

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

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**Docket No. 14-425
Issued: June 16, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 12, 2013 appellant filed an application for review from the July 11, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from April 13, 2012, the date of the most recent merit decision, to the filing of this appeal and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of her claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for further review of the merits as it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On May 6, 2002 appellant, then a 56-year-old flat sorting machine operator, filed an occupational disease claim (Form CA-2) alleging that she had sustained cervical spondylosis

¹ 5 U.S.C. § 8101 *et seq.*

after 32 years of working at the employing establishment. She stated that her condition resulted from various physical duties of her employment.

OWCP initially denied appellant's claim on July 30, 2002 but, subsequent to the June 2, 2003 decision of an OWCP hearing representative, it was remanded for further development of the medical evidence. It accepted her claim for cervical strain on August 12, 2003.

On September 26, 2011 appellant filed a claim for a schedule award, noting that she had retired from the employing establishment and that she was unable to work. She also listed a date range of January 5, 1994 through September 19, 2011 next to the section for claiming leave without pay. In a letter dated October 11, 2011, OWCP requested that appellant provide medical evidence explaining how her current cervical condition was related to work factors since she had been retired since 2002. Appellant did not respond.

By decision dated April 13, 2012, OWCP denied appellant's claim for a schedule award and for any disability compensation. It noted that she had retired in June 2002 from the employing establishment and that the last medical evidence received had been from 2005, which supported short periods of total disability related to carpal tunnel syndrome, cervical spondylosis, anxiety and entrapment syndrome from 2003 through 2005. OWCP found that there was no medical evidence to support a schedule award or temporary total disability from January 5, 1994 through September 26, 2011.

By appeal request form dated April 5, 2013, recorded as received by OWCP on April 23, 2013, appellant requested reconsideration of the April 13, 2012 decision.²

With her request for reconsideration, appellant submitted a statement dated April 5, 2013, noting that she had been released to work with light-duty restrictions, but that the light-duty restrictions had exacerbated her pain. She asserted that she had informed OWCP regarding her light-duty restrictions and that it had agreed with her, sending the employing establishment a letter stating that her light-duty job was not suited to her light-duty condition. Appellant stated that she retired due to her cervical problems and that this letter regarding the suitability of her light-duty position was in OWCP's files.

By decision dated July 11, 2013, OWCP denied appellant's request for reconsideration without a merit review, finding that the request was untimely and that she had not established clear evidence of error. It stated that her request was untimely because it was received on April 23, 2013 more than one year after the April 13, 2012 decision was issued. OWCP found that appellant had not submitted clear evidence of error.

² The appeal request form lists the decision date being appealed as March 12, 2013. As there is no decision from OWCP on this date and as there are no other effective final denial decisions of record, OWCP determined that appellant contested the April 13, 2012 decision. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (October 2011).

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ 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.⁴ When review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.⁵

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.⁶ OWCP regulations and procedures 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

³ 20 C.F.R. § 10.607(a).

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

⁵ See Federal (FECA) Procedure Manual, *supra* note 2 at Chapter 2.1602.4 (October 2011).

⁶ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 20 C.F.R. § 10.607(b); see Federal (FECA) Procedure Manual, *supra* note 2 at Chapter 2.1602.5a (October 2011). OWCP's 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."

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

In order to 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

In its July 11, 2013 decision, OWCP determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was recorded as received on April 23, 2013, more than one year after OWCP's April 13, 2012 decision denying her schedule award. As noted above, when review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.¹⁵ As OWCP received appellant's request for reconsideration more than one year after April 13, 2012, her request for reconsideration was untimely.

OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application.¹⁶ It reviewed the argument submitted by her in support of her application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the argument submitted by appellant does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The issue is whether appellant has shown clear evidence of error in OWCP's April 13, 2012 decision, denying her claim for disability compensation for the period January 5, 1994 through September 26, 2011 and for a schedule award. She submitted a statement in support of her request for reconsideration. Appellant asserted that OWCP had found that the light-duty position to which she had been assigned was unsuitable and requested that OWCP review its records.¹⁷

The Board finds that this argument is insufficient to establish clear evidence of error in OWCP's April 13, 2012 decision. The Board notes that appellant's argument is not relevant to

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ See Federal (FECA) Procedure Manual, *supra* note 2 at Chapter 2.1602.4 (October 2011).

¹⁶ See 20 C.F.R. § 501.2(c).

¹⁷ Appellant also made this argument and request on appeal to the Board.

OWCP's April 13, 2012 decision. Thus, appellant's argument does not raise a substantial question as to the correctness of OWCP's April 13, 2012 decision.

The term clear evidence of error is intended to represent a difficult standard. Appellant must present evidence or argument which on its face shows that OWCP made an error. She submitted only an argument in this case, which did not raise a substantial question as to the correctness of OWCP's April 13, 2012 decision. The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred by denying her claim for a schedule award and disability compensation as not established by the medical evidence of record. Therefore, the Board finds that she has not presented clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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