

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

I.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Forest Park, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-0052
Issued: September 10, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 7, 2019 appellant filed a timely appeal from an April 11, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated January 29, 2016 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 23, 2015 appellant, then a 35-year-old sack sorting machine operator, filed an occupational disease claim (Form CA-2) alleging bipolar depression which he attributed to a hostile work environment, including harassment and "deceptive practices" by management and staff. He noted that he first became aware of his claimed condition on April 5, 2014 and first realized its relation to factors of his federal employment on February 19, 2015. Appellant stopped work on February 23, 2015.

In a May 19, 2015 e-mail message, Tour 3 Manager C.L. stated that she had no knowledge of appellant's allegation that management was aware of his emotional condition until one week prior when she received his CA-2 claim form. She indicated that he was questioned by his supervisor, W.A., regarding why he did not report for overtime. C.L. stated that appellant "started getting very loud in the main aisle which leads to the employee's entrance, when he was informed by [W.A.] that he would have to leave with all the loud talking and calling [W.A.] 'stupid,' [but] he kept standing in the aisle talking loud and [belligerently]."

In an undated narrative statement, W.A., indicated that he did not give appellant instruction to stay in his unit for overtime. He stated that it was standard operating procedure to report to the tour office for an overtime assignment. W.A. stated that appellant's coworkers heard the overtime call and reported to the tour office for their overtime assignments, but appellant did not, so he questioned him about where he was for overtime. He contended that he did not harass appellant and was not aware of his emotional condition.

The employing establishment controverted appellant's claim in a June 1, 2015 letter.

In a development letter dated June 5, 2015, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted medical evidence, a September 25, 2015 narrative statement detailing a timeline of his past Equal Employment Opportunity (EEO) complaints, and a copy of his EEO settlement dated September 10, 2014.

By decision dated January 29, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his emotional condition arose during the course of his federal employment and within the scope of compensable work factors as defined by FECA.

On January 31, 2017 appellant requested reconsideration. He submitted a statement dated January 25, 2017 arguing that he developed an emotional condition due to a number of incidents that occurred in a hostile work environment. Appellant further submitted EEO investigative

² Docket No. 17-1821 (issued December 13, 2018).

affidavits and documentation related to his prior EEO complaints. He also resubmitted W.A.'s undated witness statement and a copy of his September 10, 2014 EEO settlement.

By decision dated March 1, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant filed an appeal with the Board on August 26, 2017. OWCP subsequently received additional evidence, in the form of a September 10, 2017 report from Tiffany D. Sanders, Ph.D., a licensed psychologist, who asserted that appellant suffered a fainting spell on September 14, 2016 and opined that he fainted due to the high level of stress and disparate treatment he was experiencing at work. Dr. Sanders further opined that appellant was medically incapacitated for the periods June 26 through August 17, 2016 and August 31 through September 28, 2016 due to a major aggravation of his diagnosed mental health conditions of major depression, anxiety disorder, and post-traumatic stress disorder (PTSD). OWCP also received discharge instructions dated September 14, 2016 from appellant's visit to the emergency department for syncope and cellulitis.

By decision dated December 13, 2018, the Board set aside the March 1, 2017 decision, finding that OWCP failed to properly explain its findings in its prior March 1, 2017 decision. The Board remanded the case for an appropriate decision on appellant's untimely request for reconsideration, including findings of fact and a clear statement of reasons explaining its disposition.

By decision dated April 11, 2019, OWCP again denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It explained that the evidence received with appellant's January 31, 2017 reconsideration request was not of sufficient probative value to raise a substantial question as to the correctness of OWCP's last merit decision dated January 29, 2016 regarding the issue of performance of duty.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's reconsideration request is untimely filed, it must nevertheless undertake a limited

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁵ 5 U.S.C. § 8128(a); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

review to determine whether it demonstrates clear evidence of error.⁶ If a reconsideration request demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁸ is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. By decision dated January 29, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his emotional condition arose during the course of his federal employment and within the scope of compensable work factors as defined by FECA. As OWCP did not receive appellant's request for reconsideration until January 31, 2017, more than one year after the January 29, 2016 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.¹¹

The Board further finds, however, that the case is not in posture for decision as to whether appellant's January 31, 2017 reconsideration request demonstrated clear evidence of error.

In the case of *William A. Couch*,¹² the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. While OWCP referenced the evidence appellant submitted with his January 31, 2017 reconsideration request, it did not reference a September 10, 2017 report from Dr. Sanders which was submitted to OWCP during the pendency of the Board's prior appeal and prior to OWCP's issuance of its April 11, 2019 decision. Dr. Sanders discussed appellant's

⁶ 20 C.F.R. § 10.607(b); *B.C.*, Docket No. 18-1496 (issued May 22, 2019).

⁷ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016).

⁸ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.607(b).

¹² 41 ECAB 548 (1990); *see also G.M.*, Docket No. 19-1395 (issued February 6, 2020).

fainting spell on September 14, 2016 from the stress and disparate treatment appellant alleged that he was experiencing at work, and diagnosed an emotional condition. As the Board's decisions are final as to the subject matter appealed,¹³ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the issuance of its final decision be addressed by OWCP.¹⁴

For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence of record at the time of the April 11, 2019 decision, followed by an appropriate decision on whether appellant has demonstrated clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. However, the case is not in posture for decision with regard to whether appellant has demonstrated clear evidence of error.

¹³ 20 C.F.R. § 501.6(d).

¹⁴ *Id.*; see also *J.D.*, Docket No. 19-1836 (issued April 6, 2020).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 10, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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