

On appeal appellant's attorney asserts that he did not receive a copy of a July 10, 2008 OWCP decision until May 22, 2009 and he was, therefore, unable to timely request a hearing. He requested that the December 5, 2011 decision be reversed and the case remanded for OWCP to reissue the July 10, 2008 decision.³

FACTUAL HISTORY

This case has previously been before the Board.⁴ In a September 23, 2005 decision, the Board affirmed a November 2, 2004 OWCP decision with regard to whether a cervical spine condition was causally related to factors of employment and whether appellant established that she sustained recurrences of disability beginning July 7 and October 29, 2000. The Board set aside the November 2, 2004 decision with regard to whether appellant established that she sustained a consequential right elbow condition and whether she was entitled to a schedule award for the accepted left upper extremity conditions, finding that conflicts in medical evidence existed regarding these issues.⁵ The law and the facts of the previous Board decision are incorporated herein by reference.

Following an OWCP referral to Dr. Ronald N. Rosenfeld, a Board-certified orthopedic surgeon, in a November 17, 2006 decision, OWCP found that appellant did not establish that her right elbow condition was employment related and denied her claim for a schedule award. In a March 13, 2008 decision, an OWCP hearing representative set aside the November 17, 2006 decision, finding that the record did not sufficiently address OWCP's use of the Physicians Directory System (PDS) database in its selection of the referee physician.

In April 2008 OWCP referred appellant to Dr. John F. Perry, Board-certified in orthopedic surgery, for an impartial evaluation. In a July 10, 2008 decision, it credited Dr. Perry's opinion and found that she did not establish that appellant sustained an employment-related right elbow condition or that she had a ratable left upper extremity impairment that would entitle her to a schedule award. The cover letter indicated that the decision was sent to appellant's address of record with a copy sent to her attorney at his address on White Horse Pike in Haddon Heights, New Jersey.

On May 26, 2009 appellant, through her attorney, requested a hearing. In an August 13, 2009 decision, an OWCP hearing representative denied appellant's request for a hearing on the grounds that it was untimely filed. On September 2, 2009 appellant's attorney requested that the July 10, 2008 decision be reissued, asserting that he did not receive it until July 10, 2009. On May 20, 2011 appellant, through her attorney, requested reconsideration. He stated that the

³ The Board notes that in the letter of appeal, the attorney also stated that the date of OWCP's decision that he asserted he did not timely receive was March 10, 2008.

⁴ On January 23, 1997 appellant, then a 39-year-old mail processor sustained left shoulder tendinitis and left lateral epicondylitis when she pulled a heavy cart at work. She underwent left elbow surgery on August 4, 1997 and worked intermittently until September 2001 when she retired on disability. The claim was also accepted for bilateral rotator cuff tendinitis.

⁵ Docket No. 05-902 (issued September 23, 2005).

July 10, 2008 decision was not provided to him until August 2009, and thus the claim should be reopened for merit review.

By decision dated December 5, 2011, OWCP denied appellant's reconsideration request on the grounds that her request was untimely filed and that she failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁷ OWCP procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁸ if the claimant's application for review shows "clear evidence of error" on the part of OWCP. In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

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 that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely 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 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.¹⁰

OWCP procedures note that 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

⁶ 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁸ 20 C.F.R. § 10.607.

⁹ *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

evidence of error.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The only decision before the Board is the December 5, 2011 decision in which OWCP denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that as more than one year had elapsed from the date of issuance of the last merit decision dated July 10, 2008 and appellant's request for reconsideration dated May 20, 2011, her request for reconsideration was untimely.¹³

While appellant's attorney asserts on appeal that he did not timely receive the July 10, 2008 decision, the Board has long held that, in the absence of evidence to the contrary, correspondence properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule."¹⁴ The record in this case shows that the July 10, 2008 decision was mailed to appellant at her address of record in Leola, Pennsylvania and a copy to the attorney's address of record at 106 White Horse Pike, Haddon Heights, New Jersey, 08035. Appellant has submitted, and the record contains, no evidence to the contrary, such as a notice that the decision was returned to OWCP as undelivered by the post office.¹⁵

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 In the case at hand, with her reconsideration request, appellant did not submit any new evidence. Counsel merely asserted that, since he did not timely receive the July 10, 2008 decision, appellant's claim should be reopened for merit review.

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁷ As the argument submitted is of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a

¹¹ *James R. Mirra*, 56 ECAB 738 (2005).

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *W.P.*, 59 ECAB 514 (2008).

¹⁵ *See M.U.*, Docket No. 09-526 (issued September 14, 2009). The Board notes that, although appellant's attorney requested a hearing on May 26, 2009, in correspondence dated September 2, 2009 and May 20, 2011, he stated that he did not receive the July 10, 2008 decision until July 10 and August 2, 2009 respectively.

¹⁶ *Id.*

¹⁷ *Robert G. Burns*, *supra* note 10.

substantial question as to the correctness of the July 10, 2008 OWCP decision, appellant has not established that OWCP committed error by its December 5, 2011 decision.¹⁸ The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument submitted by appellant with his May 20, 2011 reconsideration request to ascertain whether it demonstrated clear evidence of error in the July 10, 2008 decision and correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.¹⁹

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and that she failed to establish clear evidence of error. OWCP, therefore, properly denied a merit review of her claim.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁸ *Nancy Marcano, supra* note 12.

¹⁹ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).