



## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference.<sup>2</sup> The relevant facts are set forth below.

OWCP accepted that on or before September 28, 1990 appellant, then a 49-year-old engineering technician, experienced a six-year pattern of supervisory harassment, causing dysthymic disorder, post-traumatic stress disorder (PTSD), and major depression, recurrent episode, severe, without mention of psychotic behavior. It accepted the following incidents as factual and in the performance of duty: in August 1989, Supervisor D.M. assigned appellant work, but Supervisor W.S. instructed shop workers not to cooperate with appellant; on August 3, 1989 Supervisor W.S. kicked appellant's chair out from under him; on September 13, 1989 Supervisor W.S. became physically abusive; on September 23, 1989 appellant was required to remove asbestos without necessary training in remediation or use of a respirator; on September 26, 1990 Supervisor W.S. called managers and told them to discourage appellant from taking breaks in the shop area; and on September 28, 1990 Supervisor D.M. screamed at appellant while appellant was on the telephone to the central office obtaining job specifications.<sup>3</sup> Appellant stopped work on September 28, 1990 and returned to work in a light-duty position on October 31, 1990.

Dr. Hugh K. Batty, an attending internist, provided an October 26, 1990 report diagnosing reactive depression due to occupational stress. He found appellant totally disabled from work for the period September 28 to October 22, 1990.

On June 5, 1991 appellant filed a claim for recurrence of disability (Form CA-2a) alleging a recurrence of psychiatric symptoms related to the accepted September 28, 1990 work injury and that his recurrence required his hospitalization from May 1 to 31, 1991. He did not return to work.

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<sup>2</sup> OWCP initially denied the claim in a November 21, 1990 decision, based on a lack of factual evidence supporting any compensable employment factors. After a request for reconsideration, it denied modification in a February 21, 1991 decision finding that the medical evidence did not establish a work-related condition. Appellant again requested reconsideration on July 29, 1991, denied by OWCP in a September 26, 1991 decision. He appealed to the Board. By *Order Remanding Case* issued August 24, 1992, the Board set aside OWCP's February 21 and September 26, 1991 decisions, finding that OWCP did not make sufficient findings of fact prior to analyzing the medical evidence. Docket No. 92-0275. The Board remanded the case to OWCP for additional development and issuance of a new decision.

<sup>3</sup> OWCP found that certain occupational incidents occurred but were not within the performance of duty. These included alcohol use at the employing establishment by coworkers and managers; denial of a promotion; a question about the use of annual or sick leave; a performance discussion; denial of asbestos management training; a number of Equal Employment Opportunity (EEO) claims; revision of performance standards; prank telephone calls; matters involving Occupational Safety and Health Administration (OSHA); encountering coworkers in public places outside of work; removal of personal property from appellant's prior duty station; and being pressured to take a GS-3 position. OWCP further found that certain claimed matters did not occur. These included attacks on appellant's family; an incident regarding sprinkler head specifications; Supervisor W.S. accusing appellant of costing him a shop position so appellant could be hired; a discussion with a union representative and supervisor regarding job assignments; and Supervisor D.M. screamed at him for reaching for a reference book.

On February 18, 1993 OWCP obtained a second opinion from Dr. David Schaffer, a Board-certified psychiatrist, who diagnosed major depression, single episode, due to the accepted work factors. Dr. Schaffer opined that appellant was temporarily unable to work eight hours a day.<sup>4</sup>

Appellant elected FECA benefits on May 14, 1993, effective July 15, 1991. OWCP paid him wage-loss compensation on the periodic roll, effective May 30, 1993.<sup>5</sup>

Dr. Carlos Guerra, Jr., an attending Board-certified psychiatrist, diagnosed appellant with severe major depression on September 6, 1993 and had him hospitalized for treatment. On September 20, 1993 Dr. Thomas Brandon, an attending Board-certified psychiatrist, diagnosed major depression, severe, single episode, and mixed personality disorder with obsessive, paranoid, and schizoid features.

Dr. Stephen J. Rojcewicz, an attending Board-certified psychiatrist, opined on March 1, 1995 that appellant's major depression was due to the accepted work factors. He noted that appellant experienced traumatic hearing loss at age 17 when he was physically assaulted while serving in the U.S. Marine Corps.

The employing establishment terminated appellant in early 1996.

Dr. Arthur W. Peskind, an attending licensed clinical psychologist, followed appellant from December 1997 through July 2001. He diagnosed PTSD and major depressive disorder related to a 1958 assault while appellant was serving in the U.S. Marine Corps. Appellant asserted that a sergeant instructed the unit to wrap him in a blanket, throw him to the floor, and then kick and strike him.

