

pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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 May 15, 1998 appellant, then a 38-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on April 13, 1998 he was falsely accused by a coworker, V.H., for using "improper language" when referring to males while in the performance of duty. This resulted in an April 17, 1998 "just cause" interview for unacceptable conduct, which he contended set off his preexisting psychological condition. Appellant stopped work on April 18, 1998 and returned to work on May 15, 1998.⁵

In a May 15, 1998 letter, L.G., a supervisor, verified that on April 13, 1998 V.H., a coworker, had reported an incident wherein appellant was talking in a loud voice and using inappropriate language containing expletives while referring to Hispanics, Asians, and Caucasians. He indicated that on April 17, 1998 appellant was given a "Just Cause Interview" to make him aware of possible disciplinary action for unacceptable conduct.

In a June 9, 1998 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.

OWCP received appellant's June 12, 1998 statement and a June 15, 1998 report from Dr. James R. Liles, a Board-certified psychiatrist, who advised that appellant was on medical leave through July 15, 1998.

By decision dated July 6, 1998, OWCP denied appellant's claim. It found that the evidence failed to establish a compensable employment factor or that the employing establishment had erred, abused its authority or acted unreasonably in its handling of the alleged April 13, 1998 employment incident. OWCP concluded, therefore, that appellant's condition did not occur "while in the performance of [his] regular or specially assigned duties."

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ The record is unclear as to when appellant again stopped work.

On July 24, 1998 appellant requested a hearing before an OWCP hearing representative, which was held on February 23, 1999. By decision dated May 6, 1999, the hearing representative affirmed the July 6, 1998 decision, finding that, as no compensable employment factors were established, appellant had not established an emotional condition in the performance of duty.

Appellant continued to submit additional evidence. This included an April 29, 1999 favorable decision from the Social Security Administration, which found that appellant had been disabled from work since April 16, 1998, and the first page of a February 7, 2002 Order of the United States Court of Appeals for the Ninth Circuit, Order No. 00-17359, which granted the motion to recall the mandate, denied appellant's petition for panel rehearing, and concluded that no further filings would be accepted in this closed appeal.

In a November 17, 2018 letter, which OWCP received on December 4, 2018, appellant requested reconsideration. He argued that since he had timely filed a complaint to the Ninth Circuit Court of Appeals of the May 6, 1999 hearing representative's decision, this tolled the appeal time to pursue his FECA claim. Appellant also contended that he was in the performance of duty when he sustained his emotional condition as he was at work when the injury occurred.

By decision dated December 12, 2018, OWCP denied appellant's 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.⁶ 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.⁷ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System (iFECS)).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.¹⁰ OWCP's 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, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of

⁶ 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).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *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).

¹⁰ *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).

OWCP.¹¹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹²

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ 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.¹⁴

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 regulations¹⁵ and procedures¹⁶ 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.¹⁷ The most recent merit decision was OWCP's May 6, 1999 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 December 4, 2018, more than one year after the May 6, 1999 decision, it was untimely filed.¹⁸

In support of his untimely request for reconsideration, appellant argued that he had timely filed a complaint regarding OWCP's May 6, 1999 decision to the Ninth Circuit Court of Appeals,

¹¹ *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 8 at Chapter 2.1602.5 (February 2016).

¹² *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *J.W.*, *supra* note 12; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *Supra* note 8 at Chapter 2.1602.4 (February 2016); see *L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *J.W.*, *supra* note 12; *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ 20 C.F.R. § 10.607(b); see *L.A.*, *supra* note 16; *Debra McDavid*, 57 ECAB 149 (2005).

which tolled the time to pursue his FECA claim. The Ninth Circuit Court of Appeals, however, by order dated February 7, 2002 had affirmed the dismissal of appellant's complaint against the Department of Labor, denied his petition to rehear that decision, and concluded that no further filings would be accepted in this closed case. Thus, there is no evidence that the Ninth Circuit Court of Appeals had overturned OWCP's May 6, 1999 decision. Appellant's argument that his timely filing with the Ninth Circuit Court of Appeals tolled the time limitation to pursue his claim has no reasonable color of validity as it did not contain any basis to find that OWCP had erred in denying appellant's claim.¹⁹ Because his 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 an April 29, 1999 favorable Social Security Administration decision, which found appellant to be disabled. It is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards.²⁰

Appellant also argued that he had established his FECA claim since he was at work when he sustained his emotional condition, and therefore he was in the performance of duty. However, FECA's definition of performance of duty, in the case of an emotional condition claim, is that appellant must establish a compensable employment factor with respect to his allegations.²¹ In this case, appellant's emotional condition claim was denied as he did not establish error or abuse with regard to the employing establishment's administrative action in conducting a "Just Cause Interview" for unacceptable conduct arising from the alleged April 13, 1998 work incident.

Appellant has not submitted any argument or evidence to demonstrate clear evidence of error in OWCP's May 6, 1999 decision. The Board thus finds that OWCP properly found that appellant's request for reconsideration failed to demonstrate clear evidence of error.²²

¹⁹ See *D.P.*, Docket No. 19-0964 (issued October 2, 2019); *T.W.*, Docket No. 18-1088 (issued February 14, 2019).

²⁰ See *C.S.*, Docket No. 16-1784 (issued May 7, 2018); *F.M.*, Docket No. 15-1869 (issued May 4, 2016).

²¹ See generally *M.A.*, Docket No. 19-1017 (issued December 4, 2019).

²² See *J.D.*, Docket No. 18-1765 (issued June 11, 2019).

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.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2020
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