

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

A.S., Appellant

and

**U.S. POSTAL SERVICE, LINCOLN
STATION, New York, NY, Employer**

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**Docket No. 18-1556
Issued: September 17, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 10, 2018 appellant filed a timely appeal from a February 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from OWCP's last merit decision, dated November 16, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (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.

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated February 22, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1556 (issued February 22, 2019).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 5, 2015 appellant, then a 55-year-old supervisor, filed a traumatic injury claim (Form CA-1) alleging that on September 26, 2015 he experienced mental trauma, was unable to sleep, and had nightmares as a result of witnessing a shooting while in the performance of duty. On the reverse side of the claim form the employing establishment controverted the claim, contending that appellant was on a personal break at the time of the alleged employment incident. In a letter further controverting the claim, dated October 13, 2015, the employing establishment asserted that appellant was on an unauthorized coffee break and was, therefore, not in the performance of duty at the time of the alleged injury.

OWCP received medical evidence indicating that appellant was evaluated for an emergency on September 30, 2015.

In a development letter dated October 22, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence, and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. By separate letter of even date, it requested that the employing establishment respond to appellant's allegations.

Subsequently, OWCP received letters dated October 27 and November 3, 2015 by Dr. Raul J. Puertollano, an attending Board-certified psychiatrist, who diagnosed appellant as having panic disorder without agoraphobia, acute stress disorder, and post-traumatic stress disorder causally related to the alleged September 26, 2015 employment incident, and advised that he was totally disabled from work.

On November 2, 2015 appellant responded to OWCP's development questionnaire. He related that he walked between two postal stations on a daily basis and that on September 26, 2015 he witnessed a man with a gun shooting at three men a few feet in front of him. Appellant noted that one man was shot in the back and fell to the ground and the other two men ran. He immediately reported this incident to his manager.

By decision dated November 23, 2015, OWCP denied appellant's claim, finding that the factual component of fact of injury had not been established. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received an e-mail dated November 9, 2015, wherein the employing establishment responded to OWCP's development letter. It asserted that appellant was off its premises and not performing his regularly assigned duties when the alleged work incident occurred. The employing establishment further claimed that he did not notify anyone to cover his absence when he stepped out of the building. It noted the accommodations provided to appellant following the alleged incident.

OWCP received an additional letter dated November 10, 2015 in which Dr. Puertollano continued to address appellant's disability status.

On December 9, 2015 appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review regarding the November 23, 2015 decision.

OWCP thereafter received an additional letter dated November 24, 2015 in which Dr. Puertollano continued to opine that appellant was totally disabled from work.

During a telephonic hearing, held on July 27, 2016, appellant asserted that he was not on a coffee break. He testified that he left one postal station and was walking to another postal station when the alleged employment incident occurred. Appellant noted that he had witness statements from three coworkers. He maintained that he told three female employees at a window where he was going. Appellant described his emotional conditions and the subsequent medical treatment he received.

Following the hearing, OWCP received a letter dated August 25, 2016 by Dr. Puertollano indicating that appellant's preexisting anxiety and panic symptoms were aggravated by the alleged September 26, 2015 employment incident.

By decision dated November 16, 2016, an OWCP hearing representative modified the November 23, 2015 decision to find that appellant had established that the September 26, 2015 employment incident had occurred as alleged, but affirmed the denial of the claim as appellant failed to provide rationalized medical evidence to establish that his diagnosed emotional conditions were caused or aggravated by the accepted employment incident.

OWCP continued to receive medical evidence. An unsigned report dated December 28, 2016 from Clinical Management Consultants noted that appellant had been under its care since 2002. Appellant was diagnosed as having panic disorder without agoraphobia and acute stress disorder for which he was prescribed medication. A history of the accepted September 26, 2015 employment incident was noted. It was also noted that, after this incident, appellant's anxiety and panic symptoms were exacerbated and he had trouble sleeping. His spouse had to wake him up because he was having bad nightmares and outbursts in his sleep. On January 5, 2016 appellant was cleared to return to work on January 11, 2016.

In medical notes dated September 30, 2015 to January 5, 2016, Dr. Puertollano reported that appellant described the accepted September 26, 2015 employment incident. He discussed findings on mental examination and reiterated his prior diagnoses of panic disorder without agoraphobia and acute stress disorder.

In a letter received by OWCP on February 9, 2018, appellant requested reconsideration of the November 16, 2016 decision. He submitted a partial undated report in which Dr. Puertollano reiterated his prior diagnoses of panic disorder without agoraphobia and acute stress disorder.

OWCP, by decision dated February 14, 2018, denied appellant's request for reconsideration, 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.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ 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).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁷ If an application demonstrates clear evidence of error, it will reopen the case for merit review.⁸

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁹

OWCP's 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

³ *Id.* at § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *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).

⁷ *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).

⁸ *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 5 at Chapter 2.1602.5 (February 2016).

⁹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹¹

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.

OWCP's regulations¹² and procedures¹³ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ The most recent merit decision was an OWCP hearing representative's November 16, 2016 decision which affirmed the prior denial of appellant's traumatic injury claim, as modified. As his request for reconsideration was not received by OWCP until February 9, 2018, more than one year after the November 16, 2016 decision, the Board finds that it was untimely filed. Because appellant's request was untimely, he must demonstrate clear evidence of error on the part of OWCP in having denied his emotional condition claim.

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision.

Appellant submitted new medical notes dated September 30, 2015 to January 5, 2016 and a partial undated report, wherein Dr. Puertollano provided a history of the accepted September 26, 2015 employment incident and diagnosed panic disorder without agoraphobia and acute stress disorder. The medical notes and report are largely repetitive of Dr. Puertollano's earlier reports dated October 27 and November 3, 2015. Repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the claimant.¹⁵ For the foregoing reason, the Board finds that Dr. Puertollano's medical notes and report do not raise a substantial question concerning the correctness of OWCP's decision to deny appellant's traumatic injury claim.

The unsigned December 28, 2016 report from Clinical Management Consultants, is also insufficient to shift the weight of the medical evidence. The Board has held, a report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence.¹⁶ Therefore, this report does not shift the weight of the evidence in

¹⁰ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹¹ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹² 20 C.F.R. § 10.607(a); *see J.W.*, *supra* note 9; *Alberta Dukes*, 56 ECAB 247 (2005).

¹³ *Supra* note 5 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *See A.M.*, Docket No. 17-1434 (issued January 2, 2018); *D.B.*, Docket No. 16-0539 (issued May 26, 2016).

¹⁶ *See L.M.*, Docket No. 18-0473 (issued October 22, 2018); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

favor of appellant's claim or raise a substantial question concerning the correctness of OWCP's decision to deny his traumatic injury claim.

As the evidence submitted in support of appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in its November 16, 2016 decision, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that he had submitted all the necessary documents to establish an emotional condition causally related to the accepted September 26, 2015 employment incident. However, as previously noted, the Board lacks jurisdiction to review the merits of this case.

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.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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