

FACTUAL HISTORY

This case was previously before the Board.² On November 16, 2007 appellant, then a 28-year-old printing plant worker, filed an occupational disease claim (Form CA-2) for asthma that allegedly arose in the performance of duty on or about August 6, 2007. OWCP initially denied the claim on January 9, 2008 because appellant had failed to establish an injury in the performance of duty. Appellant requested reconsideration and OWCP subsequently denied modification on April 14, 2008, July 10, 2009, and March 15, 2011.

By decision dated January 10, 2013, OWCP denied appellant's September 14, 2012 request for reconsideration on the basis that it was untimely and because she failed to present clear evidence of error. As to the question of timeliness, it noted that it issued its latest merit decision on March 15, 2011, and that appellant's request for reconsideration was received on September 14, 2012, more than a year after the March 15, 2011 decision. When the case was last on appeal, the Board affirmed OWCP's January 10, 2013 nonmerit decision.³

In a March 10, 2014 letter to OWCP, appellant indicated that she was filing an appeal. She noted that she had been evicted and did not initially receive OWCP's March 15, 2011 decision. However, appellant called OWCP and another decision was mailed, which she believed entitled her "until March 18, 2012" to file for reconsideration. She claimed to have sent everything in on time and, therefore, appellant did not understand why OWCP found her request untimely.⁴

On April 4, 2014 OWCP acknowledged receipt of appellant's recent correspondence and noted that she had not specified which method of appeal she wished to pursue. It explained the various appeal rights available under FECA, and advised appellant that under the current circumstances it would not take any further action.

By letter dated June 25, 2014, appellant advised OWCP that she was requesting reconsideration of the August 21, 2013 decision. OWCP received her request on July 21, 2014. Appellant did not submit any additional evidence or argument with the June 25, 2014 request for reconsideration.

In a decision dated October 9, 2014, OWCP found that appellant's request for reconsideration was untimely and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain

² Docket No. 13-911 (issued August 21, 2013).

³ The Board's August 21, 2013 decision is incorporated herein by reference.

⁴ Appellant's March 10, 2014 correspondence included a copy of the Board's August 21, 2013 decision.

⁵ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

limitations in exercising its authority.⁶ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.⁸

ANALYSIS

OWCP denied appellant's occupational disease claim because she failed to establish that she sustained an injury in the performance of duty.⁹ The last merit decision was issued on March 15, 2011. Appellant claimed not to have initially received the decision because she had been evicted from her then address of record. The Board notes that on at least three occasions OWCP's March 15, 2011 decision was returned as undeliverable. However, appellant subsequently advised OWCP of her new address and another copy of the decision was forwarded to her on or about July 8, 2011. She claimed to have requested reconsideration on or about February 22, 2012; however, there is no record of her having filed a request prior to September 2012. OWCP denied appellant's request for reconsideration by decision dated January 10, 2013, which the Board affirmed on August 21, 2013.¹⁰

⁶ 20 C.F.R. § 10.607 (2014).

⁷ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of its decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). For decisions issued on or after June 1, 1987 through August 28, 2011, an application for reconsideration must be *mailed* within one year of the date of OWCP's decision for which review is sought. *Id.* at Chapter 2.1602.4e. (Emphasis added.)

⁸ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁹ To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ *See supra* note 2.

Appellant's latest request for reconsideration is dated June 25, 2014. It is unclear when she mailed the request, but was received by OWCP on July 21, 2014. The June 25, 2014 request for reconsideration postdates OWCP's last merit decision by more than three years.¹¹

Because appellant's request for reconsideration was untimely, she must demonstrate clear evidence of error on the part of OWCP in denying her occupational disease claim.¹² She did not submit any additional evidence or argument relevant to the issue of whether she sustained an injury in the performance of duty on or about August 6, 2007. Consequently, appellant's June 25, 2014 request for reconsideration failed to present clear evidence of error.

CONCLUSION

The Board finds that appellant's June 25, 2014 request for reconsideration was untimely and she failed to present clear evidence of error. Accordingly, OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹¹ Appellant mistakenly believed she had one year to file for reconsideration following the Board's August 21, 2013 decision. However, the Board did not have jurisdiction over the merits of the claim. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (October 2011).

¹² 20 C.F.R. § 10.607(b).