

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

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 20, 2008 appellant, then a 65-year-old cook foreman, filed an occupational disease claim (Form CA-2) alleging that he developed delayed onset of post-traumatic stress disorder (PTSD) due to his forced constructive termination from employment on or about August 6, 1978. He indicated that he first became aware of his condition and realized that it resulted from his federal employment on February 15, 2004. Appellant reported that his condition was diagnosed on February 15, 2004. He explained that he had not filed his claim within 30 days of becoming aware of his employment-related condition because it was not diagnosed prior to February 15, 2004. On the reverse side of the claim form, the employing establishment noted that appellant stopped working in 1978.⁵

In a letter dated November 21, 2008, appellant alleged that he sustained delayed onset of PTSD due to his constructive discharge by the employing establishment on or about August 6, 1978. He noted that he had not learned of his condition until February 15, 2004. Appellant related that he promptly notified the employing establishment.

In a neuropsychological evaluation report dated July 7, 2004, Dr. Martin L. Boone, a neuropsychologist, related that he had treated appellant for a long history of anxiety symptoms related to PTSD. He reviewed appellant's history and related that appellant began to experience PTSD symptoms more frequently after he was forced to resign from the employing establishment. Dr. Boone diagnosed delayed onset of PTSD and chronic pain.

In a December 15, 2008 letter a workers' compensation and employee health coordinator at the employing establishment controverted appellant's claim. She contended that he filed his occupational disease claim well beyond the three-year time limitation. The coordinator related that appellant became aware of his work-related PTSD condition in 2004, but had not filed an occupational disease claim until 2008.

⁴ Docket No. 10-0673 (issued November 22, 2010), *denying petition for recon.*, Docket No. 10-0673 (issued June 10, 2011); *Order Dismissing Appeal*, Docket No. 12-0004 (issued January 25, 2012); Docket No. 14-0141 (issued May 14, 2014); *Order Dismissing Appeal*, Docket No. 15-0766 (issued May 11, 2015); *Order Dismissing Petition for Reconsideration*, Docket No. 15-0766 (issued October 5, 2015); Docket No. 16-0746 (issued June 1, 2016); Docket No. 16-1521 (issued February 3, 2017); *Order Dismissing Appeal*, Docket No. 18-0571 (issued April 17, 2018).

⁵ Appellant resigned from federal employment on August 18, 1978.

In a development letter dated February 20, 2009, OWCP informed appellant that the evidence submitted was insufficient to establish the claim. It advised him of the type of medical and factual evidence needed, including a detailed description of employment factors which he believed contributed to his condition and a medical report from his physician. OWCP also noted that it did not appear that appellant had timely filed his claim within three years of the date of injury or date of awareness of a relationship between the claimed condition and his employment. It requested evidence to support that his claim had been timely filed. OWCP afforded appellant 30 days to submit the necessary evidence.

In a March 4, 2009 letter, appellant, through counsel, responded to OWCP's development letter. He described appellant's employment duties as a cook foreman and how he was forced to resign by the employing establishment. Counsel referenced several medical reports and explained that they established appellant's injury and answered questions in its development letter.

By decision dated July 10, 2009, OWCP denied appellant's occupational disease claim finding it was not timely filed pursuant to 5 U.S.C. § 8122. It found that the evidence of record had established that he had not timely filed his claim within the three-year time limitation, February 15, 2004, the date when he was aware or reasonably should have been aware of his employment-related injury. OWCP also determined that appellant's supervisor did not have actual knowledge of his condition within 30 days of his last exposure.

On July 23, 2009 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A hearing was held on October 23, 2009.

Following the hearing, appellant submitted various documents from the Equal Employment Opportunity Commission (EEOC) and from federal district court. A September 19, 2017 letter from the EEOC advised him that he had exhausted all administrative remedies regarding his April 12, 2004 complaint. An opinion dated June 20, 2006 from the U.S. District Court for the Northern District of West Virginia denied defendant's motion for summary judgement regarding a civil action that appellant had filed on March 29, 2005 for disability due to delayed onset PTSD as a result of forceful resignation. A subsequent decision dated September 27, 2006 dismissed plaintiff's complaint from the U.S. District Court for the Northern District of West Virginia.

