

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the prior decisions and orders of the Board are incorporated herein by reference. The relevant facts are set forth below.

On August 18, 1978 appellant, then a 35-year-old cook foreman, resigned from the employing establishment. On November 20, 2008 he filed an occupational disease claim (Form CA-2) alleging that he developed delayed onset of post-traumatic stress disorder (PTSD) due to his constructive termination from employment on or about August 6, 1978. Appellant indicated that he first became aware of his condition and realized it resulted from his employment on February 15, 2004. He explained that he did not file his claim within 30 days of becoming aware of his employment-related condition because the condition was not diagnosed prior to February 15, 2004.⁴

In a letter dated November 21, 2008, appellant related that he was diagnosed with delayed onset PTSD on February 15, 2004. He noted that he promptly notified the employing establishment in 2004 when he learned of his mental impairment. Appellant alleged that the constructive discharge by the employing establishment on or about August 6, 1978 caused or contributed to his diagnosis.

Appellant provided a July 7, 2004 neuropsychological evaluation report by Dr. Martin L. Boone, a neuropsychologist. Dr. Boone reviewed appellant's history and indicated that he likely began to experience symptoms of PTSD when he returned from Vietnam in 1968. He reported that appellant experienced a substantial increase in symptoms after he was forced to retire from the employing establishment due to a very stressful occupational experience associated with his employment at the employing establishment in the late 1970s. He explained that the employing establishment forced appellant to resign or he would be fired without any apparent justification. Dr. Boone diagnosed delayed onset PTSD.

By letter dated December 15, 2008, C.D., a workers' compensation and employee health coordinator at the employing establishment, controverted appellant's claim alleging that it was untimely filed within the three-year time limitation. She asserted that he indicated that he first became aware of his condition on February 15, 2004, but did not file an occupational disease claim until November 2008. C.D. also pointed out that appellant had not been employed by the employing establishment since 1978 and that he has been gainfully employed since he retired.

By letter dated February 20, 2009, OWCP advised appellant that the evidence submitted was insufficient to establish his occupational disease claim. It requested additional evidence to support that he sustained a diagnosed medical condition as a result of factors of his employment.

³ Docket No. 15-0766 (issued October 5, 2015); Docket No. 14-141 (issued May 14, 2014); Docket No. 12-0004 (issued January 25, 2012); Docket No. 10-0673 (issued November 22, 2010).

⁴ Appellant is currently receiving benefits from the Department of Veterans Affairs (VA) for service-connected PTSD due to his military service from 1967 to 1976. He is also receiving disability benefits from the Social Security Administration (SSA) for anxiety disorders.

OWCP specifically noted that it did not appear that appellant timely filed his claim within three years of the date of injury or date of awareness of a relationship between the claimed condition and his employment as required under 5 U.S.C. § 8122. It requested evidence to support that his claim was timely filed. Appellant was afforded 30 days to submit the additional evidence.

On May 15, 2009 OWCP received appellant's response to its development letter and completed questionnaire form. Appellant related that in July 2004 Dr. Boone diagnosed delayed onset PTSD and opined that his condition was a result of the forceful resignation by his supervisors. He explained that he began having problems in 1978, but he never really knew what his problems were prior to 2004. Appellant discussed the medical treatment he received.

OWCP denied appellant's occupational disease claim in a decision dated July 10, 2009. It determined that the record of evidence established that appellant was aware or should have been aware of his alleged employment-related condition on or about July 7, 2004. OWCP noted that because appellant did not file his occupational disease claim until November 20, 2008, his claim was untimely filed within the three-year time limitation pursuant to 5 U.S.C. § 8122.

