



## **FACTUAL HISTORY**

This case has previously been before the Board. In a December 8, 2008 decision, the Board affirmed a February 4, 2008 Office decision denying her request for reconsideration of the merits.<sup>2</sup> The Office found appellant's request did not raise substantial legal questions regarding the denial of her recurrence of disability claim beginning January 22, 2005 or submit pertinent new and relevant evidence. The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.<sup>3</sup>

Appellant submitted medical evidence dated March 14 to 28, 2008, from Dr. Timothy L. Lukas, a treating Board-certified orthopedic surgeon, who addressed the state of her current condition.

On December 16, 2008 appellant requested reconsideration contending that the Office erred in denying her recurrence claim. The Office subsequently received additional progress notes dated October 13, 2008 from Dr. Lukas.

By decision dated January 22, 2009, the Office denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

On April 4, 2009 appellant requested reconsideration.

By decision dated May 27, 2009, the Office denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

## **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>4</sup> provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the

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<sup>2</sup> Docket No. 08-1336 (issued December 8, 2008).

<sup>3</sup> On December 10, 1998 appellant, then a 31-year-old letter carrier, filed a traumatic injury claim alleging that she injured her right knee and possibly sustained an arm injury on that date when she was hit by a car while taking mail out of a collection box. The Office accepted the claim for right tibia fracture, open wounds and right knee internal derangement. Appellant stopped work on December 10, 1998 and returned to full-time work with restrictions on August 9, 1999, but also reduced her work hours to six on August 31, 1999. On November 2, 2000 appellant reduced her hours to four hours per day. By letter dated November 2, 2001, the Office placed appellant on the periodic rolls for partial disability for entitlement to up to four hours per day of leave without pay. On January 28, 2005 appellant filed a claim for a recurrence of disability beginning January 22, 2005. She stated that she had increased swelling and pain in her knee each time she increased her work hours and that working seven hours per day aggravated her accepted knee condition. By decision dated June 14, 2005, the Office denied appellant's claim on the grounds that the medical evidence did not demonstrate that she sustained a recurrence of disability as the evidence did not show her condition had materially worsened or that she was unable to perform her limited-duty job.

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>5</sup> To be entitled to a merit review of an Office 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.<sup>6</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>7</sup>

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>8</sup> The term “clear evidence” of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.<sup>9</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>10</sup>

### ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>11</sup> However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>12</sup> The most recent merit decision was dated January 23, 2007. Appellant had one year

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<sup>5</sup> 20 C.F.R. § 10.605.

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB \_\_\_\_ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *D.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, *supra* note 7; *James R. Mirra*, 56 ECAB 738 (2005).

<sup>10</sup> *See W.G.*, 60 ECAB \_\_\_\_ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>11</sup> 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB \_\_\_\_ (Docket No. 08-977, issued September 12, 2008); *Alberta Dukes*, *id.*

<sup>12</sup> *D.G.*, 59 ECAB \_\_\_\_ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, *supra* note 8

from the date of this decision to make a timely request for reconsideration. Since appellant did not file her request until April 4, 2009, it was filed outside the one-year time period.

As her request was untimely, appellant must submit evidence or argument that show clear evidence of error in the Office's decision denying her recurrence claim. The term clear evidence of error is intended to represent a difficult standard.<sup>13</sup> Appellant's request would have to establish on its face that the Office's denial of her recurrence claim was erroneous.

Appellant's request for reconsideration does not establish clear evidence or error. The Board finds that she failed to provide sufficient medical evidence to support her claim that she sustained a recurrence of disability on January 22, 2005. Records from appellant's treatment in 2007 and 2008 do not pertain to the time period in 2005 when she filed her recurrence claim or address her disability as of that period. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>14</sup> Appellant did not submit such evidence.

On appeal appellant contends that the Office erred in relying upon Dr. Obinanwu's May 19, 2004 report in denying her recurrence claim as it was stale and cites to the procedure manual to support her allegation of an error of law or fact. The Office denied her recurrence claim on the grounds that she failed to submit rationalized medical evidence showing either a material worsening in her condition or that she was unable to perform her light-duty job. The Office noted that Dr. Obinanwu report continued to constitute the weight of the evidence regarding her ability to perform her light-duty job. It was appellant burden to submit relevant medical evidence to support her recurrence claim. This argument was previously considered and denied and does not establish clear evidence of error by the Office.

### CONCLUSION

The Board finds that the Office properly determined that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

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<sup>13</sup> *D.L.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>14</sup> *Robert F. Stone*, *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 27, 2009 is affirmed.

Issued: July 13, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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