

ISSUE

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

FACTUAL HISTORY

On August 9, 2012 appellant, then a 59-year-old fingerprint technician, filed an occupational disease claim (Form CA-2). She attributed stress and vomiting to a hostile working environment. Appellant indicated that she became aware of her condition and its relation to her federal employment on July 31, 2012. She worked intermittently before she was terminated on April 4, 2014.

Appellant submitted multiple medical reports assessing stress-related depression, anxiety, migraines, and a history of high blood pressure.

By letter dated August 31, 2012, OWCP informed appellant of the type of evidence needed to establish her claim.

By decision dated February 1, 2013, OWCP denied appellant's claim because she failed to submit a factual statement outlining specific details surrounding her claim.

Appellant submitted medical reports advising that she had two myocardial infarctions in January and March 2013.

In April 27 and May 18, 2013 narrative statements, appellant claimed that she experienced sexual harassment and stalking from security officers J.G. and a second unnamed officer whom she claimed put his fingers under her bra and snapped it against her back. She also alleged discrimination and retaliation from her supervisors D.R. and J.L. Appellant further claimed that Coworker T.K. pointed long guns and dry fired at her, her supervisors failed to promote her in favor of T.K., she was subject to a hostile work environment, her work was sabotaged, and her supervisors refused to grant her reasonable accommodations, and advanced sick leave. She contended that D.R. and J.L. were attempting to bankrupt her by keeping her in nonpay status, she was given unsatisfactory performance evaluations in retaliation for filing complaints against her supervisors, she was restricted from entering the laboratory, she was placed on administrative leave after a dispute with T.K., she was erroneously found absent without leave, a fellow coworker, C.D. violently threw a pen to intimidate her, and she was yelled at and called a liar by D.R. Appellant noted that she submitted formal Equal Employment Opportunity (EEO) complaints regarding discrimination and a complaint with the employing establishment's Internal Affairs Division regarding her sexual harassment claim. She claimed that these incidents caused two heart attacks, depression, vomiting, panic attacks, vertigo, migraines, loss of vision, anxiety, high blood pressure, and pain in the neck, chest, back, and hips.

By letter dated August 1, 2013 and received on August 6, 2013, appellant requested reconsideration and reiterated assertions that she made in her May 18, 2013 statement.

In a February 13, 2013 e-mail to appellant, J.L. advised that appellant was approaching 240 hours of advanced sick leave and that once she exceeded that amount she would be required to use leave without pay to cover her medical appointments.

Several documents regarding a proposed five-day suspension were submitted. Appellant alleged that C.D. violently threw a pen to intimidate her in front of D.R. She was given a July 16, 2012 proposed five-day suspension for making false allegations against C.D. An August 22, 2013 memorandum from J.L. advised that the proposed five-day suspension was rescinded. He advised that, although the disciplinary action was warranted, it was no longer timely. Other documents from the employing establishment included a July 9, 2012 memorandum to appellant advising her that she was being placed on leave restriction for six months with strict guidelines for taking leave. The memorandum advised that she was required to provide medical documentation verifying treatment and informed her that failure to follow the instructions provided would result in her absences being charged as absence without leave (AWOL). In an October 24, 2012 memorandum, the employing establishment gave appellant a notice of a proposed three-day suspension for being absent without leave from October 10 through 12, 2012. It advised that she failed to follow the procedures for taking leave as found in the July 9, 2012 memorandum.

In a September 10, 2013 statement, D.R. denied the allegations made by appellant. She contended that appellant had a proclivity to lie and fabricate stories. D.R. advised that these lies became detrimental to her technical caseload and created a hostile working environment.

In a September 26, 2013 statement, J.L. denied the allegations made by appellant. He noted that any stress sustained by appellant was related to her lack of performance and disruptive conduct. J.L. noted that prior investigations by internal affairs and videotape evidence negated appellant's allegations.

By decision dated November 29, 2013, OWCP denied modification of its prior decision, finding that appellant failed to establish any compensable work factors and that evidence did not establish that the employing establishment erred or abused its discretion in its administrative decisions. As appellant did not substantiate the factual element of her claim, OWCP did not consider the medical evidence submitted.