Dr. Laura Dahmer-White, an attending clinical psychologist, treated appellant beginning on March 23, 1998. She diagnosed recurrent, severe, major depressive disorder, cognitive disorder not otherwise specified, paranoid personality disorder, and possible personality changes due to aggressive head trauma from the 1958 assault. Dr. Dahmer-White noted that psychological test results demonstrated cognitive and attention deficits precluding appellant from participating in vocational training. Dr. Randall E. Currier, an attending Board-certified family practitioner, diagnosed anxiety and depression on June 2, 2003.

On September 7, 2004 OWCP obtained a second opinion from Dr. Sharon K. Melnick, a Board-certified psychiatrist. Dr. Melnick reviewed the medical record and a statement of

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<sup>4</sup> Appellant participated in vocational rehabilitation from September 1993 through 1999, including taking community college courses in building design technology. The effort did not result in reemployment.

<sup>5</sup> In a May 6, 1994 decision, OWCP denied appellant's request to expand his claim to accept hypertension and an enlarged heart. It found that he had submitted insufficient medical evidence to establish causal relationship. After the May 6, 1994 decision, appellant appealed to the Board. In an April 24, 1995 order, the Board dismissed the appeal at appellant's request as he wished to submit additional evidence and a request for reconsideration to OWCP. *Order Dismissing Appeal*, Docket No. 95-1551. By decisions dated December 13, 1994 and April 3, 1997, OWCP denied modification of its prior decision. It found that appellant submitted insufficient medical evidence to establish causal relationship.

accepted facts (SOAF). She opined that appellant was totally and permanently disabled for work due to major depressive disorder, dysthymic disorder, PTSD, delusional disorder, a cognitive disorder, obsessive-compulsive disorder (OCD), paranoid personality disorder, and possible dementia. Dr. Melnick explained that the accepted work factors triggered PTSD, and that the accepted supervisory confrontations were sufficient to precipitate delusional disorder, major depressive disorder, and PTSD.

In December 2, 2004 and January 15, 2005 reports, Dr. James F. Harper, an attending licensed clinical psychologist, opined that the 1958 assault caused PTSD, while appellant's major depressive disorder was caused by the accepted work factors.

OWCP found a conflict of medical opinion between Dr. Harper, for appellant, and Dr. Melnick, for the government, regarding the origin of appellant's depression, PTSD, and other psychiatric conditions. To resolve the conflict, OWCP selected Dr. Basil Freedman, a Board-certified psychiatrist. Dr. Freedman submitted a May 11, 2005 report, reviewing the medical record and SOAF. He opined that the accepted work factors caused appellant's PTSD, and caused a recurrence of his major depressive disorder and dysthymic disorder. OWCP continued to pay appellant compensation for total disability on the periodic roll. Appellant remained under treatment.

Dr. David Powley, an attending osteopathic physician Board-certified in internal medicine, submitted July 22, 2011 and February 19, 2013 reports, finding appellant permanently and totally disabled due to PTSD, depression, and dysthymic disorder. He attributed these conditions to the accepted September 28, 1990 work incident.

On June 12, 2013 OWCP obtained a second opinion from Dr. Landy E. Sparr, a Board-certified psychiatrist. Dr. Sparr reviewed the medical record and a SOAF. On examination and testing he observed difficulties with memory, severe anxiety, and moderately-severe depression. Dr. Sparr diagnosed recurrent major depressive disorder, and PTSD by history. He opined that appellant's depression and PTSD were no longer work related, but due to deteriorating physical health, advancing age, and an underlying mood disorder. Dr. Sparr noted that appellant was permanently and totally disabled due to multiple idiopathic medical issues and depression. He provided an October 29, 2013 addendum report, clarifying that appellant no longer had "dysthymic disorder, which is moderate depression, but instead suffers from a depressive disorder, which is now listed as major depression." Dr. Sparr emphasized that the accepted work factors had "no current etiologic significance."

By notice of proposed termination dated March 6, 2014, OWCP notified appellant of its proposal to terminate his wage-loss compensation and medical benefits, based on Dr. Sparr's opinion that the accepted emotional conditions had ceased without residuals. It afforded him 30 days to submit additional evidence or argument. Appellant did not submit additional evidence.

By decision dated April 22, 2014, OWCP finalized its termination of appellant's wage-loss compensation and medical benefits effective May 4, 2014, based on Dr. Sparr's opinion as the weight of the medical evidence.

In an August 6, 2014 letter, received on August 14, 2014, appellant, through his then-counsel,<sup>6</sup> requested reconsideration. He asserted that new medical evidence from Dr. Jennifer R. Rossi, a licensed clinical psychologist, established that the accepted conditions remained active and disabling.

In a July 3, 2014 report, Dr. Rossi reviewed medical records and related appellant's account of workplace events. On examination she observed "a large variety of depressive features" of a severe and persistent nature. Dr. Rossi diagnosed major depressive disorder, recurrent, moderate, and PTSD. She attributed appellant's major depressive disorder to "work stress" at the employing establishment.