By decision dated December 14, 2009, an OWCP hearing representative affirmed the July 10, 2009 decision. He found that the evidence of record demonstrated that appellant had not filed his workers' compensation claim within the three-year time limitation required under FECA. The hearing representative also noted that there was no evidence of record to establish an exception to the three-year filing requirement.

Appellant filed an appeal to the Board. By decision dated November 22, 2010, the Board affirmed the December 14, 2009 decision. The Board determined that appellant's November 20, 2008 claim was not timely filed within three years pursuant to 5 U.S.C. § 8122 and the evidence

of record did not establish that appellant's supervisor had actual knowledge of appellant's injury within 30 days of his last date of employment exposure from August 18, 1978.⁶

Appellant subsequently filed multiple requests for reconsideration of OWCP's December 14, 2009 decision. OWCP denied his reconsideration requests by nonmerit decisions dated January 5, 2011,⁷ July 12, 2013,⁸ July 7, 2016,⁹ and June 21, 2017.¹⁰ These decisions were subsequently reviewed by the Board and adjudicated appropriately.

OWCP received appellant's latest request for reconsideration on April 24, 2018. Appellant requested that OWCP reopen his claim for reconsideration of the merits of his claim and contended that he filed his occupational disease claim on time. He reiterated that when he informed the employing establishment in July 2004 that he was recently diagnosed with delayed-onset of PTSD he was advised to file an EEO complaint. Appellant alleged that he put the employing establishment on notice of his work injury in 2004 and that there was no three-year delay in filing his claim. He asserted that in 2004 the employing establishment failed to follow OWCP's rules to notify them of his work-related injury.

Appellant submitted a copy of 5 U.S.C. § 8122 regarding the timeliness of making a claim.

In a statement dated April 25, 2018, appellant reiterated that he notified the employing establishment about his claim for delayed onset of PTSD in April 2004 and was instructed to file an EEOC complaint. He asserted that the employing establishment had not followed the rules and notified OWCP of the work-related injury. Appellant provided the name of the EEO officer and alleged that the EEOC complaint put the employing establishment on notice and they had actual knowledge of his injury in April and July 2004.

Appellant submitted a signed declaration dated November 21, 2005 by an EEO specialist for the employing establishment, which indicated that she was able to locate his original EEO complaint filed on April 14, 2004.

⁶ Docket No. 10-0673 (issued November 22, 2010).

⁷ Appellant filed an appeal of OWCP's January 5, 2011 nonmerit decision before the Board. By *Order Dismissing Appeal* dated January 25, 2012, the Board dismissed his appeal as untimely filed. Docket No. 12-0004 (issued January 25, 2012).

⁸ Appellant filed an appeal of OWCP's July 12, 2013 nonmerit decision before the Board. By decision dated May 14, 2014, the Board affirmed the nonmerit decision. Docket No. 14-0141 (issued May 14, 2014).

⁹ Appellant filed an appeal of OWCP's July 7, 2016 nonmerit decision, which was affirmed by the Board in a decision dated February 3, 2017.

¹⁰ Appellant filed an appeal of OWCP's June 21, 2017 nonmerit decision before the Board. By *Order Dismissing Appeal* dated April 17, 2018, the Board dismissed his appeal as untimely filed. Docket No. 18-0571 (issued April 17, 2018).

By decision dated July 2, 2018, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate clear evidence of error.¹¹

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹³ 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.¹⁴ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the integrated Federal Employees' Compensation System.¹⁵ 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.¹⁶

OWCP may not deny an application for review solely because the application was not timely 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.¹⁷ OWCP regulations and procedures provide that it 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.¹⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁹ It is not enough merely to show that the evidence

¹¹ The Board notes that OWCP indicated in its July 2, 2018 decision that appellant was requesting reconsideration of a February 3, 2017 Board decision. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). As the last OWCP merit decision is the December 14, 2009 decision, this decision is the decision over which appellant could request reconsideration. See 20 C.F.R. § 10.607(a); see also *S.M.*, Docket No. 18-0075 (issued April 11, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² This section provides in pertinent part: [t]he 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).

