

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

D.M., Appellant)	
)	
and)	Docket No. 22-1152
)	Issued: March 28, 2023
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, U.S. PARK)	
POLICE, Washington, DC, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 30, 2022 appellant filed a timely appeal from a January 31, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from OWCP's last merit decision, dated October 29, 2020 to 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 The Board notes that, during the pendency of this appeal, OWCP issued an August 2, 2022 nonmerit decision, denying appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). However, the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). Therefore, OWCP's August 2, 2020 decision is set aside as null and void. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see Order Dismissing Appeal, M.P.*, Docket No. 20-0200 (issued May 25, 2022); *J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *Order Remanding Case, J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

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

On September 16, 2020 appellant, then a 54-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2020 he developed an emotional condition when W.H., a coworker, who had previously assaulted and threatened appellant on April 15, 2012 entered his confined work area. He experienced similar feelings of being threatened, unsafe, and fearful that he had as result of his April 15, 2012 employment injury.³ Appellant stopped work on September 9, 2020.

In a development letter dated September 28, 2020, OWCP advised appellant of the deficiencies of his claim. It notified him of the type of factual and medical evidence needed and afforded him 30 days to submit the necessary.

OWCP received a September 23, 2020 duty status report (Form CA-17) from a physician with an illegible signature. The report provided a diagnosis of exacerbation of PTSD due to the alleged September 8, 2020 employment incident. The report also indicated that appellant was unable to resume his regular work.

By decision dated October 29, 2020, OWCP denied appellant's emotional condition claim, finding that he had not established a compensable employment factor. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received an undated narrative statement from appellant. Appellant recounted his April 15, 2012 employment injury. He also recounted that on September 8, 2020 he felt trapped by W.H. Appellant experienced fear, anger, and shame for not retaliating against W.H. when W.H. entered his work area and lingered in the exit pathway. He completed his work shift on that day, but thereafter, he was unable to return to work.

Appellant submitted a November 13, 2020 medical report from Dr. Adnan Durrani, a psychiatrist. Dr. Durrani noted appellant's history of injury on April 15, 2012 and September 8, 2020 and discussed his findings on psychological and physical examination. He diagnosed recurrent major depressive disorder, moderate, recurrent, and PTSD.

Appellant resubmitted a copy of the September 23, 2020 Form CA-17 report from the physician with an illegible signature.

On November 4, 2021 appellant requested reconsideration of the October 29, 2020 decision.

³ Appellant has a previously accepted April 15, 2012 traumatic injury claim (Form CA-1) for post-traumatic stress disorder (PTSD) under OWCP File No. xxxxxx747.

OWCP, by decision dated January 31, 2022, denied appellant's request for reconsideration, 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 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 discretion.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 that OWCP's most recent merit decision was in error.⁸ 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.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.¹¹ The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error. 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

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, *Reconsiderations*, Chapter 2.1602.4b (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).

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); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *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.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.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's November 4, 2021 request for reconsideration, finding that it was untimely filed.

OWCP's regulations¹⁶ and procedures¹⁷ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸ The most recent merit decision pertaining to appellant's emotional condition claim was dated October 29, 2020. As OWCP received his request for reconsideration on November 4, 2021 more than one year after the October 29, 2020 decision, the Board finds that it was untimely filed. Because appellant's request was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in denying his emotional condition claim on the claimed date.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its October 29, 2020 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 October 29, 2020 decision.¹⁹ The evidence and argument submitted did not raise a substantial question concerning the correctness of OWCP's decision.²⁰ The Board notes that OWCP denied appellant's claim on a factual basis, *i.e.*, the failure to establish any compensable employment factors. In support of his untimely

¹³ *B.W.*, *supra* note 11.

¹⁴ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 10.

¹⁵ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

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

¹⁷ *Supra* note 6 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).

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

¹⁹ *Supra* note 12.

²⁰ *Supra* note 13.

request for reconsideration of OWCP's October 29, 2020 decision, appellant submitted an undated statement in which he discussed the incident and conditions at work which he believed caused or aggravated his diagnosed emotional conditions. He asserted that on September 8, 2020 he experienced fear, anger, and shame when he was trapped in his work area by W.H., who lingered in the exit pathway, and had previously assaulted and threatened him on April 15, 2012 resulting in his previously accepted employment-related PTSD.

The Board notes, however, that appellant did not explain how this argument raised a substantial question as to the correctness of OWCP's October 29, 2020 decision. The mere allegation of factors of employment does not establish error on the part of OWCP and fails to demonstrate clear evidence of error in OWCP's October 29, 2020 decision.²¹

Appellant submitted a September 23, 2021 Form CA-17 report from a physician with an illegible signature and a November 13, 2020 report from Dr. Durrani. These physicians diagnosed major depressive disorder, moderate, recurrent, and exacerbation of PTSD due to the alleged September 8, 2020 employment incident. The Board notes, however, that the submission of these reports does not establish clear evidence of error in OWCP's October 29, 2020 decision. As previously noted, the underlying issue in this case is not medical in nature. Rather, it is factual in nature because appellant's emotional condition claim was denied on October 29, 2020 due to his failure to establish any compensable employment factors. The above-noted reports do not raise a substantial question concerning the correctness of OWCP's October 29, 2020 decision, which found that he had not established a compensable factor of employment.²²

The Board thus 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 emotional condition claim.²³ Consequently, the Board finds that his untimely request for reconsideration of OWCP's October 29, 2020 decision failed to demonstrate clear evidence of error.²⁴

CONCLUSION

The Board finds that OWCP properly denied appellant's November 4, 2021 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²¹ See *E.S.*, Docket No. 20-0215 (issued August 24, 2021); *R.M.*, Docket No. 18-1393 (issued February 12, 2019); *J.R.*, Docket No. 07-1112 (issued November 27, 2007).

²² See *supra* note 14; *R.M.*, *supra* note 21.

²³ *Supra* note 21.

²⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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