Appellant continued to submit medical evidence.

In April 3, 17, and 18, 2012 e-mails to John Herring, an EEO representative, appellant alleged that she became ill after meeting with J.L. and D.R. who advised her that she would be punished harshly if she continued to communicate with Mr. Herring while on duty. She also alleged that she witnessed the Walnut Creek Police question T.K. on April 16, 2012. Appellant noted that she was unaware as to the reason, but speculated that it was related to her claim that T.K. pointed a firearm in her direction while clicking it. She indicated that the following day her credentials and pass card were taken, she was escorted out of the building, and placed on administrative leave. Appellant argued that T.K. should have been placed on administrative leave instead of her.

In an April 20, 2012 memorandum to G.C., the deputy assistant director, T.K. disputed the allegation that she pointed guns at appellant and pulled the trigger. She contended that appellant was psychologically unstable and that she feared for her safety. A May 24, 2012 memorandum from T.K. to J.L. and D.R. was submitted. T.K. detailed her interaction with appellant and denied allegations made by appellant.

In a July 6, 2012 e-mail, J.L. advised that, the day before appellant's scheduled work-related travel, she notified him that she lost her government purchase card and cancelled her travel plans as a result. He further noted that she had an outstanding fee of \$6.49 which she was required to pay without reimbursement, as the employing establishment was unable to accept vouchers months after they were due.

On December 15, 2014 OWCP received a request for reconsideration dated November 27, 2014. Appellant submitted both new and previously submitted evidence.

An October 10, 2012 e-mail from D.R. was submitted acknowledging receipt of appellant's message that she would be out on sick leave. Appellant also submitted an October 10, 2012 e-mail to J.L. advising that she called him at 7:30 a.m. to inform him that she would be taking sick leave that day. She noted that she was unable to reach him. Appellant also submitted an October 19, 2012 e-mail sent to J.L. advising him that she asked her physician for a certificate to verify the visit. However, J.L. did not think it was necessary as he previously submitted documentation that she was under his care. Appellant noted that she did not have control over what her physician chose to provide and indicated that it was retaliatory, discriminatory, and cruel to find her AWOL when she was sick.

Appellant submitted several witness statements from former coworkers. In a June 29, 2013 statement, A.P. advised that she never witnessed appellant being violent or threatening. She further noted that, although they had disagreements appellant was always professional and courteous. In an April 30, 2014 e-mail, A.P. advised that she did not agree with anything D.R. and J.L. did and that she filed a discrimination suit of her own. In a September 27, 2013 statement, J.M., appellant's former coworker, advised that she never exhibited anger or aggression and was very mild mannered. In a September 12, 2013 statement, F.H., appellant's former coworker, advised that she enjoyed a good relationship with D.R. until she had a neck and shoulder injury. She claimed that after her injury she was demeaned, threatened, discredited, stalked, interrogated, and treated with severe injustice. F.H. listed other employees who left due to unfair treatment by D.R. She attached a complaint that she filed against D.R. for discrimination. In a July 6, 2013 e-mail to appellant, R.G., appellant's former supervisor at the employing establishment, advised that he never witnessed her display any violent behavior.

Appellant submitted a July 8, 2013 decision from the Department of Justice where M.M., an applicant of the employing establishment, alleged that she was discriminated against on the basis of her transgender status. The decision found that the employing establishment discriminated against her. Appellant argued that this showed that D.R. engaged in discriminatory practices against her as well.

In an undated statement, appellant advised that she was ambushed at her home on April 4, 2014 and wrongfully terminated. She noted that the employing establishment disputed

her entitlement to unemployment benefits because she was terminated for misconduct. Appellant advised that A.S., special agent for the employing establishment, testified that the source of the misconduct was mostly appellant filing a sexual harassment claim.

