

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

D.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION, MEDICAL
CENTER, Bronx, NY, Employer**

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**Docket No. 17-1197
Issued: November 1, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 10, 2017 appellant filed a timely appeal from a January 17, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ The most recent merit decision was a Board decision dated May 29, 2013. A decision of the Board is final upon the expiration of 30 days from the date of that decision.² OWCP has not issued a merit decision since the Board's May 29, 2013 merit decision. As the January 17, 2017 nonmerit decision is the only decision issued within 180 days of this appeal, pursuant to the Federal Employees'

¹ Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated September 8, 2017, the Board denied the request for oral argument as the Board did not have jurisdiction over the merits of the case and oral argument would further delay issuance of a decision. *Order Denying Request for Oral Argument*, Docket No. 17-1197 (issued September 8, 2017).

² 20 C.F.R. § 501.6(d).

Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly determined that appellant's December 6, 2016 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are incorporated herein by reference.⁵ The relevant facts are as follows.

On October 28, 2011 appellant, then a 56-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging an injury to her low back on October 26, 2011 during the course of her federal employment. She alleged that she was the victim of an assault and battery that occurred when an elderly man punched her from behind as she was leaving the employing establishment cafeteria. Appellant stopped work on October 28, 2011.

In a decision dated December 19, 2011, OWCP denied appellant's claim, finding that the assault did not occur as alleged. On December 28, 2011 appellant requested a hearing before an OWCP hearing representative. By decision dated May 17, 2012, a hearing representative affirmed the denial of appellant's claim.

On June 12, 2012 appellant appealed to the Board. By decision dated May 29, 2013, the Board affirmed the hearing representative's May 17, 2012 decision. The Board determined that appellant had not established that the incident occurred as alleged, noting inconsistencies in her statements, the video evidence, the lack of eyewitnesses despite numerous individuals in and around the area where the incident allegedly occurred, and her behavior subsequent to the alleged incident.⁶

By letter dated December 1, 2016, received by OWCP on December 6, 2016, appellant requested reconsideration. She alleged that she had been wrongfully terminated from her place of employment and wrongfully accused of not providing information.⁷ Appellant alleged that

³ 5 U.S.C § 8101 *et seq.*

⁴ Appellant submitted new evidence on appeal. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

⁵ Docket No. 12-1353 (issued May 29, 2013).

⁶ *Id.*

⁷ Appellant's letter also appears to be a request for reconsideration of her claim for a consequential injury for hepatitis due to a needle stick on July 11, 2001 in File No. xxxxxx949. OWCP is developing this case separately. File No. xxxxxx949 is not presently before the Board.

three employees witnessed the assault, but that they later recanted their stories. She alleged that a witness was willing to take a polygraph examination that would clear her name.

In support of her request, appellant submitted medical statements with regard to her separate hepatitis C claim. She also continued to submit medical evidence noting continuing treatment for persistent neck and lower back pain.

By decision dated January 17, 2017, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁸ 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.⁹ 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.¹⁰ 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).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 nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.¹² 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 demonstrates clear evidence of error on the part of OWCP.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

⁸ 20 C.F.R. § 10.607(a).

⁹ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹¹ *Id.* at Chapter 2.1602.4b.

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

¹³ *Id.* at § 10.607(b); *supra* note 10 at Chapter 2.1602.3d (January 2004).

¹⁴ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁵ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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.¹⁷ 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.¹⁸ To demonstrate 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.¹⁹

ANALYSIS

The last decision on the merits of the claim was the Board's May 29, 2013 decision. Appellant's request for reconsideration was dated and received on December 6, 2016, which was more than one year after the last merit decision of May 29, 2013.²⁰ As appellant's request was untimely filed, she must demonstrate clear evidence of error on the part of OWCP in its denial of her traumatic injury claim.²¹

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether appellant established that the October 26, 2011 incident occurred as she alleged and that she was in fact assaulted and punched from behind in the employing establishment cafeteria. The Board finds that the arguments and evidence submitted by appellant in support of her request for reconsideration did not raise a substantial question as to the correctness of the denial of her claim.

The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration, that she had been wrongfully terminated from employment, and that witnesses to her assault had recanted their initial statements, is not the type of positive, precise, and explicit argument which manifested on its face that OWCP committed an error.²² Appellant's argument is of insufficient probative value to shift the weight in her favor and raise a substantial question as to the correctness of OWCP's May 17, 2012 merit decision.²³

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁷ See *supra* note 15.

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 9.

²⁰ *J.M.*, Docket No. 15-1586 (issued March 23 2016) (the Board explained that, according to OWCP procedures, the received date is determine by the document received date into the iFECS system).

²¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

²² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²³ See *J.P.*, Docket No. 17-0053 (issued March 23, 2017).

In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²⁴ The only evidence submitted on reconsideration was medical evidence. However, appellant's claim was not denied for medical reasons. Rather, her claim was denied because she failed to establish that the employment incident occurred as alleged. The Board finds that appellant's argument and evidence submitted with her untimely request for reconsideration does not rise to the level of clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's reconsideration request 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 January 17, 2017 is affirmed.

Issued: November 1, 2017
Washington, DC

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

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

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

²⁴ B.C., Docket No. 16-1404 (issued April 14, 2017).