

¹ For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. 20 C.F.R. § 501.3(d)(2). OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This is the second appeal in the present case. In an October 12, 2010 decision, the Board affirmed OWCP's decision dated October 26, 2009. The Board found that appellant's October 12, 2009 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.² The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.³

On September 27, 2011 appellant's attorney requested reconsideration. He indicated that this request was timely filed pursuant to OWCP's procedure manual which indicated that appellant had a right to reconsideration within one year of OWCP's merit decision and any merit decision of the Board. Appellant submitted an April 19, 2011 report from Dr. Gregory Daly, an osteopath, who noted treating her since August 2007. Dr. Daly reported that her chair had broken causing her to fall and injure her neck. Appellant noted no previous injuries to her neck. Dr. Daly treated her on January 16, 2008 for musculoskeletal and fascial pain in her neck. He noted a magnetic resonance imaging (MRI) scan of the cervical spine revealed spondylosis of the cervical spine, disc protrusions and osteophyte complexes at C3-4 and C5-6. Dr. Daly opined that appellant's current neck condition and subluxation is related to her fall and that she continued to have residual pain and spasm due to this injury.

In a December 22, 2011 decision, OWCP denied appellant's reconsideration request finding that the request was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA 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 anytime on her 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."⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the

² On October 30, 2007 appellant, a systems coordinator, filed a traumatic injury claim alleging that on October 29, 2007 she sat in a chair at work which collapsed and caused injury to her neck and back. She did not stop work but returned to a limited-duty part-time position.

³ *C.J.*, Docket No. 10-409 (issued October 12, 2010).

⁴ 5 U.S.C. 8128(a).

date of that decision.⁵ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. 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 be manifest on its face that OWCP committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

In its December 22, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on April 14, 2008. Appellant's request for reconsideration was dated September 27, 2011, more than one year after April 14, 2008. Although counsel indicated that the reconsideration request was filed within one year of the Board's October 12, 2010 decision, the Board's October 12, 2010 decision specifically stated that the Board did not have jurisdiction over the merits of the claim. It was a nonmerit decision finding that appellant's reconsideration request was untimely filed and did not demonstrate clear evidence of error. A right to reconsideration within one year only accompanies a merit decision by the Board.¹² Thus, appellant reconsideration request was not timely filed.

⁵ 20 C.F.R. § 10.607(b); *Annie L Billingsley*, 50 ECAB 210 (1998).

⁶ *Id.*; *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

The Board notes that the underlying issue is medical in nature and that appellant failed to submit new medical evidence sufficient to shift the weight of the evidence in her favor and establish that OWCP erred in denying her for a traumatic injury on October 29, 2007. Appellant submitted Dr. Daly's April 19, 2011 report which noted that her chair had broken causing her to fall and injure her neck. Dr. Daly treated her on January 16, 2008 for musculoskeletal and fascial pain in her neck and noted that an MRI scan of the cervical spine revealed spondylosis, disc protrusions and osteophyte complexes. He opined that appellant's current neck condition and subluxation was related to her fall and that she continued to have residual pain and spasm due to this injury. However, this is insufficient to establish clear evidence of error. 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. The term clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report, which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that Dr. Daly's reports submitted on reconsideration are insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its December 22, 2011.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated September 27, 2011 was untimely filed and did not demonstrate clear evidence of error.

¹³ *D.G.*, 59 ECAB 455 (2008); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board