Appellant, through counsel, requested a telephone hearing before an OWCP hearing representative in a letter dated July 23, 2009. A hearing was held on October 23, 2009. Counsel was present. Appellant explained that in 2004 he was diagnosed with delayed onset PTSD due to his alleged forceful resignation in 1978 and he had immediately reported the injury to the employing establishment. He related that the employing establishment advised him to reopen his old Equal Employment Opportunity Commission (EEOC) case for discrimination and did not inform him about filing a workers' compensation claim. Appellant asserted that if he had known about filing a workers' compensation injury in 2004 he would have filed a claim. He noted that he did not know that he could file a workers' compensation claim until 2008. Counsel argued that this case was not a question of when appellant knew about his condition, but whether he knew what to do about filing a claim. He alleged that appellant properly informed the employing establishment about the delayed onset PTSD in 2004.

In a July 27, 2009 progress note, Dr. Abdel Massoud, a psychiatrist, related that appellant had been under his care since 2001 for depression and PTSD, which made him not able to make good decisions for himself in a timely manner.

On September 3, 2009 OWCP received a statement from appellant. Appellant corrected discrepancies he found in the record and alleged that the various errors in his record were affecting how OWCP reviewed his case. He further clarified that he believed his service-connected PTSD with the VA was different from the PTSD delayed onset that he experienced after his alleged forceful resignation in August 1978.

Appellant submitted various documents from the EEOC. He provided a September 19, 2007 letter, which advised appellant that he had exhausted all administrative remedies regarding his April 12, 2004 complaint. Appellant also submitted a decision dated June 20, 2006 from the U.S. District Court for the Northern District of West Virginia, which denied defendant's motion for summary judgment regarding a civil action that appellant filed on March 29, 2005 for disability due to delayed onset PTSD as a result of forceful resignation. He also provided a

decision dismissing plaintiff's complaint from the U.S. District Court for the Northern District of West Virginia.

In a decision dated December 14, 2009, the hearing representative affirmed OWCP's July 10, 2009 decision. He determined that the record established that appellant did not file a timely occupational disease claim under 5 U.S.C. § 8122 and appellant's unawareness of the law was insufficient to provide an exception to the three-year filing requirement.

Appellant filed an appeal before the Board. By decision dated November 22, 2010, the Board affirmed the December 14, 2009 decision. The Board determined that appellant's November 20, 2008 claim was untimely filed within three years pursuant to 5 U.S.C. § 8122 and there was no evidence that appellant's supervisor had actual knowledge of his injury within 30 days of his last date of employment exposure.⁵

Appellant subsequently filed multiple requests for reconsideration of OWCP's December 14, 2009 decision. OWCP denied appellant's reconsideration requests by nonmerit decisions dated January 5, 2011⁶ and July 12, 2013,⁷ both of which were subsequently reviewed by the Board.

OWCP received appellant's latest request for reconsideration on January 5, 2016. In a letter dated December 21, 2015, appellant noted that he contacted OWCP multiple times but had not heard back about his 2004 work-related injury. He alleged that he put the employing establishment on notice when he was first diagnosed with a work-related injury. Appellant claimed that in February and July 2004 he reported his injury to the employing establishment, but they failed to inform OWCP of the reported injury. He stated that the employing establishment did not inform him of how to file a workers' compensation claim, but instead advised him to re-file his claim with the EEOC. Appellant noted that he was enclosing a copy of the 8120 form (Report of Injury) and EEOC documentation. He asserted that the documentation would prove that the employing establishment had actual knowledge of the injury in 2004. No additional documentation was enclosed with the reconsideration request.

⁵ Docket No. 10-0673 (issued November 22, 2010). Appellant filed a petition for reconsideration of the Board's decision. On June 10, 2011 the Board issued an Order Denying Petition for Reconsideration. Docket No. 10-673 (issued June 10, 2011).

⁶ Appellant filed an appeal of OWCP's January 5, 2011 nonmerit decision before the Board. In Order Dismissing Appeal dated January 25, 2012, the Board dismissed appellant's appeal as untimely filed. Docket No. 12-0004 (issued January 25, 2012).