By decision dated June 1, 2015, OWCP denied modification, finding that Dr. Rossi's opinion was insufficient to outweigh or create a conflict with that of Dr. Sparr, as she did not use the SOAF as a framework for her opinion.

In November 10 and 18, 2016 letters, appellant contended that OWCP failed to respond to a December 10, 2015 request for reconsideration. He noted that he had telephoned OWCP in September 2016 and was informed that OWCP had not received a request for reconsideration or a notice of legal representation.

In documents received by OWCP on November 3 and 21, 2016, appellant requested reconsideration of OWCP's June 1, 2015 decision. He also provided a November 15, 2016 letter and affidavit from his then-counsel contending that he mailed a request for reconsideration on December 10, 2015. Counsel also provided a copy of a December 10, 2015 request for reconsideration, and correspondence to and from appellant's elected representative regarding the December 10, 2015 reconsideration request. Additionally, he submitted new medical evidence.

In an undated report of September 28 and October 26, 2015 evaluations, Dr. Robert E. Schneider, an attending licensed clinical psychologist, reviewed medical records and related appellant's account of occupational and nonoccupational stressors. He opined that Dr. Sparr provided no rationale explaining how and why the accepted conditions had ceased, and were subsequently related to other factors. Dr. Schneider indicated that he reviewed the SOAF, but that "the events that occurred at [the employing establishment] ha[d] become amalgamated in [appellant's] mind as a hostile work environment that he thought was threatening and abusive. It [was] impossible ... to separate out the three accepted facts" from the remainder of appellant's experiences. However, Dr. Schneider explained that it was "medically reasonable to accept that the three accepted facts represent the experience that he had during his working years at [the employing establishment] and precipitated his major depressive disorder, dysthymia and rekindled the nascent PTSD that had been sub-clinical to that point." He diagnosed major depressive disorder, PTSD, and status post-traumatic brain injury with "subtle neurocognitive problems" attributable to the 1958 assault while in the Marine Corps.

In a February 17, 2017 decision, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. It explained that his reconsideration request of the June 1, 2015 merit decision was not received within one

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<sup>6</sup> Counsel withdrew from representation, effective August 9, 2014.

year of that decision. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence of error in OWCP's June 1, 2015 decision.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>7</sup> 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.<sup>8</sup> The one-year period begins on the next day after the date of the contested decision. 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.<sup>9</sup> 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).<sup>10</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>11</sup> OWCP regulations and procedures provide that OWCP will reopen a claimant's case for 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.

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

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<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

<sup>10</sup> *Id.* at Chapter 2.1602.4b.

<sup>11</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>12</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>13</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>14</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>15</sup> *See supra* note 13.

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.<sup>16</sup>

The Board makes an independent determination as to whether a claimant has submitted 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.<sup>17</sup> 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 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.

### ANALYSIS

The Board finds that, in its February 17, 2017 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision with regard to the termination of all compensation benefits on June 1, 2015. Appellant requested reconsideration by letter received by OWCP on November 3, 2016.

With his request for reconsideration, appellant provided a November 15, 2016 letter and affidavit, when his then-counsel contended that he had timely requested reconsideration on December 10, 2015. He made similar contentions in his November 21, 2016 letter and in the correspondence to and from his elected representative. OWCP's procedures provide that timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the iFECS systems.<sup>18</sup> In this instance, the iFECS record reflects that OWCP first received appellant's request for reconsideration on November 3, 2016.

OWCP denied the request by February 17, 2017 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. As the reconsideration request was untimely filed, it must now be determined whether the request demonstrated clear evidence of error in OWCP's June 1, 2015 decision.

Appellant also submitted a new medical report from Dr. Schneider, an attending licensed clinical psychologist, generally supporting a continued causal relationship between the accepted work factors and the accepted psychiatric conditions. However, even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>19</sup>

The Board finds that the additional evidence submitted does not demonstrate clear evidence of error. Appellant has not provided argument or evidence of sufficient probative value

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<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>17</sup> *B.L.*, Docket No. 17-1452 (issued October 25, 2017).

<sup>18</sup> *Supra* note 10.

<sup>19</sup> See *G.M.*, Docket No. 17-0149 (issued May 11, 2017).

to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's June 1, 2015 merit decision. Consequently, OWCP properly denied appellant's reconsideration request as his request does not demonstrate clear evidence of error.

On appeal appellant contends that his former attorney timely requested reconsideration of OWCP's June 1, 2015 decision. As noted, the record establishes that the reconsideration request was not received by OWCP until November 3, 2016. Appellant also argued that Dr. Schneider's report was sufficient to create a conflict with that of Dr. Sparr. As explained above, medical evidence sufficient to create a conflict if it were received prior to the termination is insufficient to demonstrate clear evidence of error.

### **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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 17, 2017 is affirmed.

Issued: December 27, 2017  
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