¹³ 20 C.F.R. § 10.607.

¹⁴ *Id.* at § 10.607(a). 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹⁵ *Id.* at Chapter 2.1602.4(b).

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

¹⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁸ *Id.* at § 10.607(b); *supra* note 16 at Chapter 2.1602.5(a) (February 2016).

¹⁹ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

could be construed so as to produce a contrary conclusion.²⁰ 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.²¹

OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.²² 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 evidence requiring further development is insufficient to demonstrate clear evidence of error.²³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.²⁴

ANALYSIS

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

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.²⁵ The right to reconsideration within one year accompanies any subsequent merit decision on the issues.²⁶ The last decision on the merits of the case was the Board's November 22, 2010 decision, which affirmed the December 14, 2009 OWCP decision, finding that appellant had not timely filed his occupational disease claim. OWCP received his most recent request for reconsideration on April 24, 2018. Because it received appellant's request for reconsideration more than a year after its last merit decision, the request was untimely filed, and he must demonstrate clear evidence of error on the part of OWCP in its December 14, 2009 decision.²⁷

The Board finds that appellant's arguments and evidence submitted on reconsideration do not raise a substantial question as to the correctness of OWCP's December 14, 2009 decision or shift the weight of the evidence of record in his favor.

²⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

²¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

²² *Supra* note 16 at Chapter 2.1602.5a (October 2011).

²³ A.R., Docket No. 15-1598 (issued December 7, 2015).

²⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

²⁵ *Supra* note 16.

²⁶ See *Robert F. Stone*, 57 ECAB 292 (2005).

²⁷ *Supra* notes 17 and 20. One year from November 22, 2010 would be November 22, 2011. Therefore, OWCP properly found that appellant's request for reconsideration, received on April 24, 2018 was untimely filed.

In its most recent decision, OWCP denied appellant's occupational disease claim finding that his November 20, 2008 claim was not timely filed pursuant to 5 U.S.C. § 8122. On reconsideration appellant alleged that his occupational disease claim was timely filed. He reiterated that he was not diagnosed with the employment-related condition until July 2004. Appellant explained that, when he informed the employing establishment of his injury, he was advised to file an EEOC claim, not a workers' compensation claim. He asserted that the employing establishment failed to follow OWCP's rules and had not notified them of his work-related injury. Appellant argued that he put the employing establishment on notice of his work-related injury in 2004 and there was no three-year delay in filing his claim. He submitted a signed declaration dated November 21, 2005 by an EEO specialist for the employing establishment, which indicated that she was able to locate his original EEO complaint filed on April 14, 2004.

Appellant, however, has not provided any evidence to establish that his November 20, 2008 occupational disease claim was timely filed pursuant to 5 U.S.C. § 8122. It is established that he had filed an EEO complaint on April 14, 2004, however, this evidence is insufficient to establish that appellant's supervisor had actual knowledge of the work-related injury within 30 days of the injury. Appellant has not submitted any evidence to demonstrate that he timely filed his occupational disease claim pursuant to 5 U.S.C. § 8122 or that he met any of the exceptions to the three-year time limitation. Accordingly, his reconsideration request does not raise a substantial question as to the correctness of OWCP's decision.²⁸

The Board finds that appellant has not supported his reconsideration request with evidence or argument demonstrating that OWCP's December 14, 1999 decision was clearly erroneous. Appellant's request was insufficient to shift the weight of the evidence in his favor or raise a substantial question that OWCP erred in its December 14, 2009 decision. Thus, OWCP properly denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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

²⁸ See *T.W.*, Docket No. 13-0594 (issued August 5, 2013).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2019
Washington, DC

Christopher J. Godfrey, 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