

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

W.K., Appellant)
and) Docket No. 18-1260
U.S. POSTAL SERVICE, POST OFFICE,) Issued: February 5, 2019
Wayne, PA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 4, 2018 appellant filed a timely appeal from a December 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated September 14, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

FACTUAL HISTORY

On September 23, 1997 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that harassment and unfair discipline at work caused an

¹ 5 U.S.C. § 8101 *et seq.*

emotional condition. Following initial denial of the claim, OWCP accepted that appellant's allegation that he was unfairly disciplined constituted a compensable employment factor, and on April 30, 1999 it accepted the claim for adjustment disorder with mixed anxiety and depressed mood. It paid him wage-loss compensation from September 15, 1999 to December 31, 2003.

In correspondence dated April 24, 2015, appellant questioned why authorization for a prescribed medication had been denied. He attached an October 1, 2013 report in which Dr. Stephan C. Mann, a Board-certified psychiatrist, noted that appellant had been under his care since November 6, 2007 and that his original diagnosis of adjustment disorder with mixed anxiety and depressed mood had matured into major depressive disorder, recurrent, severe. Dr. Mann indicated that appellant also saw a licensed social worker on a weekly basis for psychotherapy and that he was treating appellant with medication.

By letter dated May 7, 2015, OWCP noted that appellant's claim had not been accepted for major depression. It advised that he should provide a medical report from his treating psychiatrist that contained a rationalized medical opinion explaining how his current diagnosis of major depression was related to the accepted work incident that occurred in 1997.

On September 3, 2015 appellant responded that Dr. Mann had retired and he had requested that his current psychologist be allowed to provide additional information. Nothing further was submitted.

By decision dated September 14, 2016, OWCP denied expansion of the acceptance of the claim to include major depressive disorder. It noted that the most recent medical evidence, Dr. Mann's October 1, 2013 report, did not provide rationale as to how his diagnosis of major depressive disorder (recurrent, severe) was causally related to the accepted employment factor.

On September 18, 2017 appellant requested reconsideration maintaining that his current depression was a natural progression of the accepted adjustment disorder. He attached copies of pages from an unidentified publication regarding adjustment disorders and major depressive disorder.

By decision dated December 7, 2017, OWCP denied appellant's reconsideration request, finding that 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 request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.² Timeliness is determined by the document receipt date, as indicated by the "received date" in OWCP's integrated Federal Employees' Compensation

² 20 C.F.R. § 10.607(a).

System.³ 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.⁴

When a request for reconsideration is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrated clear evidence of error.⁵ 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.⁶

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.⁷

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.⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.⁹

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.

As appellant's request for reconsideration was received by OWCP on September 18, 2017, more than one year after OWCP's September 14, 2016 decision, the Board finds that his request

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

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

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 20 C.F.R. § 10.607(b); *supra* note 3 at Chapter 2.1602.5(a) (February 2016).

⁷ *M.M.*, Docket No. 18-0622 (issued October 2, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

⁸ *Supra* note 3 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

⁹ See *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

for reconsideration was untimely filed.¹⁰ Consequently, he must demonstrate clear evidence of error by OWCP in its prior merit decision.¹¹

The Board finds that appellant failed to demonstrate clear evidence of error. In his reconsideration request, appellant maintained that his diagnosed major depression was a natural progression of the accepted adjustment disorder. In support thereof, he submitted information from an unidentified publication. The Board has held that excerpts from publications have little probative value in resolving medical questions unless a physician shows the applicability of the general medical principles discussed in the articles to the specific factual situation at issue in the case.¹² Appellant has not submitted such a report from a physician.

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's September 14, 2016 merit decision, appellant has not established that OWCP committed error.¹³

Appellant asserts on appeal that due to his accepted emotional condition, he suffers from an inability to focus, especially with regard to his FECA claim, which is very distressing. He maintains that, therefore, it would be reasonable to find that his reconsideration request was timely. While appellant alleged that he was mentally incompetent to timely request reconsideration following the September 14, 2016 merit decision, he has not provided medical evidence to support a finding of incompetency during the relevant time period. Therefore, appellant has not proven incompetence as alleged.¹⁴

The Board therefore finds that OWCP properly denied appellant's untimely request for reconsideration.¹⁵

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.

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Supra* note 7.

¹² A.S., Docket No. 18-0376 (issued July 18, 2018); *Roger G. Payne*, 55 ECAB 535 (2004).

¹³ P.S., Docket No. 17-1707 (issued February 9, 2018).

¹⁴ See E.P., Docket No. 17-1086 (issued October 13, 2017).

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

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board