

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

J.K., Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
KAILUA-KONA, HI, Employer**)

**Docket No. 21-1130
Issued: October 13, 2022**

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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 20, 2021 appellant filed a timely appeal from a January 27, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated October 25, 2018 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 order are incorporated herein by reference. The relevant facts are as follows.

On June 7, 2018 appellant, then a 43-year-old city letter carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on June 6, 2018 he experienced stress and anxiety due to harassment at work from his supervisor while in the performance of duty. He stopped work on June 6, 2018.

In an attached statement, appellant explained that on June 5, 2018 he submitted an official request to V.M., the employing establishment officer in charge, for 24 hours of official time to prepare for a scheduled Equal Employment Opportunity Commission (EEOC) redress meeting. He recounted that V.M. denied his request and instructed him to do janitorial work. Appellant indicated that, later that day, V.M. informed him that she was granting him two hours of leave. He also alleged that V.M. instructed him to leave the employing establishment premises because his physician had placed him off work. Appellant asserted that he tried to provide additional documentation to V.M., but she refused to look at it. He indicated that he felt threatened and discriminated against.

Appellant submitted medical evidence in support of his claim, including a May 21, 2018 work status note by Dr. Frank Eigner, a family medicine specialist, a June 8, 2018 report and work status note by Dr. Zain Vally, an internal medicine specialist, and a June 8, 2018 letter by Dr. Serena A. Edwards, a family medicine specialist. OWCP also received Part B, Attending Physician's Report, of an authorization for examination and/or treatment form (Form CA-16) signed by a physician with an illegible signature who noted a history of injury of harassment at work by a supervisor and findings of stress, anxiety, and adjustment disorder.

In a June 19, 2018 development letter, OWCP informed appellant of the deficiencies of his claim. It requested that he submit additional factual and medical evidence to establish that he sustained an emotional condition while in the performance of duty. By separate development letter of even date, OWCP requested additional information from the employing establishment, including comments from appellant's supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to submit the necessary evidence.

In a July 3, 2018 letter, V.M., appellant's supervisor, described in detail her conversations and interactions with appellant on June 5 and 6, 2018. She indicated that he requested 24 hours of leave to work on an EEOC case, but she was informed by an EEOC specialist that a reasonable amount of time to authorize was one hour. V.M. recounted that appellant also requested that she change his previous leave absences, but he refused to provide the necessary documentation to support his requests. She contended that he was not harassed by management, but was asked to follow the instructions of his physician who placed him off work. V.M. submitted a copy of appellant's timesheets for 2017 and 2018 and an employing establishment Request for or Notification of Absence form dated June 4, 2018.

² *Order Remanding Case*, Docket No. 20-0556 (issued August 13, 2020).

On July 24, 2018 appellant signed and completed OWCP's development questionnaire. He indicated that he did not have any other sources of stress outside of his federal employment. Appellant alleged that the only source of his stress was a result of filing for a work injury with OWCP. He described the medical treatment and counseling that he had received and explained why he required more than two hours of official time to prepare for his EEOC meeting.

In a July 26, 2018 letter, OWCP indicated that it was converting appellant's traumatic injury claim to an occupational disease claim (Form CA-2). It informed him of the deficiencies of his claim and requested that he submit additional factual and medical evidence to establish that he developed an emotional condition while in the performance of duty. OWCP afforded appellant 30 days to submit the necessary evidence.

On September 13, 2018 appellant signed and completed OWCP's July 26, 2018 development questionnaire. He alleged that V.M. acted abusively by only granting him two hours of leave to prepare for his EEOC meeting, refusing to participate in a conference call with him and an EEOC specialist about his leave request, and instructing him to leave the employing establishment on June 5, 2018.

Appellant subsequently submitted additional medical evidence, including reports and work status notes from Dr. Vally dated July 6, August 3, and September 7, 2018 and a September 10, 2018 letter from Dr. Eigner.

OWCP also received a series of documents, including a Request for Official EEOC Time form dated June 5, 2018, a copy of appellant's timesheet August 4 through 17, 2018, a copy of EEOC procedures regarding official time, witness statements from S.T. and R.H. about the conversation between appellant and V.M., a statement by O.R. about his conversation with appellant and V.M., documents regarding appellant's June 12, 2018 redress mediation conference, and a July 13, 2018 letter informing appellant of his right to file an EEOC complaint.

