

ISSUE

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

FACTUAL HISTORY

On June 21, 2016 appellant, then a 49-year-old program specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained an aggravation of psychological distress causally related to factors of her federal employment. The employing establishment indicated that she had resigned from employment on March 25, 2016.⁴

In a statement dated July 29, 2016, appellant, through counsel, asserted that the employing establishment erred in placing her on a PIP and issuing a notice of unacceptable performance. She noted that the employing establishment had subsequently cancelled both the notice of unacceptable performance and her placement on a PIP after she filed a grievance. Appellant further maintained that management erred in denying her access to her personnel file. She contended that management engaged in disparate treatment when it denied her request for "use it or lose it" leave, and told her not to respond to e-mails during training. Appellant advised that she had to plan a predeployment event without adequate assistance and that from 2007 to 2012 she had worked overtime in order to complete her regularly assigned employment duties. In 2012 the employing establishment limited her to working 40 hours a week, even though she continued to work overtime due to weekend events. M.T. instructed appellant to complete an after action report without advance notice that such a report would be required. She maintained that she had experienced stress trying to complete her documents, including travel orders, to M.T.'s satisfaction.

By decision dated February 16, 2017, OWCP denied appellant's emotional condition claim. It found that she had not established a compensable employment factor or submitted medical evidence containing a diagnosed condition. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 16, 2018 appellant submitted medical evidence and additional factual evidence. She further submitted an unsigned 29-page statement. Appellant related that it was in "reply to the responses my supervisor provided and the questions you so far presented...." She summarized the attachments submitted. Appellant quoted OWCP's findings in its February 16, 2017 decision. Below the quotes, she provided her rebuttal to OWCP's determinations and cited attachments which she asserted supported her allegations.

Appellant related that she had filed a discrimination claim that was settled favorably and that the Office of Personnel Management (OPM) had approved her application for disability

⁴ In a statement dated November 18, 2014, submitted in connection with another OWCP file number, M.T., a commander and appellant's supervisor, advised that a support specialist contract position was vacant April through August 2014, but that appellant had no additional demands placed upon her due to the vacancy. He advised that she was currently on a performance improvement plan (PIP) and had to ask him if she wanted assistance from a contractor. M.T. related that appellant was off work on sick leave for three weeks and that he had provided her with a week to adjust when she returned to work. She maintained that her workload was excessive because of planning for a program event and meeting the requirements of the PIP, which M.T. advised constituted her work duties.

retirement. She contended that M.T. had lied in his responses to OWCP and described actions taken by M.T., including making false accusations against her in September 2014, issuing a proposed suspension on September 24, 2014, placing her on a PIP on September 24, 2014 without prior notice of unsatisfactory job performance, denying her request for her personnel file, and denying her requests for assistance with her program. Appellant maintained that M.T. had expanded her job duties under the PIP and had assigned her an unreasonable amount of work, including completing orders for all service members and their families. Management also refused to grant her request for leave without pay (LWOP). Appellant noted that the employing establishment subsequently cancelled her proposed five-day suspension and placement on a PIP. She related that she resigned on March 26, 2016 to retire on disability.

Appellant challenged OWCP's findings in its February 16, 2017 decision. She contended that her placement on a PIP was discriminatory and constituted error by the employing establishment. Appellant maintained that management committed error in refusing to grant her leave request and marking her as absent without leave (AWOL), noting that it was later changed to LWOP. She advised that M.T. refused to allow her help from the contractor specifically hired to assist her with her duties and refused to reasonably accommodate her for her disability. Management limited appellant, but not her coworkers, to 40 hours a week except when she had weekend events even though she was on a maxi schedule. M.T. assigned her an after action report and requested repeated revisions of the report to show her inability to perform the duties of her position. He also denied her access to her personnel file against regulations. Appellant advised that she had a work laptop but had never taken it to events. She asserted that she had generated travel orders for reservists and spouses from April through June 2014, in contradiction to M.T.'s assertion.

Appellant submitted additional evidence, including a November 12, 2014 letter from the employing establishment suspending her for five days.

On October 9, 2015 the employing establishment cancelled the notice of unacceptable performance and placement of appellant on a PIP.

Appellant also submitted an e-mail from M.T. requesting revisions to a memorandum and a March 27, 2015 letter indicating that he was designating her as AWOL effective March 27, 2015. She further submitted a November 2, 2014 letter regarding leave usage, copies of her PIP requirements, an October 14, 2017 letter extending her PIP and modifying performance expectations, and an October 3, 2014 letter submitted in response to a proposed suspension. Appellant also submitted a letter from an individual confirming that she wrote travel orders.

