

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

W.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fajardo, PR, Employer**

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**Docket No. 17-1067
Issued: August 7, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 17, 2017 appellant filed a timely appeal from a March 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated December 18, 2015, to the filing of this appeal, 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 the claim.

ISSUE

The issue is whether OWCP properly denied appellant's December 20, 2016 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 19, 2015 appellant, then a 56-year-old sales associate and distribution clerk, filed a traumatic injury claim (Form CA-1) for an anxiety attack and high blood pressure, which

¹ 5 U.S.C. § 8101 *et seq.*

she attributed to an alleged October 9, 2015 incident involving her supervisor and the postmaster. She claimed that she was constantly harassed and persecuted, which created a hostile work environment. Appellant also claimed to have received a letter of warning without justification.

In a November 9, 2015 letter, appellant's postmaster controverted the claim. She noted that appellant had constantly challenged her supervisor's authority and after several attempts to correct her performance, appellant was issued a September 15, 2015 letter of warning for failure to follow instructions. The postmaster further indicated that on October 9, 2015 appellant's supervisor gave her specific instructions, which appellant refused to follow. She then spoke with appellant and told her to follow the instructions she had received. After completing the requested task, appellant asked for a Form CA-1 because she was reportedly feeling anxious and stressed.

In a November 13, 2015 initial development letter, OWCP advised appellant of the deficiencies in her claim and afforded her 30 days to submit appropriate medical and factual evidence. Additionally, it specifically requested that appellant respond to questions regarding the letter of warning and the October 9, 2015 incident(s) involving her supervisor and postmaster.

In a December 12, 2015 statement, appellant explained that the 10-day delay in filing her claim was due to the fact that her supervisor did not have the appropriate form when she initially requested it. She believed she should have filed a Form CA-2 instead of the Form CA-1 she submitted. Appellant also indicated that grievances were submitted and she had a pending equal employment opportunity (EEO) complaint.

OWCP received medical reports dated December 10 and 11, 2014 and January 14 and 15, and September 24, 2015.² Appellant also submitted copies of various leave requests.

By decision dated December 18, 2015, OWCP denied appellant's claim because the factual evidence failed to support that the employment incident(s) occurred as alleged. It also found that she had not submitted any medical evidence containing a diagnosis in connection with the alleged incident(s).

On December 20, 2016 OWCP received appellant's request for reconsideration, which was dated December 16, 2016. Appellant submitted a December 16, 2016 narrative statement in response to OWCP's November 13, 2015 factual questionnaire. She also submitted copies of formal EEO complaints and grievances she had filed, which described specific actions she felt her postmaster and supervisor had taken that amounted to harassment and verbal intimidation. Appellant also submitted additional medical evidence, including diagnostic test results.

By decision dated March 7, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It noted that the prior decision was dated December 18, 2015 and that appellant's request for reconsideration was received on December 20, 2016, which was more than a year after the decision.

² The medical reports were in Spanish.

LEGAL PRECEDENT

OWCP regulations provide that to be entitled to a merit review of an OWCP decision, 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, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.⁴ In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁰

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP properly determined that appellant's December 20, 2016 request for reconsideration was untimely filed. For OWCP decisions issued on or after August 29, 2011, the

³ 20 C.F.R. § 10.607.

⁴ *See id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁸ *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

date of the application for reconsideration is the received date as recorded in iFECS.¹¹ The most recent merit decision was OWCP's December 18, 2015 decision. Appellant had one year from that date to timely file for reconsideration. The last day of the one-year filing period fell on a weekend; therefore, appellant had until Monday, December 19, 2016 to timely request reconsideration.¹² Because her request was not received by OWCP until December 20, 2016, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.¹³

In its March 7, 2017 decision, OWCP indicated that it had considered appellant's request under 20 C.F.R. § 10.607(b) to determine whether she demonstrated clear evidence that its last merit decision was incorrect. However, the Board finds that it failed to make any findings or provide analysis on the issue of whether appellant demonstrated clear evidence of error.

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁴ Its regulations at section 10.126 of Title 20 of the Code of Federal Regulations provide that an OWCP decision shall contain findings of fact and a statement of reasons.¹⁵ Moreover, OWCP's procedure manual provides that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁶

To determine whether appellant has demonstrated clear evidence of error, OWCP must review the evidence of record and any arguments in support of the request to determine whether such evidence and/or argument is sufficient to demonstrate error in the prior merit decision.¹⁷ It shall then issue a decision containing findings of fact and conclusions of law.¹⁸ Herein, OWCP did not provide any analysis or findings on the issue of whether appellant demonstrated clear evidence of error. Its failure to provide factual findings and explain the basis for its conclusion demonstrates clear evidence of error.¹⁹

The Board, having duly considered the matter, finds that OWCP failed to properly explain the findings with respect to the issue presented. Thus, OWCP, in its March 7, 2017 decision, did not discharge its responsibility to set forth findings of fact and a clear statement of

¹¹ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see C.B.*, Docket No. 13-1732 (issued January 28, 2014).

¹² *See supra* note 11 at Chapter 2.1602.4b.

¹³ *Supra* note 4 at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁴ 5 U.S.C. § 8124(a); *see Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

¹⁵ 20 C.F.R. § 10.126; *see M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹⁶ *Supra* note 11 at Chapter 2.1400.5 (February 2013).

¹⁷ *See George C. Vernon*, 54 ECAB 313 (2003).

¹⁸ *Supra* note 15 at § 10.126.

¹⁹ *See supra* note 13.

reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, whether she demonstrated clear evidence that OWCP's last merit decision was incorrect.²⁰

The Board will set aside OWCP's March 7, 2017 decision and remand the case for an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further proceedings consistent with this opinion.

Issued: August 7, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁰ *Id.*