

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

B.M., Appellant)
and) Docket No. 16-0326
DEPARTMENT OF VETERANS AFFAIRS,) Issued: September 13, 2016
VETERANS ADMINISTRATION MEDICAL)
CENTER, Beckley, WV, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 9, 2015 appellant, through counsel, filed a timely appeal from a June 15, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed since the last merit decision dated July 18, 2006, and the date of this appeal,² 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.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal with the Board. See 20 C.F.R. § 501.3(d)(2) (2008).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

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

On appeal counsel contends that OWCP's decision was contrary to fact and law.

FACTUAL HISTORY

On June 30, 2005 appellant, then a 52-year-old patient records assistant, filed an occupational disease claim (Form CA 2) alleging that she suffered an emotional condition (stress followed by bouts of depression, insomnia, and paranoia) causally related to factors of her federal employment. The employing establishment controverted appellant's claim.

In a decision dated October 14, 2005, OWCP denied appellant's claim, finding that the evidence was insufficient to establish that the events occurred as alleged and that no medical evidence provided a diagnosis which could be connected to the claimed events.

On November 10, 2005 appellant requested a hearing before an OWCP hearing representative.

In a decision dated July 18, 2006, an OWCP hearing representative found that neither appellant's allegations with regard to the development of her workers' compensation claim nor her activities as a union representative constituted compensable factors of employment. She further determined that appellant did not establish that she experienced discrimination alleged in her Equal Employment Opportunity (EEO) complaint, which included allegations that she was denied an opportunity to compete for positions and was denied a position or transfer. The hearing representative found that appellant had established compensable factors of employment as the evidence supported that she received inadequate training in the oncology department and that she was provided insufficient supplies to perform her job. However, she determined that the medical evidence did not establish that appellant sustained an emotional condition causally related to these accepted factors of employment. Accordingly, the hearing representative affirmed the denial of appellant's claim.

By letter dated March 30, 2015, received by OWCP on May 5, 2015, appellant requested reconsideration. She alleged that OWCP chose to brush aside her claim because it was complicated. Appellant argued that she did her job until she could no longer safely do so. She noted instances of alleged discrimination and harassment, and further contended that she suffered a reprisal due to her EEO claim. Appellant alleged that she was not allowed to compete for certain jobs and was overworked. She discussed her medical treatment. Appellant submitted copies of receipts for her medication and earnings and leave statements from the employing establishment.

Appellant also submitted a June 10, 2008 form response wherein Dr. John Hutton, a Board-certified psychiatrist, noted appellant's history of severe workplace stress, harassment, conflict, sense of abandonment, humiliation, and degradation. Dr. Hutton noted objective physical findings of anxiety, fear, intensive thoughts, nightmares, panic, obsessiveness, crying,

and depression. He diagnosed post-traumatic stress disorder (PTSD) and major depressive disorder single episode severe with psychotic symptoms.

Appellant also submitted copies of letters regarding her lawsuit against the employing establishment in the United States District Court of the Southern District of West Virginia. These documents included a copy of the release that she signed, noting that a settlement had been reached in the amount of \$60,000.00. The release also contained a statement that the employing establishment was sorry that the last several years of appellant's employment had been so stressful. The release specifically indicated that it was not intended to cover any claim with OWCP. It also revealed that it was understood that the settlement did not constitute an admission of liability, but rather to the contrary liability for the claim was strictly denied. Appellant also submitted a portion (8 pages of 23) of a March 28, 2007 investigative report conducted by the employing establishment with regard to her EEO complaint. This partial document set forth appellant's allegations and a few of the investigator's findings.

By decision dated June 15, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.⁴

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶ 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 reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁷

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.⁸ OWCP regulations and procedures provide that it will reopen a claimant's case for merit

⁴ In the June 15, 2015 decision, OWCP stated that appellant requested reconsideration of a March 30, 2015 decision. The June 15, 2015 decision later states that the request for reconsideration was not timely filed. The Board finds that there was no decision issued in this case on March 30, 2015; the last decision in the current case was issued by OWCP on July 19, 2006. The Board also notes that there was no decision issued in appellant's other case, Docket No. xxxxxx187, on that date. It appears that OWCP's reference to a March 30, 2015 decision was an error, and that this date may refer to the date of appellant's reconsideration request.

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To show clear evidence of error, 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.¹⁵

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for reconsideration of the merits as the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

As previously stated, the Board does not have jurisdiction over the last merit decision issued on July 18, 2006. The only decision over which the Board has jurisdiction is the June 15, 2015 nonmerit decision wherein OWCP denied reconsideration as appellant's request was untimely filed and failed to demonstrate clear evidence of error. As more than one year elapsed between the last merit decision issued in this case on July 18, 2006 and appellant's May 5, 2015 request for reconsideration, OWCP properly found that appellant's request for reconsideration was untimely filed.

The Board further finds that OWCP properly denied appellant's untimely request for reconsideration as she failed to demonstrate clear evidence of error. OWCP initially denied appellant's claim for an emotional condition. It determined that the only compensable factors of employment that appellant had established were improper training for her assignment in

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 6.

oncology and inadequate office supplies for her job. OWCP specifically rejected appellant's assertions that compensable factors included harassment and discrimination, allegations that were pursued by appellant in her EEO claim against the employing establishment. It noted that appellant had not submitted documents supporting her allegations. Appellant has now submitted the settlement agreement and other papers with regard to her claim before the United States District Court for the Southern District of West Virginia. These documents do not establish clear evidence of error. The settlement agreement specifically noted that it was not intended to cover any claim appellant may have against OWCP. The agreement indicated that the settlement did not constitute an admission of liability, and that liability for the claim was specifically denied by the employing establishment. The incomplete investigative report also does not establish clear evidence of error as only a small portion of the report was submitted into the record, and this portion merely sets forth appellant's allegations. Appellant's leave statements and medication receipts do not demonstrate clear evidence of error as they do not address compensable factors of employment nor are they medical opinions addressing causal relationship.

OWCP did determine that appellant experienced specific compensable factors of employment, *i.e.*, she was improperly trained for her work in the oncology department and she was given insufficient office supplies. However, it denied her claim as appellant failed to submit medical evidence finding that her diagnosed emotional conditions were caused or aggravated by these specific factors of her federal employment. On reconsideration, appellant submitted a June 10, 2008 form response to queries wherein Dr. Hutton indicated that appellant experienced stress, harassment, conflict, sense of abandonment, humiliation and degradation at her employment. Dr. Hutton then noted that appellant suffered from PTSD and a major depressive disorder with psychotic symptoms. However, he never explained how the specific accepted employment factors caused appellant's emotional condition, and therefore his report also does not demonstrate clear evidence of error.

The Board notes that clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed well-rationalized 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.¹⁶

Accordingly, the Board finds that OWCP properly denied appellant's untimely reconsideration request.

CONCLUSION

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

¹⁶ B.W., Docket No. 15-0892 (issued August 26, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2015 is affirmed.

Issued: September 13, 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