The record contains a portion of a March 2016 settlement agreement between appellant and the employing establishment regarding an Equal Employment Opportunity (EEO) complaint. The employing establishment agreed to pay her representative, remove disciplinary action from her personnel file, cooperate with her application for disability retirement, and change her AWOL status to LWOP pending receipt of her resignation. Appellant agreed to withdraw her discrimination complaint.

On September 11, 2018 counsel requested the status of appellant's February 2018 request for reconsideration. In a September 14, 2018 response, OWCP advised that it had received

numerous documents subsequent to its February 16, 2017 decision, but not a request for reconsideration.

In response to a November 15, 2018 telephone call from appellant, OWCP advised that she should submit a clear request for reconsideration.

On November 26, 2018 appellant requested reconsideration.

By decision dated December 10, 2018, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease, or increase the compensation awarded or award compensation previously refused or discontinued.⁵

OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁷ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System.)⁸ 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.⁹

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.¹⁰ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a); *see also D.G.*, Docket No. 18-1038 (issued January 23, 2019).

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

⁸ *Id.* at Chapter 2.1602.4(b) (February 2016).

⁹ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

¹⁰ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

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.¹¹

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹² The Board notes that clear evidence of error is intended to represent a difficult standard.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁶ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

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

An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁸ As appellant's request for reconsideration was not received until November 26, 2018, more than one year after the issuance of its February 16, 2017 decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its February 16, 2017 decision.¹⁹

On appeal counsel contends that the correspondence OWCP received on February 16, 2018 constituted a request for reconsideration. OWCP's procedures provide, regarding reconsideration requests, "While no special form is required, the request must be in writing, be signed and dated by the claimant or authorized representative, and be accompanied by relevant new evidence or

¹¹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹² *G.G.*, *supra* note 10.

¹³ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* 9.

¹⁴ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁵ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁶ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁷ *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

argument not previously considered.”²⁰ Appellant did not sign the February 16, 2018 correspondence, and thus it fails to meet the requirements for a valid reconsideration request.²¹

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its February 16, 2017 decision. The evidence and argument she submitted failed to raise a substantial question concerning the correctness of OWCP’s decision.²² Appellant asserted that she had received a favorable decision on her discrimination claim. She submitted part of a March 2016 settlement agreement in which the employing establishment agreed to pay attorney’s cost, removal of all disciplinary action from her personnel file, cooperate with her application for disability retirement, and change her AWOL status to LWOP pending receipt of her resignation. The portion of the settlement in the record, however, does not contain an admission of fault by the employing establishment or otherwise demonstrate that OWCP committed an error in denying appellant’s claim.²³ Appellant has thus not explained how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying her emotional condition claim.²⁴

Appellant submitted a statement addressing OWCP’s findings in its February 16, 2017 decision. She contended that management erred and discriminated against her in marking her as AWOL, limiting her work hours, and placing her on a PIP. Appellant further alleged that M.T. refused to permit a contractor to help her even though the contractor was hired for that purpose, refused to reasonably accommodate her disability, unreasonably requested multiple revisions on an after action report, denied her access to her personnel file, and erroneously denied that she generated travel orders for reservists and spouses from April through July 2014. She submitted e-mails from M.T. requesting revisions to a memorandum, a March 27, 2017 letter classifying her as AWOL, letters regarding her PIP, and letters regarding a proposed suspension and leave usage. Appellant did not, however, explain how her arguments or the evidence submitted raised a substantial question regarding the correctness of OWCP’s February 16, 2017 decision. As noted, the term clear evidence is a difficult standard.²⁵ It is not enough to show that the evidence could be construed to produce a contrary conclusion.²⁶ None of the evidence manifests on its face that OWCP committed an error in denying appellant’s emotional condition claim. Appellant has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP’s decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.²⁷

²⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.2(a) (October 2011).

²¹ *Id.*

²² *See P.T.*, Docket No. 18-0494 (issued July 9, 2018).

²³ *See W.R.*, Docket No. 18-1042 (issued February 12, 2019).

²⁴ *See M.B.*, Docket No. 17-1505 (issued January 9, 2018).

²⁵ *R.M.*, Docket No. 18-1393 (issued February 12, 2019).

²⁶ *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

²⁷ *Id.*

On appeal counsel argues that OWCP failed to address her allegations of overwork. As noted, however, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.²⁸

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁸ *R.T.*, Docket No. 14-0779 (issued August 22, 2014).