

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On October 19, 2015 appellant, then a 56-year-old sales associate and distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that, on October 9, 2015, she suffered an anxiety attack and high blood pressure due to the actions of the postmaster, M.V., and a coworker, W.M. She stopped working on the date of injury and returned to work on October 15, 2015.

By decision dated December 18, 2015, OWCP denied the claim, finding that the factual evidence of record failed to establish that the October 9, 2015 employment incident occurred as alleged.

On December 20, 2016 appellant requested reconsideration. In support of her reconsideration request, appellant submitted narrative statements dated December 16, 2016 and documentation related to an equal employment opportunity (EEO) grievance and settlement dated January 30 and December 30, 2016. She also submitted diagnostic test results dated August 17, 2015 and September 26 and October 3, 2016. In a January 22, 2015 prescription note, it was reported by an unidentified health care provider that appellant was a postoperative patient of left knee arthroscopic surgery and needed more time to heal. Additionally, it was requested that appellant be afforded the use of a chair when knee symptoms such as pain, swelling, or decreased range of motion appeared.

Appellant further submitted a December 7, 2016 report from Dr. Gerardo Tejedor, a psychiatrist, who diagnosed generalized anxiety disorder.

In a December 12, 2016 report, Dr. Benjamin R. Velazquez Lopez, a family practitioner, noted that he saw appellant on August 25, 2015 and at that visit, she was diagnosed with high blood pressure and general anxiety. He further noted that she was prescribed medication and educated on taking her blood pressure twice a day. Dr. Lopez also indicated that on March 18, 2016 he prescribed additional medication and asked for a cardiology evaluation. He noted that in May 2016, appellant was evaluated with a psychiatrist and cardiologist.

By decision dated March 7, 2017, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

Appellant subsequently filed an appeal with the Board. By decision dated August 7, 2017, the Board set aside OWCP's March 7, 2017 decision as it failed to make findings or provide analysis on the issue of whether appellant had demonstrated clear evidence of error.

By decision dated November 30, 2017, OWCP again denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant had submitted additional medical evidence, personal statements that provided a description of her work-related incidents which she believed contributed to her

² Docket No. 17-1067 (issued August 7, 2017).

condition, and grievance/settlement documents in support of her claim, but had not provided an argument in support of her contention that OWCP's December 18, 2015 merit decision was improperly decided.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁶

Section 10.607(b) provides that OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. 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).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁹ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to

³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 20 C.F.R. § 10.607(a).

⁶ See *Jesus D. Sanchez*, *supra* note 3; *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, *supra* note 3.

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

¹¹ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹² See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, *supra* note 10.

¹³ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

produce a contrary conclusion.¹⁴ 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.¹⁵ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶

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 (for example, proof that a schedule award was miscalculated). 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.¹⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁸

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 17, 2017 decision because the Board considered that evidence in its August 7, 2017 decision and found that OWCP properly determined that her request for reconsideration was untimely filed. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. In support of her reconsideration request, appellant submitted narrative statements and a December 7, 2016 report from Dr. Tejedor who diagnosed generalized anxiety disorder and a December 12, 2016 report from Dr. Lopez who diagnosed high blood pressure. Clear evidence of error is intended to represent a difficult standard.¹⁹ Even a detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.²⁰ It is not enough to

¹⁴ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁵ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹⁸ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (February 2016); see *Dean D. Beets*, *supra* note 11.

²⁰ See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²¹

The narrative statements submitted by appellant merely reiterate the factual history previously of record and the medical evidence fails to address the October 9, 2015 work incident. Moreover, the Board finds the documentation related to appellant's EEO grievance/settlement, her diagnostic testing results, and the January 22, 2015 note from an unidentifiable healthcare provider do not demonstrate clear evidence of error because they do not demonstrate that OWCP committed an error in denying appellant's traumatic injury claim, nor raise a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that the evidence does not demonstrate clear evidence of error on the part of OWCP in its December 18, 2015 decision.²²

CONCLUSION

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

²¹ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²² See also *L.M.*, Docket No. 14-1738 (issued March 3, 2015) (where the claimant resubmitted medical reports previously of record, the Board found that the evidence was duplicative and failed to demonstrate clear evidence of error).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2019
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