

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

L.W., Appellant)	
)	
and)	Docket No. 17-1630
)	Issued: June 7, 2018
DEPARTMENT OF HEALTH & HUMAN)	
SERVICES, CENTER FOR MEDICARE &)	
MEDICAID SERVICES, Baltimore, MD,)	
Employer)	
)	

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 July 24, 2017 appellant filed a timely appeal from a January 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from OWCP's last merit decision, dated September 17, 2009, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

¹ Appellant timely requested oral argument before the Board. By order dated April 20, 2018, the Board exercised its discretion pursuant to 20 C.F.R. § 501.5(a) and denied the request finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1630 (issued April 20, 2018).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

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

On June 5, 2007 appellant, then a 47-year-old health insurance specialist, filed both traumatic injury (Form CA-1) and occupational disease (Form CA-2) claims alleging that he experienced significant stress and sustained a traumatic mental injury as a result of harassment and discrimination by the employing establishment and a verbally abusive and threatening work environment. He noted that the employing establishment banned him from its buildings and asserted that the employing establishment prevented him from filing a workers' compensation claim. In the occupational disease claim, appellant alleged that he developed a stress-related condition and first realized that it was caused or aggravated by his employment in 1994. He was terminated from employment on May 6, 1997.

In a June 12, 2007 statement, the employing establishment controverted the claim because appellant did not file a timely notice of injury within three years of the claimed injury. It also noted that none of his supervisors were available to confirm or refute his claims.

By development letter dated June 15, 2007, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he explain the delay in filing the claim, describe the specific work factors he attributed to his claim, and explain the development of his condition. OWCP also requested supporting documentation and a detailed medical report addressing the causal relationship of the alleged work factors and his condition.

On June 5, 2007 appellant filed a claim for wage-loss compensation (Form CA-7) benefits. On the back of the claim form, the employing establishment noted that there was no record of any wage loss and that appellant was terminated on May 6, 1997.

In a statement dated July 30, 2007, appellant described various incidents at work which he believed constituted a hostile, threatening, and racially insensitive environment, the medical and psychological treatment he sought, and his attempts to complete the appropriate forms and paperwork with the employing establishment. He noted that he first filed a complaint with the employing establishment in 1994, but no action was taken. Appellant submitted various notices of disciplinary action from the employing establishment, medical documents, Office of Personnel Management (OPM) personnel records, and an affidavit from K.L. a computer systems specialist at the employing establishment.

³ Docket No. 15-1788 (issued April 26, 2016); Docket No. 14-1242 (issued March 19, 2015).

By decision dated August 31, 2007, OWCP denied appellant's occupational disease claim, finding that it was untimely filed. It found that he did not file his claim within the three-year time period of the alleged injury as required under FECA and the evidence of record did not establish that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

On October 12, 2007 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. In an attached statement, appellant requested tolling of the three-year filing of claim requirement because he provided verbal and written notice to the employing establishment of a possible work-related injury. He also alleged that it acted wrongly and cited various cases regarding error and abuse on the part of the employing establishment. Appellant described the harassment and hostile work environment he believed contributed to his condition. He further requested that the Branch of Hearings and Review produce the presence of specific witnesses and documents. Appellant resubmitted his July 30, 2007 statement and various documents.

In a July 8, 2008 letter, an OWCP hearing representative denied appellant's request for the issuance of a subpoena.

On July 29, 2008 a hearing was held. Appellant explained that he did not notify the employing establishment sooner because he did not realize that he was injured at that time. He asserted that various e-mails and discussions he had with his supervisors about work-related events, specifically a November 19, 1996 incident, when he felt harassed and discriminated against, put them on notice that the work incidents he described could have caused or resulted in his condition. Appellant further alleged that his untimely filing should be excused under the equitable tolling rule because the employing establishment showed misconduct in its actions by barring him from the building, not assisting him or providing him with information, and allowing the filing deadline to pass.

In a September 12, 2008 statement, appellant reiterated his allegations that the equitable tolling rule should apply in this case and resubmitted various documents. He also provided additional personnel records, Equal Employment Opportunity Commission complaints and decisions, medical reports, and insurance billing statements.

By decision dated December 1, 2008, an OWCP hearing representative affirmed the August 31, 2007 decision.

On August 7, 2009 OWCP received appellant's request for reconsideration. In a statement, appellant asserted that the date of injury was March 3, 1997 and that he had notified various individuals and union representatives of the incidents at work which he attributed to his emotional condition. He stated that he reported his injury on March 4, 2007 and expressed interest in filing a workers' compensation claim. Appellant indicated that his emotional condition prevented him from being aware of the time limitation to file a claim. He further alleged that OWCP erred in denying an excusable neglect waiver of the three-year time limitation. Appellant noted several federal laws and court proceedings in support of his contention.

Appellant submitted copies of the American with Disabilities Act of 2008; Executive Orders 13078, 13163, 13217; various court and administrative decisions and documents; and handwritten notations. He also resubmitted evidence previously of record.

By decision dated September 17, 2009, OWCP affirmed the December 1, 2008 decision denying his claim as untimely filed.

Appellant subsequently submitted multiple requests for reconsideration which OWCP denied, finding that the evidence submitted was insufficient to warrant further merit review.

