

<sup>3</sup> The record also contains a July 23, 2010 decision related to attorney's fees. This decision is not being appealed.

## **ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

This case has previously been on appeal before the Board. In a September 23, 2005 decision, the Board affirmed OWCP's termination of compensation benefits effective March 22, 2003 and also found that appellant had not established that her condition on or after March 22, 2003 was causally related to her accepted work injury.<sup>4</sup> In a December 4, 2008 decision, the Board affirmed an October 16, 2007 OWCP decision that denied appellant's reconsideration request without a merit review of the claim.<sup>5</sup> The facts and the history contained in the prior appeals are incorporated by reference.

In a letter dated June 29, 2010, appellant, through her representative, requested reconsideration. She asserted that OWCP failed to accept all of appellant's injuries as compensable. Appellant alleged that all of her conditions were related to her accepted February 29, 2000 employment injury. She also alleged that OWCP did not meet its burden of proof to terminate her compensation benefits as she continued to suffer from her employment-related injuries. In support of her arguments, appellant submitted new medical evidence.

In a January 20, 2010 report, Dr. Sana L. Bloch, a Board-certified neurologist and treating physician, noted that she reviewed appellant's history of injury and treatment. She also examined appellant on January 3, 2010 and related that appellant had pain on rotation of the neck to either side, spasm of the cervical muscles on the left side. Dr. Bloch advised that appellant continued to have a failed back syndrome which caused severe pain radiating down the left arm. She stated that appellant could not engage in gainful employment as she could not do any lifting, twisting or turning. Dr. Bloch opined that appellant was currently permanently and totally disabled due to her employment. She advised that appellant's condition was "more probably than not caused by the fact of federal employment." Dr. Bloch noted that her opinion was previously documented in her prior reports.

In a decision July 23, 2010, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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<sup>4</sup> Docket No. 05-331 (issued September 23, 2005), *petition for recon. denied* (issued February 3, 2006).

<sup>5</sup> Docket No. 08-749 (issued December 4, 2008).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>6</sup> vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>7</sup>

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).<sup>8</sup> This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.<sup>9</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP’s decision was, on its face, erroneous.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish 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.<sup>11</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Id.* at § 8128(a).

<sup>8</sup> *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> *Id.* at § 10.607(b).

<sup>11</sup> *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

a conflict in the 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 submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

In its July 23, 2010 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on August 18, 2006. Counsel's June 29, 2010 letter requesting reconsideration was submitted more than one year after the August 18, 2006 merit decision and was, therefore, untimely.

In accordance with Board precedent and internal guidelines, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. OWCP reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence and argument submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The August 18, 2006 decision denied modification of prior decisions that terminated appellant's benefits effective March 22, 2003 and denied any continuing work-related condition thereafter. With the June 20, 2010 request for reconsideration, appellant alleged that OWCP failed to accept all of her injuries as compensable and that they were all related to the February 29, 2000 employment injury. The Board notes that this argument does not establish clear evidence of error. OWCP terminated appellant's compensation and benefits on the grounds that she no longer had any injury-related disability or continuing employment-related residuals after March 22, 2003 causally related to her employment-related injury. It considered the medical evidence in reaching its decision and the Board's prior decision affirmed OWCP's decision. Counsel did not show any error by OWCP in its August 18, 2006 decision that raises a substantial question as to the correctness of OWCP's decision.

To establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, appellant's lay opinion<sup>13</sup> that additional medical conditions were work related does not establish clear evidence of error. Likewise, appellant's assertion that OWCP did not meet its burden of proof to terminate appellant's compensation benefits as appellant continued to suffer from her employment-related injuries does not establish clear evidence of error. OWCP accorded special weight to the opinion of the impartial medical examiners, when it terminated appellant's compensation benefits. The

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<sup>12</sup> *Id.*

<sup>13</sup> See *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

Board previously affirmed OWCP's determination. Appellant has not presented evidence or argument that raises a substantial question concerning the correctness of OWCP's decision.

Appellant also submitted a January 20, 2010 report from Dr. Bloch who opined that appellant had additional employment-related injuries and was permanently and totally disabled as a result of her employment injury. This report is insufficient to establish clear evidence of error. The Board notes that Dr. Bloch was on one side of conflict that was resolved by the impartial medical examiner. Additional reports from a physician on one side of the conflict that is properly resolved by a referee physician are generally insufficient to overcome the weight accorded the referee's report or create a new conflict.<sup>14</sup> Even evidence sufficient to create a conflict would not, establish clear evidence of error. The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.<sup>15</sup>

The Board finds that the evidence and argument submitted on reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim and raise a substantial question that OWCP erred in its August 18, 2006 decision. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant repeated arguments made in his reconsideration request, but as noted above, they are not sufficient to establish clear evidence of error.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

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<sup>14</sup> See *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

<sup>15</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 23, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board