

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

_____)	
E.B., Appellant)	
)	
and)	Docket No. 22-0169
)	Issued: July 25, 2022
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, Morgantown, WV,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 8, 2021 appellant filed a timely appeal from an October 18, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated November 22, 2010, which became final after 30 days of issuance, and is not subject to further review.¹ As there was no merit jurisdiction by OWCP within 180 days of 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 over the merits of this case.

¹ 20 C.F.R. § 501.2(c)(1).

² 5 U.S.C. § 8101 *et seq.*

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

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On November 20, 2008 appellant, then a 65-year-old cook foreman, filed an occupational disease claim (Form CA-2) alleging that he developed delayed onset of post-traumatic stress disorder (PTSD) due to "forcible constructive termination on or about August 6, 1978." He noted that he first became aware of his claimed condition and realized its relation to his federal employment on February 15, 2004. Appellant explained that he had not filed his claim within 30 days of becoming aware of his employment-related condition because he was not diagnosed until February 15, 2004. On the reverse side of the claim form the employing establishment indicated that appellant resigned from his position in 1978.

In a November 21, 2018 statement, appellant explained that on February 15, 2004 he was diagnosed with delayed onset of PTSD. He alleged that he promptly notified the employing establishment in 2004 when he learned of his mental impairment.

In a December 15, 2008 letter, the employing establishment controverted appellant's claim, asserting that he failed to timely file his occupational disease claim within the three-year time limitation. It noted that appellant first became aware of his work-related PTSD condition in 2004, which was more than three years prior.

By decision dated July 10, 2009, OWCP denied appellant's occupational disease claim, finding that it was not timely filed pursuant to 5 U.S.C. § 8122.

On July 23, 2009 appellant, through his then-counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 23, 2009.

Appellant subsequently submitted various documents dated 2005 through 2007 from the EEOC and from federal district court regarding complaints that he had filed for disability due to delayed onset PTSD as a result of forceful resignation from his federal employment.

By decision dated December 14, 2009, OWCP's hearing representative affirmed the July 10, 2009 decision.

³ Docket No. 10-0673 (issued November 22, 2010), *order denying petition for recon.*, Docket No. 10-0673 (issued June 10, 2011); Docket No. 14-0141 (issued May 14, 2014); Docket No. 16-0746 (issued June 1, 2016); Docket No. 16-1521 (issued February 3, 2017); Docket No. 19-0036 (issued May 21, 2019); Docket No. 21-0348 (issued September 2, 2021).

Appellant appealed to the Board. By decision dated November 22, 2010, the Board affirmed the December 14, 2009 decision, finding that his occupational disease claim was untimely filed pursuant to 5 U.S.C. § 8122.⁴

Appellant continued to request reconsideration.

In nonmerit decisions dated January 5, 2011; July 12, 2013; February 24 and July 7, 2016; June 21, 2017; and July 2, 2018, OWCP denied appellant's reconsideration requests.

Appellant appealed the July 2, 2018 OWCP decision to the Board.

By decision dated May 21, 2019, the Board affirmed the July 2, 2018 nonmerit decision.⁵

On January 3, 2020 appellant again requested reconsideration. He asserted that the May 21, 2019 decision indicated that appellant did not notify his employing establishment of his claim within 30 days of the last date of his employment exposure. Appellant reiterated that he could not have notified his employing establishment within 30 days of August 1978, the last date of his exposure, because he was not diagnosed with delayed onset PTSD until February 15, 2004. He also reported that the diagnosis did not exist in 1978 and was not recognized by the American Psychiatric Association (APA) until 1980. Appellant contended that it was impossible for him to file his claim within 30 days of his last exposure.

Appellant submitted various articles about the history of PTSD, which indicated that the condition of PTSD was first included in the APA Diagnostic and Statistical Manual of Mental Disorders in 1980.

In statements dated September 7 and October 9, 2019, appellant reiterated that it was not possible for him to notify his employing establishment or to file his claim in 1978 because he was not diagnosed with delayed onset PTSD until February 15, 2004.

By an October 21, 2020 decision, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

Appellant appealed the October 21, 2020 decision to the Board.

By decision dated September 2, 2021, the Board set aside the October 21, 2020 nonmerit decision, finding that the request for reconsideration was untimely filed as it was received on January 3, 2020, more than one year after the November 22, 2010 merit decision. The Board, therefore, remanded the case for OWCP to apply the proper standard for untimely requests for reconsideration.⁶

⁴ Docket No. 10-0673 (issued November 22, 2010), *petition for recon, denied*, Docket No. 10-0673 (issued June 10, 2011).

⁵ Docket No. 19-0036 (issued May 21, 2019).

⁶ Docket No. 21-0348 (issued September 2, 2021).

By decision dated October 18, 2021, 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.⁷ To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁹ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.¹¹ 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 demonstrates clear evidence of error on the part of OWCP.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence

⁷ 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).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

¹⁰ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ See 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹² *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); see also *id.* at § 10.607; *supra* note 15 at Chapter 2.1602.5(a) (September 2020).

¹³ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁵ See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.¹⁶ To demonstrate clear evidence of error, 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 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.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed.

The Board, in its September 2, 2021 decision found that appellant's request for reconsideration was untimely filed as it was received on January 3, 2020, more than one year after the November 22, 2010 merit decision. The Board, therefore, remanded the case for OWCP to apply the proper standard for untimely requests for reconsideration.¹⁹ Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.²⁰

In support of his untimely reconsideration request, appellant submitted several statements in which he argued that he could not have notified his employing establishment within 30 days of August 1978, the last date of his exposure, because he was not diagnosed with delayed onset PTSD until February 15, 2004. He noted that the diagnosis of PTSD did not exist in 1978 and submitted various articles regarding PTSD. As previously noted, to demonstrate clear evidence of error, the evidence 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.²¹ While appellant explained on reconsideration why he was unable to notify his supervisor of his PTSD condition in 1978, he has not established that he timely filed his occupational disease claim.

The Board, therefore, finds that appellant has not raised an argument or submitted any evidence that manifests, on its face, that OWCP committed an error in denying his occupational

¹⁶ *B.W.*, *supra* note 14.

¹⁷ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁸ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁹ Docket No. 21-0348 (issued September 2, 2021).

²⁰ *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²¹ *See supra* note 17.

disease claim as untimely filed. Accordingly, OWCP properly determined that his January 3, 2020 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.²²

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 October 18, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²² *R.O.*, Docket No. 20-0247 (issued December 13, 2021); *S.C.*, Docket No. 19-1424 (issued September 15, 2020).