

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

F.N., Appellant

and

**U.S. POSTAL SERVICE, MISSOURI CITY
CARRIER ANNEX, Missouri City, TX, Employer**

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**Docket No. 11-1180
Issued: October 20, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On April 1, 2011¹ appellant filed a timely appeal of the October 4, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than 180 days elapsed between the most recent merit decision dated June 17, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on October 4, 2010, the 180-day computation begins October 5, 2010. 180 days from October 5, 2010 was April 4, 2011. Since using April 15, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 1, 2011, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

case but has jurisdiction over the nonmerit decision pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant contends that she filed a timely request for reconsideration.⁴

FACTUAL HISTORY

On July 23, 2008 appellant, then a 39-year-old regular rural carrier, filed an occupational disease claim alleging that in January 2008 she first became aware of her migraine headaches and hearing loss. She realized that these conditions were caused by carrying mail to the street for delivery and working in extreme conditions, four hours per day for several months.⁵

In a September 16, 2008 decision, OWCP denied appellant's claim finding that she failed to submit any evidence establishing that she sustained an injury in the performance of duty.

On October 15, 2008 appellant requested a telephone hearing before an OWCP hearing representative. Narrative statements from her and employing establishment employees described work incidents for which she filed a grievance. Medical reports dated January 30 and October 4, 2008 addressed treatment of appellant's alopecia condition.

Following a February 13, 2009 telephone hearing, appellant submitted medical reports dated February 16 and March 10, 2009, which addressed her eye, neck, emotional and hair loss conditions. A narrative statement from an employing establishment employee described a work incident that caused her emotional condition.

In a June 17, 2009 decision, an OWCP hearing representative affirmed the September 16, 2008 decision. She found that appellant did not submit sufficient rationalized medical evidence establishing that her claimed conditions were caused by factors of her federal employment.

² 5 U.S.C. § 8101 *et seq.*

³ For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

⁴ Although, pursuant to 20 C.F.R. § 501.5(b), appellant submitted a timely request for oral argument before the Board, the Board denied the request *via* an August 5, 2011 order. The Board explained that oral argument would delay issuance of a Board decision and would not serve a useful purpose. Moreover, the Board concluded that appellant's contentions could be adequately addressed in a decision based on the record as submitted. Docket No. 11-1180 (issued August 5, 2011).

⁵ In a prior appeal related to appellant's accepted right shoulder sprain/strain under File No. xxxxxx421, the Board issued a decision dated February 13, 2007, which affirmed a June 19, 2006 OWCP decision finding that she received an overpayment in the amount of \$906.28, but reversed the finding that she was at fault in creating the overpayment and remanded the case for consideration of whether she was entitled to waiver of recovery of the overpayment. Docket No. 06-2136 (issued February 13, 2007).

In letter dated June 16, 2010 and in an appeal request form dated June 17, 2010, both received by OWCP on July 13, 2010, appellant requested reconsideration of the June 17, 2009 OWCP decision. In a June 16, 2010 medical report, Dr. David Suchowiecky⁶ obtained a history of the alleged employment-related injury, discussed specific incidents involving appellant's supervisors and noted findings on examination. Appellant submitted a leave analysis form, a June 22, 2007 note discussing other incidents with her supervisors and employment matters and narrative statements from her and employing establishment employees described work incidents that caused her emotional condition for which she filed a grievance.

In an October 4, 2010 decision, OWCP denied appellant's June 17, 2010 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated September 16, 2008. It explained that the request was dated June 17, 2010, but not received until July 13, 2010, thereby rendering it as untimely.

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁸ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's 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.⁹

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.¹⁰

To establish 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 be manifest on its face that OWCP committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of how the

⁶ The Board notes that Dr. Suchowiecky's professional qualifications are not contained in the case record.

⁷ 5 U.S.C. § 8128(a).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.607(b).

¹¹ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁴ *Leona N. Travis*, *supra* note 12.

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.¹⁵

To show 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶ 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.¹⁷

ANALYSIS

OWCP denied appellant's June 17, 2010 request for reconsideration, finding that it was not timely filed and failed to present clear evidence of error. The Board finds that OWCP improperly determined that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

The Board notes that appellant actually filed two requests for reconsideration dated June 16 and 17, 2010, which sought review of the most recent merit decision: that of an OWCP hearing representative dated June 17, 2009 and not the September 16, 2008 merit decision as found by OWCP in its October 4, 2010 decision. The one-year time limitation for requesting reconsideration begins to run on the date of the original OWCP decision.¹⁸ A right to reconsideration within one year accompanies any merit decision on the issues.¹⁹ The Board notes that OWCP's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date OWCP receives the request, but by the postmark on the envelope.²⁰ The procedure manual provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.²¹

The Board notes that while the June 16 and 17, 2009 reconsideration requests were received by OWCP on July 13, 2010, the envelopes containing the reconsideration requests were not retained in the record. As the only indicia of mailing is the date of the letter, these requests were timely filed. For this reason, the Board finds that the reconsideration requests were timely filed. Appellant timely filed her request for reconsideration within one year of the June 17, 2009 OWCP hearing representative's merit decision. The Board finds that OWCP improperly denied

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁸ 20 C.F.R. § 10.607(a); see *A.F.*, 59 ECAB 714 (2008).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (January 2004).

²⁰ *Id.* at Chapter 2.1602.3(b)(1). See 20 C.F.R. § 10.607(a).

²¹ *Id.* at Chapter 2.1602.3(b)(1).

her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.²²

CONCLUSION

The Board finds that appellant's request for reconsideration was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision of the Board.

Issued: October 20, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

²² See *Donna M. Campbell*, 55 ECAB 241 (2004).