

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, MORGAN GENERAL
MAIL FACILITY, New York, NY, Employer**

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**Docket No. 12-1000
Issued: October 4, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2012 appellant filed a timely appeal from November 18, 2011 and March 7, 2012 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP) denying her requests for reconsideration as untimely and insufficient to establish clear evidence of error. As the last merit decision was issued June 1, 2010, more than 180 days before the filing of the appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration as they were untimely and did not show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated May 1, 1995, the Board affirmed a March 1, 1993 decision finding that appellant did not establish a recurrence of disability on December 26, 1991 causally related to her October 15, 1981 work injury.² In a decision dated September 23, 2011, the Board affirmed a November 22, 2010 decision denying her request to reopen her case for further merit review under 5 U.S.C. § 8128.³ The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

On October 21, 2011 appellant requested reconsideration. She asserted that medical evidence demonstrated that she experienced pain in her back and lower extremities due to a pinched nerve.

By decision dated November 18, 2011, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and did not demonstrate clear evidence of error.

By letter dated January 31, 2012, appellant again requested reconsideration. She argued that a magnetic resonance imaging (MRI) scan study established that she had a back condition. Appellant submitted a September 23, 2011 MRI scan study showing degenerative changes of the lumbar spine, stenosis of the central spinal canal and neural foraminal narrowing at multiple levels.

In a decision dated March 7, 2012, OWCP denied appellant's request for reconsideration after finding that the request was not timely and failed to show clear evidence of error.

On appeal, appellant argues that she has a legitimate injury and that the second opinion examiner did not reach an independent conclusion. She further maintains that she did not receive a letter from OWCP requesting additional information. Appellant asserts that an MRI scan study established that she had a pinched nerve resulting in pain in the lower extremity.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁴ OWCP will not review a decision denying or

² Docket No. 93-2094 (issued May 1, 1995). OWCP accepted that on October 15, 1981 appellant, then a 42-year-old clerk, sustained low back pain and lumbosacral strain in the performance of duty. In a decision dated November 21, 1991, it reduced her compensation benefits after finding that her actual earnings as a part-time modified manual distribution clerk fairly and reasonably represented her wage-earning capacity.

³ By decision dated May 21, 2009, OWCP terminated appellant's compensation and authorization for medical benefits after finding that she had no further disability or residuals of her accepted low back syndrome and lumbosacral strain. In decisions dated October 30, 2009 and June 1, 2010, it denied modification of its May 21, 2009 termination decision. In a November 22, 2010 decision, OWCP denied appellant's request for reconsideration after finding that she did not raise arguments or submit evidence sufficient to warrant reopening her case under section 8128.

⁴ 5 U.S.C. § 8101 *et seq.*

terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ When an application for review is untimely, it undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁶ OWCP procedures state 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 application for review shows "clear evidence of error" on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. 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 establish clear evidence of error.⁹ 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 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 raise a substantial question as to the correctness of OWCP's decision.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹¹

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ As appellant's October 21,

⁵ 20 C.F.R. § 10.607; *see also* *Alan G. Williams*, 52 ECAB 180 (2000).

⁶ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁷ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[OWCP] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

¹⁰ *Id.*

¹¹ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹² 20 C.F.R. § 10.607(a).

¹³ *Robert F. Stone*, 57 ECAB 292 (2005).

2011 and January 31, 2012 requests for reconsideration were submitted more than one year after the June 1, 2010 decision of record, they were untimely. Consequently, she must demonstrate clear evidence of error by OWCP in terminating her compensation.¹⁴

In her October 21, 2011 request for reconsideration, appellant argued that the medical evidence was sufficient to show that she had a pinched nerve causing back and lower extremity pain. While she provided her interpretation of the medical evidence, her general allegation is insufficient to establish clear evidence of error as her argument does not raise a substantial question as to the correctness of OWCP's decision. The underlying issue is medical in nature and can only be resolved through the submission of medical evidence.¹⁵ Appellant's lay opinion on the medical evidence is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.¹⁶

With her January 31, 2012 request for reconsideration, appellant asserted that an MRI scan study established that she continued to have a back condition. A September 23, 2011 MRI scan study showed degenerative changes of the lumbar spine, central spinal canal stenosis and foraminal narrowing. The MRI scan study, however, is not relevant to the issue of whether appellant has any further disability due to her employment-related low back syndrome and lumbosacral strain. The diagnostic study does not address either disability or causation. Further, 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.¹⁷ The Board finds that an MRI scan study submitted on reconsideration is insufficient to show clear evidence of error.

On appeal, appellant asserts that she has a valid injury as demonstrated by an MRI scan study. As noted, however, an MRI scan study is insufficient to show clear evidence of error as it does not establish any error by OWCP in terminating her benefits for her accepted work injury. Appellant also maintains that the second opinion physician did not reach an independent conclusion but submitted no evidence supporting this allegation.

Appellant also generally asserts that she did not receive a letter from OWCP requesting additional information. Her unsupported contention, however, is insufficient to show any error by OWCP. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.¹⁸ The evidence appellant submitted on reconsideration fails to meet this standard.

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

¹⁵ *George C. Vernon*, 54 ECAB 319 (2003).

¹⁶ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁷ *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁸ See *Veletta C. Coleman*, *supra* note 6.

CONCLUSION

The Board finds that OWCP, in its November 18, 2011 and March 7, 2012 decisions, properly denied appellant's requests for reconsideration as they were untimely and did not show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2012 and November 18, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 4, 2012
Washington, DC

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

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

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