A decision from a September 9, 2014 hearing at the Oakland Office of the California Unemployment Appeals Board noted that appellant challenged a determination that she was not entitled to unemployment benefits. It advised that she was discharged after an investigation by the employing establishment failed to confirm her allegations of sexual harassment. The judge ruled that the employing establishment failed to prove that appellant was terminated for misconduct and found that she was entitled to unemployment benefits.³

In a decision dated March 13, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant argues the merits of her claim and made new allegations. She contends that OWCP committed error by allowing D.R. and J.L. more time to complete their statements in response to her claims than she was allowed. Appellant also argued that the March 13, 2015 decision was authored by a reconsideration examiner who she believed was employed by the employing establishment.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for

³ The employing establishment failed to appear at a preceding July 22, 2014 hearing. As it was able to establish good cause, the administrative law judge allowed a new September 9, 2014 hearing.

⁴ 20 C.F.R. § 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 its 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). 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). *See also* Chapter 2.1602.4b.

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹²

ANALYSIS

The Board finds that, in its March 13, 2015 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request dated November 27, 2014 was not received by OWCP until December 15, 2014. Because appellant's reconsideration request was not received within one year of the November 29, 2013 merit decision, appellant must demonstrate clear evidence of error by OWCP.¹³

The Board further finds that appellant did not show clear evidence of error by OWCP in its November 29, 2013 decision. The evidence submitted by appellant did not raise a substantial question concerning the correctness of OWCP's decision. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴

Appellant submitted numerous statements from former coworkers advising that she was neither violent, nor threatening. Various statements and evidence indicated that other employees also filed complaints alleging discrimination against D.R. and the employing establishment. The Board finds that, although this evidence was new, it was not relevant because it did not directly

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011). OWCP procedures further provide that 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 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.

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *supra* note 7.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See 20 C.F.R. § 10.607(a) (an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought).

¹⁴ *Id.* at § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

relate to appellant's claim. Evidence that other employees alleged discrimination is not relevant to whether appellant was exposed to compensable work factors that caused her claimed conditions. Such irrelevant evidence cannot serve as a basis for reopening appellant's claim.¹⁵

Appellant submitted a statement alleging that she was wrongfully terminated on April 4, 2014. She also submitted a decision from a state unemployment appeals court which determined that she was entitled to unemployment benefits as the employing establishment failed to prove that she was discharged for misconduct. A state unemployment court's characterization of appellant's termination was not at issue at the time of the November 29, 2013 merit decision. Furthermore, it is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing eligibility for benefits.¹⁶ This evidence is insufficient to establish clear evidence of error.

Several medical reports were submitted with appellant's request for reconsideration. As OWCP found that there were no compensable factors of employment, the underlying issue is factual in nature and medical evidence is insufficient to establish clear evidence of error.¹⁷

Appellant resubmitted several documents previously considered by OWCP. However, she has not sufficiently explained how resubmission of this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, this resubmitted evidence is insufficient to show clear evidence of error.¹⁸

On appeal, appellant argues the merits of her claim and asserted new allegations. However, as noted, the Board does not have jurisdiction over the merits of the claim. Appellant also contends that OWCP gave her supervisors more time to draft a response to her allegations than she was given. However, this allegation does not raise a substantial question as to the correctness of OWCP's decision. Appellant argues that the March 13, 2015 decision was seemingly authored by someone employed by the employing establishment and that this constituted clear evidence of error. The Board notes that the decision was authored by an OWCP reconsideration examiner. OWCP typically sends the employing establishment a copy of its decisions and the address provided under the reconsideration examiner's name was the address that the decision was forwarded to.

Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness

¹⁵ See *E.R.*, Docket No. 09-599 (issued June 3, 2009) (to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP; this evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error).

¹⁶ *Andrew Fullman*, 57 ECAB 574 (2006).

¹⁷ See *supra* note 15.

¹⁸ See *L.M.*, Docket No. 14-1734 (issued March 3, 2015) (duplicate medical reports which were previously considered did not demonstrate clear evidence of error).

of OWCP's November 29, 2013 decision. Consequently, OWCP properly denied her reconsideration request as her request does not demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 4, 2016
Washington, DC

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

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

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