caused from experiencing overwhelming anxiety and stress at his workplace on account of the tremendously stressful environment at the time.

By letter dated October 10, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish his occupational disease claim. It requested additional evidence to demonstrate that he actually experienced the employment factors he alleged and additional medical evidence to establish that the described employment factors caused or contributed to his medical condition. A similar letter was sent to the employing establishment.

On November 11, 2013 OWCP received appellant's response to the development letter. Appellant noted that his condition developed when the management team arrived. He alleged that the team was an aggressive group of individuals who were very controlling and demanding on a daily basis. Appellant indicated that the team had a lack of care and concern for the employees and that on several occasions he was yelled at and told different misleading instructions from each member of the team. He described his symptoms as fear, pressure, helplessness, hopelessness, confusion, shaking, sadness, and elevated blood pressure. Appellant reported that before the "management team" arrived at the employing establishment the employing establishment was totally different and he was treated with respect. He noted that he was providing witness statements from coworkers.

Appellant submitted a handwritten June 21, 2013 witness statement from Erik Christoffel, a coworker. Mr. Christoffel reported that on June 15, 2013 he was casing route 1673, which was next to appellant's route, when appellant told him about the harassment he was receiving at work. Appellant related examples of when management advised Mr. Christoffel of different times to begin his work shift and whether to write down addresses. Mr. Christoffel noted that during their conversation Ms. Larsen confronted appellant about his eight hours and questioned why he was still at work. He stated that appellant got upset and broke down. Appellant was removed from the docks and paramedics were called.

In another handwritten statement, Rick Wolfgram, another coworker, explained that he was casing route 1675 when he heard a commotion on route 1665. He looked over and observed management talking to appellant who was visibly upset. Appellant stated that he wanted to leave because he was being harassed and he began to cry and shake. Mr. Wolfgram reported that when appellant began to scream and cry he took appellant outside and waited with him until the ambulance came to take him to the hospital.

Annie McCoy, another coworker, further noted in a handwritten statement that on June 15, 2013 she was casing her route when she saw David Taylor instructing appellant to line his parcels up in the order in which they would go out. Shortly, after, she observed Ms. Larsen walk over to appellant and question him in a loud tone regarding why he was not done with his work yet. Ms. Larsen then informed him that he had to finish his collection in eight hours. Appellant stated that he could not finish in eight hours and became visibly upset. He stated that Ms. Larsen was harassing him and he could not take it anymore. Ms. McCoy indicated that appellant was shaking and crying. Mr. Wolfgram called 911 and an ambulance arrived shortly.

In a handwritten October 29, 2013 report, Dr. Weisberg related that during the week of June 10 through 15, 2013 appellant experienced a significant amount of emotional stress while at work at the employing establishment due to management's verbal harassment and conflicting demands. He explained that management was applying significant emotional pressure on appellant in regards to his workload and work requirements. Dr. Weisberg opined that the emotional pressure and stress escalated to the point that appellant suffered an acute severe panic attack, which led to uncontrollably shaking and becoming emotional labile. He related that paramedics came and transported appellant to the nearest hospital where he was treated for dangerously high blood pressure. Dr. Weisberg concluded that the emotional trauma from extreme pressure being applied by appellant's superiors directly contributed to a temporary

harmful and detrimental physiologic state, which caused an unacceptably high blood pressure along with a panic attack.

By decision dated January 23, 2014, OWCP denied appellant's occupational disease claim finding that the employment factors he alleged to have caused or contributed to his emotional condition were not compensable factors of employment under FECA.

On January 28, 2015 OWCP received appellant's January 17, 2015 reconsideration request. Appellant stated that his request was based on the fact that it was work-related traumatic stress that occurred on the job during work hours. He explained that management provoked a hostile work environment and ongoing harassment during his route evaluation period. Appellant noted that he was escorted by an ambulance from his employment and would be attaching medical reports from the ambulance and the hospital. OWCP did not receive any further evidence.

By decision dated March 16, 2015, OWCP denied appellant's January 17, 2015 request for reconsideration finding that his request did not meet any of the requirements for further merit review pursuant to 5 U.S.C. § 8128(a). It determined that his letter did not raise a substantive legal question nor include new and relevant evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.⁴ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (October 2011).

Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.⁵

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it 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. If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁷

ANALYSIS

The most recent decision reviewing the merits of appellant's case was OWCP's January 23, 2014 decision. As the appeal rights attached to that decision explained, appellant had one calendar year from the date of that decision or until January 23, 2015, to ensure receipt by OWCP of any reconsideration request.

OWCP received appellant's January 17, 2015 reconsideration request on January 28, 2015. As the received date was more than one year beyond January 23, 2014, appellant's request must be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, OWCP did not determine whether appellant's reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the wrong standard of review to the untimely request for reconsideration, the Board will set aside OWCP's September 29, 2014 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.⁸

CONCLUSION

The Board finds that OWCP improperly denied appellant's January 28, 2015 reconsideration request under 5 U.S.C. § 8128(a).

⁵ *Id.*

⁶ 20 C.F.R. § 10.607.

⁷ *Supra* note 4 at Chapter 1.1602.5.a (October 2011).

⁸ *See* 20 C.F.R. § 10.607(b). *See L.D.*, Docket No. 15-0865 (issued October 6, 2015).

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further review under the clear evidence of error standard.

Issued: January 14, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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