⁷ Docket No. 14-141 (issued May 14, 2014). Appellant appealed OWCP's July 12, 2013 nonmerit decision, which the Board affirmed by decision dated May 14, 2014. Docket No. 14-141 (issued May 14, 2014). Appellant subsequently filed a petition for reconsideration, which the Board dismissed as untimely filed in an Order Dismissing the Petition. Docket No. 14-141 (issued March 12, 2015). Following the Board's March 12, 2015 Order Dismissing the Petition, appellant wrote to the Board in a letter dated January 26, 2015. The Board considered the letter as a request for a new appeal and assigned Docket No. 15-0766. By Order Dismissing Appeal dated May 11, 2015, the Board dismissed appellant's appeal because there was no final adverse OWCP decision over which the Board may properly exercise jurisdiction. Docket No. 15-766 (issued May 11, 2015). Appellant filed a petition for reconsideration before the Board, which the Board dismissed by Order Dismissing Petition for Reconsideration dated October 5, 2015.

In letters dated January 10 and 17, 2016, appellant asserted that after Dr. Boone informed him in July 2004 that he had a work-related injury he reported the injury to the employing establishment, but they did not report his work-related injury to OWCP as required. He related that the employing establishment advised him to file an EEOC claim, which they eventually denied, and did not inform him to file a claim for workers' compensation. Appellant noted that he had been fighting the employing establishment for years and they continued to allege that his claim was untimely filed even though they had actual knowledge of his work injury in 2004. He claimed that he followed all OWCP rules and that the employing establishment had not. Appellant explained that he had a latent condition, which meant that the time began to run when he became aware of his condition. He noted that he was unaware of his condition until Dr. Boone examined him in 2004.

Appellant provided an annotated copy of 5 U.S.C. § 8120 regarding the employing establishment's responsibility to report an injury and 5 U.S.C. § 8122 regarding the timeframe to file a claim under FECA.

By decision dated February 24, 2016, OWCP denied merit review of the Board's May 11, 2015 order because appellant's January 5, 2016 reconsideration request did not meet any of the requirements requiring further merit review under 5 U.S.C. § 8128(a). The Board found that he did not establish that OWCP erroneously applied or interpreted a point of law or advance any new legal argument not previously considered. OWCP further determined that the evidence submitted was cumulative, and thus, substantially similar to evidence or documentation already considered.

Appellant filed an appeal before the Board. By decision dated June 1, 2016, the Board set aside the February 24, 2016 OWCP decision, which denied further merit review of appellant's claim under 5 U.S.C. § 8128(a).⁸ It determined that OWCP erroneously noted that the decision under review was the Board's May 11, 2015 order, which dismissed appellant's January 26, 2015 appeal for lack of jurisdiction, but the last OWCP merit decision was the OWCP hearing representative's December 14, 2009 decision.⁹ The Board remanded the case for OWCP to properly adjudicate appellant's January 5, 2016 reconsideration request under the standard for an untimely request for reconsideration.

By *de novo* decision dated July 7, 2016, OWCP denied appellant's January 5, 2016 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. It determined that because appellant's reconsideration request of the last merit decision was received on January 5, 2016 it was not timely filed within the one-year time limitation. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence that OWCP's decision was in error.

⁸ Docket No. 16-0746 (issued June 1, 2016). The above-mentioned Board decision is incorporated herein by reference.

⁹ While the Board's prior decision noted that the last OWCP merit decision was the December 14, 2009 decision, the Board notes that the Board's November 22, 2010 decision was the last merit decision of record. Appellant had one year from November 22, 2010 to file a timely request for reconsideration with OWCP. A right to reconsideration within one year accompanies any subsequent merit decision. This includes ... any merit decision by the Board. *R.M.*, Docket No. 15-538 (issued September 23, 2016).

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant's application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ 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.¹¹

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 nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹⁴

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.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.¹⁷

ANALYSIS

The last merit decision in the case was the Board's November 22, 2010 decision, which affirmed OWCP's December 14, 2009 decision denying appellant's occupational disease claim because it was untimely filed under 5 U.S.C. § 8122. Appellant submitted several requests for

¹⁰ 20 C.F.R. § 10.607(a).

