

On appeal, appellant contends that OWCP improperly terminated her wage-loss compensation because it did not properly develop or weigh the medical evidence; that the decision was based on an incomplete medical record; that the delay in filing her request for reconsideration was not her fault. She also contends that the new evidence submitted with her request for reconsideration establishes that she is totally disabled for work.

FACTUAL HISTORY

This case was previously before the Board. In an October 2, 2012 decision, the Board affirmed OWCP's decision of August 2, 2011. It denied appellant's request for reconsideration of a November 18, 1999 decision, terminating her wage-loss compensation as she failed to accept an offer of suitable work. The Board found that appellant's request for reconsideration was not timely filed and failed to establish clear evidence of error.³ The facts of the cases set forth in the Board's prior decisions are incorporated by reference.⁴

By letter dated January 30, 2013, appellant requested reconsideration. She contended that her benefits were improperly terminated based on an incomplete medical record; the factual and medical evidence was not properly developed or weighed; and that physicians improperly concealed information. Appellant contended that her case should have been referred to an impartial medical examiner prior to the termination of benefits.

Appellant submitted a December 14, 2012 report by Dr. Michael G. Porody, a Board-certified internist and rheumatologist, who noted that she continued to experience muscle weakness as well as joint swelling and morning stiffness. Appellant had significant osteoarthritis as well as myopathy. For these reasons, it was Dr. Porody's opinion that she was physically unable to perform the limited-duty job offer of September 15, 1999 and was totally disabled. Appellant also submitted evidence previously of record.

Appellant resubmitted the following reports: (1) reports dated March 3, 2006 and April 21, 2008 by Dr. Porody; (2) progress notes dated March 19, 1996 by Dr. Salem Foad, a rheumatologist; (3) a report of an office visit on May 23, 1997 with Dr. Errol J. Stern, a Board-certified orthopedic surgeon; (4) an August 23, 2006 report by Dr. William Lee Eschenbacher, a Board-certified internist with a Board-certified subspecialty in pulmonology; (5) an October 8, 2007 report by Dr. Christopher Hayner, an internist with Board-certifications in critical care medicine and pulmonary diseases; and (6) a September 27, 2004 note by Dr. Irvin Lewin, a

³ Docket No. 12-471 (issued October 2, 2012). In Docket No. 00-2328, the Board dismissed appellant's appeal at her request. *Order Dismissing Appeal*, Docket No. 00-2328 (issued October 11, 2000). Further, in Docket No. 03-1651, the Board affirmed a November 18, 2002 OWCP's decision, finding that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error. *See* Docket No. 03-1651 (issued December 3, 2003).

⁴ On November 15, 1995 appellant filed a notice of occupational disease alleging that she suffered from tendinitis due to the repetitive stretching and reaching involved in her federal employment. OWCP accepted this claim for bilateral sprain/strain of both hands and wrists and right shoulder. On May 18, 1997 appellant filed a traumatic injury claim alleging that on April 19, 1997 she sustained an injury to her left shoulder, arms and hands as a result of her federal duties. Her claim was accepted for sprain tendinitis left arm/shoulder. These claims were combined on May 31, 2002. Appellant received appropriate compensation benefits.

podiatrist. Other evidence already in the record included a copy of the September 15, 1999 limited-duty job offer.

By decision dated May 2, 2013, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and procedure 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(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to establish 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 previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ To

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedures further provide, "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 that a schedule award was miscalculated). Evidence such as 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." *Id.* at Chapter 2.1602.3c.

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See supra* note 9.

¹³ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

establish 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.¹⁴

ANALYSIS

The Board finds that appellant failed to file a timely application for review. As noted, appellant must file her application for review within one year of the last merit decision of OWCP.¹⁵ The most recent merit decision is dated March 2, 2001. Appellant's request for reconsideration was dated January 30, 2013, over 11 years after the most recent merit decision. Accordingly, her request for reconsideration was not timely filed.

The Board further finds that appellant failed to establish clear evidence of error. In order to establish clear evidence of error, a claimant, must submit evidence that is positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁶ Appellant has not submitted such evidence. Dr. Porody's December 14, 2012 report stated that she was not currently able to perform the September 15, 1999 limited-duty position and was disabled. His opinion is not fully rationalized in that he did not discuss the job offer or explain why she could not work with limitations. Although appellant still received medical treatment, OWCP did not terminate her medical benefits. Moreover, Dr. Porody's opinion is repetitive of prior reports dated March 3, 2006 and April 21, 2008. The remaining evidence submitted with appellant's reconsideration request is duplicative of evidence of record and previously considered. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim.¹⁷

The term clear evidence of error is intended to represent a difficult standard.¹⁸ 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.¹⁹ The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

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

¹⁴ *Leon D. Faidley, Jr., supra* note 6.

¹⁵ *Supra* note 5.

¹⁶ *Id.*; A.F., Docket No. 11-1297 (issued December 20, 2011).

¹⁷ *Id.*

¹⁸ S.S., Docket No. 11-1579 (issued April 24, 2012).

¹⁹ *See Veletta C. Coleman*, 48 ECAB 367 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 2, 2013 is affirmed.

Issued: December 2, 2013
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