

FACTUAL HISTORY

On January 24, 2015 appellant, then a supervisor of distribution and operations, filed an occupational disease claim (Form CA-2) for assault and emotional distress. In a statement dated January 24, 2015, he indicated that on September 23, 2014 employee J.S. hit him on the shoulder. Appellant further related that on December 23, 2014 the employing establishment sent him a Notice of Proposed Removal on the basis of witness statements regarding this incident and this caused increased stress. He related that he was on administrative leave and had also filed a traumatic injury claim (Form CA-1).²

By letter dated February 2, 2015, OWCP informed appellant of the evidence needed to support his occupational disease claim and asked the employing establishment to respond.

In a February 16, 2015 statement, appellant related that he had been made the scapegoat of the events of September 23, 2014. He maintained that omissions and actions by the employing establishment, J.S., and the union caused embarrassment and humiliation. Appellant related that he began supervising J.S. in approximately October 2001. He indicated that at about 4:08 a.m. on September 23, 2014 he sent several employees to help J.S. with automated parcel and bundle sorter (APBS) processing and sent additional personnel to help him with additional tasks. Appellant indicated that J.S. had several complaints about his duties that evening, and as he left the unit, J.S. followed him, began yelling profanity at him, and tried to hit him in the face. He indicated that he put up his right hand to protect himself. Appellant claimed that employees witnessed that J.S. was the aggressor and some gave false statements, which led to the proposed removal. He further alleged that the union had defamed him, and all this caused stress beginning on or about January 15, 2015 when he was on administrative leave.

Appellant submitted a January 28, 2015 report in which Dr. Carlos M. Zapata, a psychiatrist, evaluated appellant for depression. Dr. Zapata related that appellant had been on administrative leave since September 2014 based on a false accusation made at work. He performed a mental status examination and diagnosed depression, unspecified, with occupational problems. On January 30, 2015 appellant was seen by a social worker for psychotherapy follow-up. The social worker reiterated Dr. Zapata's diagnosis.³

The employing establishment forwarded an October 6, 2014 investigative memorandum from the postal inspection service regarding the events of September 23, 2014, describing witness statements with J.S., supervisors, and coworkers. J.S. maintained that appellant was the aggressor. Supervisor J.N., who did not see any hitting, saw appellant and J.S. square off in a fighting stance. An acting supervisor, R.R., saw J.S. first hit appellant in the face. She reported the incident to Manager M.G. and witnessed appellant and J.S. hitting each other, maintaining that appellant was trying to hit J.S. back. R.R. further indicated that appellant followed her telling her what she should say in her written statement. Another coworker witnessed what appeared to be a physical fight. The postal inspectors also interviewed appellant who indicated

² A traumatic injury claim is not found in the record before the Board.

³ Appellant also submitted a January 21, 2015 treatment note regarding treatment for diabetes, completed by a registered nurse.

that J.S. began to act crazy and make complaints using abusive language and told appellant to shut up repeatedly. Appellant maintained that he did not hit J.S., who hit at him first but that he held his right arm out. He related that R.R. changed her statement which, he believed, was done at the request of M.G. Statements and photographs of T.S.' hand were attached.

The employing establishment forwarded a Notice of Proposed Removal dated December 11, 2014 based on his improper conduct on September 23, 2014. Statements regarding the September 23, 2014 incident, grievances and Equal Employment Occupational (EEO) claims filed against appellant including some settlements, statements regarding other concerns, and photographs of J.S.' hands were also submitted. An incident summary was completed by Manager M.G. A letter of removal decision was issued on May 20, 2015, effective May 26, 2015. This indicated that the charge of improper conduct was fully supported by the evidence and warranted appellant's removal from the employing establishment.

A statement of accepted facts (SOAF) dated August 13, 2015 indicated that the sole accepted factor was that on September 23, 2014 appellant and J.S. engaged in a verbal altercation and physical assault.

