

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

B.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nashville, TN, Employer**

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**Docket No. 13-914
Issued: July 15, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 7, 2013 appellant filed a timely appeal from a January 14, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. Because more than one year elapsed from the most recent merit decision of November 15, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.³

¹ Appellant requested an oral argument. The Board denied her request under a separate order.

² 5 U.S.C. § 8101 *et seq.*

³ For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated March 1, 2001, the Board remanded the case for a merit decision with respect to the termination of appellant's compensation.⁴ OWCP issued a merit decision dated May 24, 2001 and, by decisions dated October 17, 2001 and August 6, 2002, it denied her applications for reconsideration without further merit review. The Board affirmed the August 6, 2002 decision on February 20, 2003.⁵ Appellant requested an oral hearing, which was denied in a June 5, 2003 decision. By decision dated May 26, 2004, the Board affirmed the June 5, 2003 OWCP decision.⁶ Appellant requested an appeal to the Board, which was dismissed by order dated February 17, 2005 on the grounds that it did not have jurisdiction over a final decision of OWCP.⁷ In a June 9, 2006 decision, the Board affirmed a May 14, 2005 decision denying her request for a hearing under 5 U.S.C § 8124(b).⁸ Appellant requested reconsideration of her claim, which OWCP denied on the merits on November 15, 2006. She requested an oral hearing, which was denied by OWCP's decision dated March 7, 2007. In a January 24, 2008 decision, the Board affirmed OWCP's November 15, 2006 and March 7, 2007 decisions. The Board found that OWCP met its burden of proof to terminate compensation for wage loss effective March 30, 1997 for the accepted back and elbow conditions and appellant did not submit any probative medical evidence establishing a continuing employment-related disability causally related to the accepted orthopedic conditions after March 30, 1997. The Board further found that OWCP properly denied her request for a hearing before an OWCP hearing representative as she had previously requested reconsideration. On December 22, 2008 the Board issued an order denying appellant's petition for reconsideration.⁹ The history of the case, as provided in the Board's prior decisions, is incorporated herein by reference.

Appellant requested reconsideration of her claim by letter dated April 30, 2008. By decision dated July 8, 2008, OWCP denied reconsideration without a review of the merits.

Appellant requested an oral hearing. By decision dated February 26, 2009, OWCP denied the hearing request, finding that she had already requested reconsideration and the Board had affirmed those OWCP decisions. It further stated that the hearing request was further

⁴ Docket No. 99-708 (issued March 1, 2001).

⁵ Docket No. 03-199 (issued February 20, 2003).

⁶ Docket No. 04-831 (issued May 26, 2004).

⁷ Docket No. 04-2116 (issued February 17, 2005).

⁸ Docket No. 05-1728 (issued June 9, 2006).

⁹ Docket No. 07-1639 (issued December 22, 2008).

considered and it was denied on the grounds that the issue could equally well be addressed through the reconsideration process by submitting evidence not previously considered which establishes that the previous decisions denying wage loss for the September 30, 1987 injury were incorrect.

Appellant requested reconsideration of her claim by letter dated October 27, 2012. She contended that her compensation should be reinstated because it was unjustly terminated and she still experiences increased and ongoing pain along with other complications directly connected with the injuries. In support of her reconsideration request, appellant referenced a 1992 remand order from the Branch of Hearings and Review, which reinstated her compensation. She also submitted numerous medical documents previously of record along with copies of previous Board and OWCP decisions.

By decision dated January 14, 2013, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹⁰ 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.¹¹

OWCP, however, 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.¹² OWCP regulations and procedure provide that OWCP 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.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise and explicit and must

¹⁰ 20 C.F.R. § 10.607(a).

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

¹² See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedure further provides, 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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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.

¹⁴ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸

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.¹⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁰ As appellant's October 27, 2012 request for reconsideration was submitted more than one year after the last merit review of January 24, 2008, it was untimely. Consequently, she must establish clear evidence of error by OWCP in denying her claim for compensation.²¹

On reconsideration, appellant argued that her compensation should be reinstated because it was unjustly terminated. She referenced a 1992 remand order from the Branch of Hearings and Review in support of her statements. The remand decision issued December 23, 1992 did reinstate appellant's compensation; however, in a subsequent decision dated March 19, 1997 OWCP determined that the medical evidence of record demonstrated that the accepted orthopedic conditions no longer prevented her from performing her date-of-injury position and, she was no longer entitled to wage-loss compensation. The record reflects that she requested multiple hearings and reconsiderations before OWCP and appeals before the Board. In each case, the termination of appellant's wage-loss compensation was affirmed. Appellant has presented no new evidence or argument in support of her contention that her compensation was unjustly terminated. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²² Appellant has not submitted any evidence establishing one of the above-listed criteria; consequently, she has not established clear evidence of error.

¹⁵ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁷ See *Leona N. Travis*, *supra* note 15

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ 20 C.F.R. § 10.607(a).

²⁰ *Robert F. Stone*, 57 ECAB 292 (2005).

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

²² *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, she has not established clear evidence of error.²³

On appeal, appellant argues the merits of her case. The Board noted above that it only has jurisdiction over OWCP's January 14, 2013 nonmerit decision and therefore is precluded from conducting a merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's application for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2013
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

²³ See *Veletta C. Coleman*, 48 ECAB 367 (1997).