

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, 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 decision are incorporated herein by reference. The relevant facts are as follows.

On August 8, 2017 appellant, then a 45-year-old program support assistant, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition due to factors of her federal employment, including harassment and being treated differently by her coworkers. She alleged that she worked in a hostile environment and as a result suffered post-traumatic stress disorder (PTSD), stress, anxiety, and high blood pressure. Appellant noted that she first became aware of her condition and its relationship to her federal employment on July 19, 2017. She stopped work on July 19, 2017.

The employing establishment controverted the claim.

By decision dated February 2, 2018, OWCP denied appellant's occupational disease claim, finding the evidence of record was insufficient to establish a compensable work factor.

On August 11, 2020 appellant requested reconsideration and noted, "past timely filing due to error."

In an undated statement also received on August 11, 2020, appellant argued that she had clear evidence that error was committed in the processing of her claim. She explained that her appeal was untimely because her then-counsel believed that her claim would be settled within her Equal Employment Opportunity (EEO) claim; however, she was informed that she would be unable to recover lost wages through her EEO settlement.

OWCP received an undated report from Jyotsna Milbourne, a clinical psychologist, who diagnosed PTSD due to appellant's time in the military and opined that appellant's current symptoms of headache and anxiety were due to a hostile work environment.

Appellant also submitted emails dated from November 23, 2016, between J.H., a manager, and appellant, regarding appellant's leave request, timekeeping, and work assignments. Some of these emails questioned whether she was going to use annual leave and requested that she enter her time into the timekeeping system. Appellant was also asked to complete certain work matters by the end of the workweek. OWCP also received a May 2, 2019 statement from L.H., a coworker, who provided details regarding appellant's work environment, indicating that she was asked to use leave when other white coworkers were not asked and that she has been asked to update her

³ *Order Remanding Case*, Docket No. 21-0140 (issued August 25, 2021).

productivity report when L.H. was not asked. OWCP also received a November 9, 2017 statement from appellant's spouse, relating to employment factors that she described.

By decision dated August 27, 2020, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On November 9, 2020 appellant filed a timely appeal to the Board from the August 27, 2020 nonmerit decision. By order dated August 25, 2021, the Board found that the case was not in posture for decision as OWCP did not address all relevant evidence received prior to the issuance of its final decision. The Board set aside the August 27, 2020 decision and remanded the case and ordering that following any further development as deemed necessary, OWCP should issue an appropriate decision.

On December 14, 2021 OWCP received a January 24, 2020 Equal Employment Opportunity Commission (EEOC) confidential settlement agreement between appellant and the employing establishment regarding her claim that she was subjected to a hostile work environment based on race, color and reprisal, as well as any claim of non-selection based upon any protected basis

By decision dated January 21, 2022, OWCP denied appellant's August 11, 2020 request for reconsideration of its February 2, 2018 decision, 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.⁴ 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.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

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.⁸ Its procedures provide that it will reopen a claimant's case for merit review,

⁴ 5 U.S.C. § 8128(a); *see S.N.*, Docket No. 22-0264 (issued September 9, 2022); *A.M.*, Docket No. 20-0143 (issued October 28, 2020); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

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

⁷ *S.M.*, Docket No. 19-1166 (issued October 16, 2020); *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).

⁸ *See* 20 C.F.R. § 10.607(b); *A.M.*, *supra* note 4; *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *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 for reconsideration 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 which was decided by OWCP.¹¹ 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.¹³ As appellant's request for reconsideration was not received by OWCP until August 11, 2020, more than one year after the February 2, 2018 decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its February 2, 2018 decision.¹⁴

⁹ See *S.M.*, *supra* note 7; *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(b); *supra* note 6 at Chapter 2.1602.5 (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 *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5a (September 2020).

¹² *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *George C. Vernon*, 54 ECAB 319 (2003).

¹³ *Supra* note 5.

¹⁴ *G.L.*, Docket No. 18-0852 (issued January 14, 2020); 20 C.F.R. § 10.607(b); *T.C.*, *supra* note 11; *Charles J. Prudencio*, *supra* note 8.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its February 2, 2018 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its decision.¹⁵ The evidence and argument she submitted failed to raise a substantial question concerning the correctness of OWCP's finding that appellant had not established a compensable factor of employment.¹⁶

Following OWCP's February 2, 2018 decision, it submitted a statement noting that her appeal was untimely because her then-counsel believed that her occupational disease claim would be settled within her EEO claim; however, she was informed that she would be unable to recover lost wages through her EEO settlement. Appellant did not offer any arguments to raise a question regarding the correctness of OWCP's decision. The Board finds that these arguments failed to raise a substantial question concerning the correctness of OWCP's decision.¹⁷

The Board has reviewed the emails from appellant's manager, J.H., and finds that this evidence on its face does not raise a substantial question concerning the correctness of OWCP's decision. Administrative and personnel matters, although generally related to employment, are administrative functions of the employer, and not the regular or specially assigned work duties of the employee. For an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.¹⁸

The only direct evidence submitted in support of appellant's allegation of hostile work environment was the statement from appellant's coworker, L.H. While this statement indicated that appellant was asked to request leave and update her productivity report, this bare and vague statement does not establish any specific error on the part of the employing establishment, occurring on any specific date.¹⁹ Appellant also submitted a statement from her husband wherein he reiterated appellant's allegations. This secondhand reiteration of appellant's allegations is insufficient to establish that OWCP erred in finding that appellant had not established a compensable factor of employment.

While appellant submitted the EEO confidential settlement agreement, which notes that appellant was to receive a financial settlement, it does not contain a finding of wrongdoing by the

¹⁵ See *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *M.H.*, Docket No. 21-1297 (issued December 20, 2022); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁹ See *J.K.*, Docket No. 21-1130 (issued October 13, 2022).

employing establishment. There is no final EEO decision in the case record establishing that harassment occurred.²⁰

Appellant also submitted medical records from Ms. Milbourne, who diagnosed PTSD from appellant's military service and opined that workplace stress caused appellant to experience anxiety and headaches. However, OWCP denied the employee's claim on a factual basis, *i.e.*, the failure to establish a compensable employment factor. The Board finds that this evidence does not demonstrate that OWCP erred in its determination that appellant failed to provide sufficient evidence to establish that employment factors led to an occupational disease.

Therefore, the Board finds that the evidence submitted following merit review does not demonstrate that OWCP erred when it denied appellant's occupational disease claim.²¹ As noted, clear evidence of error is intended to represent a difficult standard.²² It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its February 2, 2018 decision.²³ Therefore, OWCP properly determined that she failed to demonstrate clear evidence of error in its February 2, 2018 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²⁰ See *M.R.*, Docket No. 18-0304 (issued November 13, 2018).

²¹ See *S.T.*, Docket No. 18-0925 (issued June 11, 2019).

²² See *supra* note 6 at Chapter 2.1602.5a (September 2020); see *T.G.*, Docket No. 22-0352 (issued September 29, 2022); see also *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²³ See *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 2023
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