In September 2015 OWCP referred appellant to Dr. Benjamin A. Carey, a Board-certified psychiatrist, for a second opinion evaluation. In a November 21, 2015 report, Dr. Carey noted his review of the SOAF and questions provided by OWCP. He noted that his office sent a development questionnaire to appellant for completion before the appointment, but that when appellant arrived he had not completed the questionnaire. Appellant acknowledged that he got into an altercation on September 23, 2014 and this, along with his termination, caused psychological stress. He related that he had a previous conflict with a manager at another facility in 2011 or 2012, and then transferred to the employing establishment. Following review of the record, psychological testing,⁴ and mental status evaluation, Dr. Carey diagnosed adjustment disorder with mixed anxiety and depressed mood, improved, related to being terminated from his job following the altercation with J.S. in September 2014. He included a provisional diagnosis of another adjustment disorder due to a conflict with management in approximately 2012. Dr. Carey also diagnosed dependent, schizoid, and passive-aggressive features. He concluded that appellant could be gainfully employed, had no residuals from the employment injury, and had no work restrictions.

By decision dated January 25, 2016, OWCP denied the claim, finding that the medical evidence submitted was insufficient to establish causal relationship between the accepted employment factor and a diagnosed emotional condition.

On March 4, 2016 appellant requested reconsideration. He submitted no additional evidence or argument. In a nonmerit decision dated March 22, 2016, OWCP denied reconsideration of the merits of the claim. It noted no additional evidence was received.

Appellant again requested reconsideration on January 30, 2017. He asserted that the evidence of record supported that his claim should be accepted. Appellant submitted one page of the Notice of Proposed Removal, and a November 17, 2014 investigation interview with R.R.

⁴ A copy of psychological test results is found in the record.

In a February 3, 2017 decision, OWCP found that, as appellant's reconsideration request was untimely filed and failed to present clear evidence of error, his request for reconsideration was denied.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.⁶ Timeliness is determined by the document receipt date, as indicated by the "received date" in OWCP's Integrated Federal Workers' Compensation System.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 of FECA.⁸

OWCP may not deny an application for review solely on the grounds that 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 demonstrated clear evidence of error.⁹ OWCP's 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.¹⁰

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

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

⁷ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

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

⁹ *See* 20 C.F.R. § 607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ 20 C.F.R. § 607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹¹ *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP procedures note that the term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical 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.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

The only decision before the Board in this appeal is the February 3, 2017 nonmerit decision in which OWCP denied appellant’s request for reconsideration because the request was untimely filed and failed to demonstrate clear evidence of error. Appellant requested reconsideration regarding denial of his occupational disease claim for an emotional condition. The Board finds that as appellant’s request for reconsideration was received by OWCP on January 30, 2017, more than one year after the most recent merit decision on this issue dated January 25, 2016, the reconsideration request was untimely filed.¹⁴

The Board also finds that appellant failed to demonstrate clear evidence of error. In his January 30, 2017 reconsideration request, appellant maintained that the record established that his claim should be accepted. He submitted one page of the Notice of Proposed Removal which was previously of record, and a November 17, 2014 statement from R.R. While this statement was not previously of record, it merely described the September 23, 2014 altercation between appellant and J.S., an accepted employment factor.

The merit issue in this case is whether appellant has established that a diagnosed condition was causally related to the accepted employment factor. He submitted no additional medical evidence following the January 25, 2016 merit decision.

The term “clear evidence of error” is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁵ Evidence such as a detailed, well-rationalized medical 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

As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the January 25, 2016 OWCP merit decision, appellant has not established that OWCP committed

¹² Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹³ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁴ 20 C.F.R. § 10.607(a) (2011).

¹⁵ *Supra* note 11.

¹⁶ *E.D.*, Docket No. 16-0708 (issued January 17, 2017).

error.¹⁷ The Board therefore finds that in accordance with Board precedent, OWCP properly performed a limited review of the argument and evidence submitted by appellant with his January 30, 2017 reconsideration request to ascertain whether it demonstrated clear evidence of error in its January 25, 2016 decision. OWCP correctly determined that it did not, and thus properly denied appellant's untimely request for merit reconsideration on that basis.¹⁸

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. OWCP, therefore, properly denied a merit review of his claim.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

¹⁷ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

¹⁸ 20 C.F.R. § 10.607(b) (2011); *see D.G.*, 59 ECAB 455 (2008).