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

¹² *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹⁵ *See* 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

reconsideration before OWCP, which were denied. Appellant's latest request for reconsideration was dated December 21, 2015 and received on January 5, 2016.

The only decision before the Board on this appeal is the July 7, 2016 OWCP decision, which declined to reopen appellant's case on the merits because his request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP received appellant's latest request for reconsideration on January 5, 2016, which was more than one year after the November 22, 2010 decision and was therefore outside the one-year time limit.¹⁸ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁹

The Board finds that appellant has not demonstrated clear evidence of error by OWCP. OWCP denied appellant's occupational disease claim because he did not file a timely claim under 5 U.S.C. § 8122. It found that appellant was aware or should have been aware of his alleged work-related injury on or about July 7, 2004, but he did not file his occupational disease claim until, approximately four years later on November 20, 2008. OWCP determined that appellant did not file his claim within the three-year time limitation under 5 U.S.C. § 8122 and failed to establish that the employing establishment had actual knowledge of his injury within 30 days. Along with his most recent January 5, 2016 reconsideration request, appellant reiterated his previous arguments that the employing establishment had actual knowledge of his work-related injury within 30 days of July 7, 2004. He reported that he informed the employing establishment about his injury in February and July 2004, and they advised him to file an EEOC complaint. Appellant asserted that the employing establishment failed to inform him that he needed to file a separate claim for workers' compensation and also failed to report the injury to OWCP as required by OWCP regulations. He provided an annotated copy of two FECA statutory provisions, 5 U.S.C. §§ 8120 and 8122.

The Board finds that appellant's duplicative contentions do not raise a substantial question as to whether OWCP's decision finding that his claim was untimely filed was erroneous.²⁰ Appellant merely reasserted his previous arguments that the employing establishment had actual knowledge of his alleged work-related injury because he informed them of his condition in 2004. OWCP has previously considered these arguments in its prior decision and found them to be insufficient. Appellant's assertions did not raise a substantial question as to the correctness of OWCP's decision.²¹ Furthermore, the annotated copy of FECA statutes also fail to support that OWCP committed an error in denying appellant's occupational disease

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4) (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

¹⁹ 20 C.F.R. § 10.607(b); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

²⁰ *Supra* note 16.

²¹ *Id.*

claim.²² Appellant has not presented any additional evidence to establish that he filed a timely occupational disease claim under 5 U.S.C. § 8122 or that the employing establishment had actual knowledge of his work-related injury within 30 days sufficient to establish that OWCP's denial decision was clearly erroneous.

To demonstrate clear evidence of error, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.²³ The Board finds that the arguments and evidence submitted by appellant in support of his untimely request for reconsideration do not constitute positive, precise, and explicit evidence, which manifested on its face that OWCP committed an error in denying appellant's occupational disease claim.²⁴ Therefore, appellant failed to meet his burden of proof to demonstrate clear evidence of error on the part of OWCP.

On appeal, appellant alleges that the reconsideration of all his cases were filed within the one-year time limitation. He notes that he requested an appeal before the Board on November 22, 2010 and a hearing before an OWCP hearing representative on December 19, 2010, which would be within the one-year time limitation of the December 14, 2009 decision. The Board notes that the November 22, 2010 appeal and December 14, 2009 hearing request are not presently before the Board. These previous appeals have been considered. The current issue before the Board is whether appellant's latest reconsideration request dated December 21, 2015 and received on January 5, 2016 demonstrated clear evidence of error by OWCP sufficient to warrant further merit review of appellant's case. For reasons explained above, the Board has found that appellant did not meet his burden of proof to establish that his untimely January 5, 2016 reconsideration request demonstrated clear evidence of error in OWCP's December 14, 2009 merit decision. Accordingly, OWCP properly denied his request.

CONCLUSION

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

²² *Supra* note 14.

²³ *Supra* note 18 at Chapter 2.1602.5a (October 2011).

²⁴ *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2017
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