By decision dated October 25, 2018, OWCP denied appellant's emotional condition claim, finding that he had not established a compensable employment factor. It found that the employing establishment did not commit error or abuse as issues related to leave requests were administrative functions of the employer and not duties of the employee.

On October 29, 2019 appellant requested reconsideration. In an October 22, 2019 statement, he argued that he was in the performance of duty on June 6, 2018 when his supervisor informed him that he was allowed only two hours of official time to prepare for his EEOC meeting, refused to let him return to work, and failed to listen to the EEOC counselor. Appellant asserted that management was attempting to circumvent the EEOC process and impede his attempts to receive information from OWCP because it had not answered any of his requests for records and additional information. He submitted additional statements dated September 27 through October 11, 2019, in which he requested a union steward, witness statements, and information related to appellant's EEOC complaint, additional documentation regarding his redress mediation conference, earnings and leave statements, and an April 12, 2018 limited-duty job offer.

OWCP also received work status notes and reports by Dr. Vally dated January 17, March 7, and April 4 and 18, 2019.

In a November 14, 2019 decision, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant filed an appeal to the Board. In an order dated August 13, 2020, the Board set aside OWCP's November 14, 2019 decision, finding that OWCP properly determined that his request for reconsideration was untimely filed, but that OWCP summarily denied his reconsideration request without complying with the review requirements under FECA and its implementing regulations. The Board remanded appellant's case for OWCP to properly analyze the evidence or arguments submitted as to whether he demonstrated clear evidence of error in the October 25, 2018 OWCP decision.³

By decision dated January 27, 2021, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. It explained that the evidence and argument submitted on reconsideration was insufficient to raise a substantial question concerning the correctness of OWCP's November 14, 2019 decision.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ 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.⁵ 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).⁶ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

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 of error.⁸ OWCP's regulations and procedures provide that it will reopen a claimant's case for merit review,

³ Appellant subsequently submitted additional medical reports and duty status reports (Form CA-17) by Dr. Vally dated March 5, April 6, May 11, June 15, and July 20 and 24, 2020. Dr. Valley noted appellant's complaints of feeling overwhelmed and frustrated, difficulty sleeping, and anxiety attacks. He conducted an examination and assessed stress/anxiety, depression, and an adjustment disorder. Dr. Vally opined that the mechanism of injury was consistent with that described by appellant. Appellant also resubmitted the June 5, 2018 Request for Official EEOC Time form dated June 5, 2018.

⁴ 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).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (September 2020).

⁷ *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).

⁸ 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).

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.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

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.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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 evidence of error on the part of OWCP.¹³ 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. 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.¹⁴

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.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's reconsideration request, as the Board found in its August 13, 2020 order that his request was untimely filed. Findings made in prior Board decisions and/or orders are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹⁵

In support of his reconsideration request, appellant argued that the employing establishment mishandled his EEOC and workers' compensation claim and impeded his attempts

⁹ *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 6 at Chapter 2.1602.5(a) (September 2020).

¹⁰ *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).

¹¹ 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).

¹² *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *B.W.*, *supra* note 11.

¹⁴ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ *See S.J.*, Docket No. 21-0217 (issued December 16, 2021); *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

to obtain information from OWCP. However, these vague and unsupported allegations are insufficient to demonstrate clear evidence of error.¹⁶

Appellant also submitted additional medical reports and work status notes by Dr. Vally dated January 17 through April 18, 2019. These reports, however, do not demonstrate that OWCP committed an error in finding that appellant failed to establish a compensable factor of employment as they do not raise a substantial question as to the correctness of OWCP's October 25, 2018 merit decision.¹⁷

Consequently, OWCP properly found that appellant's November 20, 2020 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.¹⁸

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.

¹⁶ *R.L.*, Docket No. 21-0090 (issued May 12, 2021).

¹⁷ *See D.R.*, Docket No. 21-0061 (issued May 24, 2021).

¹⁸ *O.K.*, Docket No. 21-708 (issued September 29, 2021); *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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