On June 20, 2013 appellant again requested reconsideration. He reiterated his previous arguments and resubmitted medical reports, personnel records, and the MSPB decision. By nonmerit decision dated June 27, 2013, OWCP denied appellant's June 20, 2013 reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

On February 26, 2014 appellant again requested reconsideration. He asserted that it was inconsistent that the Secretary of the Department of Labor approved his disability claim under the UnumProvident Settlement while OWCP continued to deny his workers' compensation claim. Appellant provided frequently asked questions about the UnumProvident Settlement. By decision dated April 1, 2014, OWCP again denied appellant's February 26, 2014 request for reconsideration. It determined that appellant's request was untimely filed and failed to demonstrate clear evidence of error.

On May 5, 2014 appellant appealed to the Board. On March 19, 2015 the Board affirmed the April 1, 2014 OWCP decision denying appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.⁴

On March 28, 2015 appellant again requested reconsideration. He alleged that his occupational disease claim should be considered timely based on federal employee misconduct, human rights violations, federal and state employee trickery, and racial profiling. Appellant explained that federal employees were aware of 5 U.S.C. §§ 8122 and 8128 regarding the time limitations to file a workers' compensation claim before he applied for workers' compensation. He cited *Irwin v. Veterans Administration*, 498 U.S. 89 (1990). Appellant also resubmitted a copy of 5 U.S.C. § 8122, Executive Order 13107, the concurring opinion of Supreme Court Justice Sandra O'Connor in the case *Arizona v. Isaac Evans* (issued March 1, 1995), Rules Governing Petitions for Executive Clemency from the Department of Justice, and Appointment Affidavits dated September 29, 1987 and February 17, 1989.

By decision dated May 12, 2015, OWCP denied appellant's March 28, 2015 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁴ Docket No. 14-1242 (issued March 19, 2015).

On August 26, 2015 appellant appealed to the Board. On April 26, 2016 the Board affirmed the May 12, 2015 OWCP decision denying appellant's reconsideration request, finding that it was untimely filed and fail to demonstrate clear evidence of error.⁵

On July 5, 2016 appellant again requested reconsideration. In an accompanying letter he alleged that his claim should be considered timely based on federal employee misconduct, human right violations, federal and state employee trickery, and racial profiling. Appellant argued that his claim continues to be denied because of the employing establishment's failure to change his date of injury from January 1, 1994 to March 1997. He advised that his requests for reconsideration were untimely filed because he was a caretaker of family members due to their health issues, he was under the care of medical professionals, he was wrongly imprisoned, abused and tortured, and that he could not afford legal representation. Appellant asserted that the Department of Labor had approved his claim, but yet continued to deny benefits. He resubmitted various documents previously of record. These included personnel records, notices of disciplinary action from the employing establishment; a handwritten letter to Robert Moore, Register (Presidential Documents -- Implementation of Human Rights Treaties); and OPM/FERS personnel record. Documents pertaining to bills were also submitted.

By decision dated January 27, 2017, OWCP denied appellant's July 5, 2016 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸

OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."⁹

⁵ Docket No. 15-1788 (issued April 26, 2016).

⁶ This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.607(b).

The request must demonstrate on its face that such decision was erroneous.¹⁰ Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

In the last merit decision of appellant's case, dated September 17, 2009, OWCP denied appellant's occupational disease claim because he did not file his claim within the three-year limitation period provided in 5 U.S.C. § 8122(b). As it received appellant's July 5, 2016 request for reconsideration more than one year after the September 17, 2009 merit decision, the Board finds that OWCP properly determined that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim for compensation.¹²

Along with his reconsideration request, appellant asserted that his claim should be reopened due to federal employee misconduct and his interaction with the employing establishment in attempt to obtain benefit approval. He continues to assert that the employing establishment failed to change his date of injury from January 1, 1994 to March 1997. Appellant also discussed the issue of racial profiling and provided reasons why his reconsideration requests were untimely filed. This, however, does not raise a substantial question as to the correctness of OWCP's September 17, 2009 merit decision. The evidence submitted by appellant with his July 5, 2016 reconsideration request also does not establish that appellant filed a timely occupational disease claim or that the employing establishment had timely notice of his injury. He has not presented any evidence to raise a substantial question as to the correctness of OWCP's decision to deny his claim. The Board finds, therefore, that appellant has not demonstrated clear evidence of error.

On appeal appellant alleges that OWCP had confused several issues, which he had clarified, including that the date of injury was March 1997, not January 1, 1993, and that a former Secretary of Labor had approved his workers' compensation benefits. He also submitted letter outlining various events/assertions he argued rendered his claim timely filed under 5 U.S.C. § 8122. None of these allegations or evidence submitted, however, raise a substantial question concerning the correctness of OWCP's decision or manifests on its face that OWCP's decision

¹⁰ *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ 20 C.F.R. § 10.608(b).

¹² See *Robert F. Stone*, 57 ECAB 292 (2005); see also *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

was in error. Additionally, as previously noted, the Board lacks jurisdiction to review the merits of this case.

As the evidence submitted does not raise a substantial question concerning the correctness of OWCP's September 17, 2009 merit decision, appellant has failed to demonstrate clear evidence of error on the part of OWCP in denying further merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2018
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