



## **FACTUAL HISTORY**

On October 10, 1997 appellant, then a 42-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging that on July 24, 1997 he first realized that his back pain, headaches, anxiety, stress, and insomnia were due to discrimination, retaliation, and denial of promotion he experienced while in the performance of his federal employment due to his prior EEO complaints. He stopped work on August 4, 1997.

An April 11, 1997 affidavit from C.S., supervisory criminal investigator, denied appellant's allegations of discrimination and retaliation.

In notes dated August 8 and 25, 1997, Dr. Tony L. Wong, a Board-certified internist, diagnosed work-related stress. In the August 25, 1997 note, he attributed appellant's stress to a hostile work environment. In both notes, Dr. Wong advised that he should stop work. In an October 9, 1997 report, he indicated that appellant was seen for complaints of stress, anxiety, and possible depression. Appellant related frustration with denials of promotion and requests for relocation, which he believed was due to racial discrimination, his accent, and his physical appearance. Dr. Wong completed an attending physician's report (Form CA-20) on October 9, 1997 releasing appellant to return to work on December 4, 1997. Diagnoses included stress, anxiety, and depression. Dr. Wong checked a box marked "yes" to the question of whether the diagnosed conditions had been caused or aggravated by an employment activity.

An unsigned October 10, 1997 notice of final Equal Employment Opportunity (EEO) counseling report, noted that appellant alleged discrimination based on race, age, national origin, and reprisal for filing past EEO complaints. The report detailed appellant's allegations, records reviewed, and summarized personal interviews.

In a November 4, 1997 development letter, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It afforded him 30 days to submit the necessary evidence.

In a December 28, 1997 report, Dr. John Roumasset, a Board-certified psychiatrist, noted that he had treated appellant on five occasions. He diagnosed single episode of depression and stressful work situation. Dr. Roumasset noted that appellant began filing EEO complaints about two years prior, which he believed resulted in retaliation and lower performance appraisals.

In a January 7, 1998 report, Dr. Richard B. Ward, a Board-certified internist, diagnosed work-related stress and likely depression. He noted appellant's allegations that his requests for transfer were denied due to discrimination and retaliation. Dr. Ward opined that appellant's symptoms had resolved and that he was capable of working without restrictions.

In a January 30, 1998 report, Dr. Kenneth I. Gottlieb, a Board-certified psychiatrist, observed that appellant had an obsessive compulsive personality disorder with prominent dependent personality traits. Diagnoses included adjustment disorder with depression and anxiety, resolved, and stressful work situation regarding transfer/promotion. Dr. Gottlieb concluded that appellant could return to work.

By decision dated July 30, 1998, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that his "diagnosed emotional or psychiatric illness arose out of and during the course of the performance of his duty as a federal employee."

On March 23, 2000 appellant requested reconsideration and submitted an August 12, 1999 court order from the United States District Court for the Northern District of California finding retaliation and awarding appellant compensatory damages.

By decision dated March 30, 2000, OWCP denied appellant's request for reconsideration finding that his request was untimely and failed to demonstrate clear evidence of error.

On May 9, 2018 appellant requested reconsideration alleging that his case had not been properly adjudicated following a May 2002 court decision.<sup>3</sup> He asserted that the court order issued subsequent to OWCP's adjudication of his claim was sufficient to establish his claim. Appellant submitted an August 19, 1999 court order awarding him compensatory damages for retaliation and emotional distress and a May 28, 2002 court order vacating a May 16, 2000 judgement and denying defendant's motions for a new trial and judgement as a matter of law. The August 19, 1999 court order contained a checked a box marked "yes" next to the questions of whether appellant established retaliation as a motivating factor in his April 1998 officer corps rating system (OCORS) rating by a preponderance of the evidence and "yes" to the question of whether appellant established that he suffered inconvenience, suffering, mental anguish, emotional pain, loss of enjoyment of life, or other nonpecuniary losses from intentional retaliation by the employing establishment. The May 28, 2002 court order denied defendant's motion for a judgement as a matter of law and motion for a new trial. The court noted that on May 16, 2000 the court granted defendant's motion for judgement as a matter of law and conditionally granted its request for a new trial. The order noted that a jury heard testimony that in April 1998 appellant had been issued a lowered OCORS rating and that in September 1998 he was transferred to work at the county jail, which had been the first job he held at the employing establishment. On remand, the court found the evidence presented at trial sufficient to support the jury's verdict. Thus, it denied defendant's motion for judgment as a matter of law and motion for a new trial. The clerk of the court was instructed to vacate the May 16, 2000 judgment and enter an amended judgment in accordance with the jury verdict.

By decision dated July 16, 2018, OWCP denied appellant's May 9, 2018 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For

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<sup>3</sup> Appellant stated that the current claim had been consolidated with OWCP File No. xxxxxx179. However, a review of the current record does not contain any memorandum or letter from OWCP indicating that this file had been combined with another claim. In OWCP File No. xxxxxx179, OWCP accepted the conditions of aggravation of L5-S1 herniated disc for a February 2, 2004 employment-related traumatic injury.

<sup>4</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>8</sup> Its 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, if the claimant's application for review demonstrates "clear evidence of error" on the part of OWCP.<sup>9</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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 merely to 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 not only be of sufficient probative value to create a conflict in medical opinion or establish 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.<sup>12</sup>

### 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.

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>9</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

<sup>12</sup> *J.W.*, *supra* note 10; *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP's regulations<sup>13</sup> and procedures<sup>14</sup> establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>15</sup> The most recent merit decision was OWCP's July 30, 1998 decision which found that the evidence of record was insufficient to establish an emotional or psychiatric condition in the performance of duty. As appellant's request for reconsideration was not received by OWCP until May 9, 2018, more than one year after the July 30, 1998 decision, it was untimely filed.<sup>16</sup> Because appellant's request was untimely, he must demonstrate clear evidence of error on the part of OWCP in denying his emotional condition claim.

In support of his untimely request for reconsideration, appellant submitted court orders dated August 19, 1999 and May 28, 2002. These cursory orders concerned an April 1998 lowered OCORS rating and a September 1998 transfer within the employing establishment. This evidence fails to address the issue that was before OWCP at the time it issued its July 31, 1998 decision, which was whether the evidence submitted was sufficient to establish an emotional or psychiatric condition in the performance of duty with respect to allegations of discrimination and retaliation in 1997. The evidence submitted addresses allegations that were not part of appellant's 1997 workers' compensation claim. Appellant did not provide positive, precise, and explicit evidence to demonstrate that OWCP's denial of his 1997 claim was in error. Therefore, the Board finds that his May 9, 2018 request for reconsideration failed to demonstrate clear evidence of error because it did not raise a substantial question regarding OWCP's July 30, 1998 decision.

Thus, appellant has not discharged his burden of proof to demonstrate clear evidence of error in OWCP's July 30, 1998 decision denying his claim.

### 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.

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<sup>13</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>14</sup> *Supra* note 6 at Chapter 2.1602.4 (February 2016); see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>15</sup> *J.W.*, *supra* note 10; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>16</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 29, 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