

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

K.W., Appellant)	
)	
and)	Docket No. 10-2201
)	Issued: August 8, 2011
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Long Beach, CA, Employer)	
)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 27, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated July 20, 2010 denying her request for reconsideration because it was not timely filed and failed to establish clear evidence of error. The last merit decision of OWCP is dated May 5, 2005, more than one year from the filing of this appeal. The Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 1, 2007, the Board affirmed a May 22, 2006 nonmerit decision denying appellant's request for

¹ 5 U.S.C. §§ 8101-8193.

reconsideration.² The Board found that, while appellant advised in a May 4, 2006 letter that she was submitting a report from Dr. McQueen, such report was not received prior to OWCP's May 22, 2006 decision. The Board notes that additional evidence OWCP received following its May 22, 2006 decision included a May 30, 2006 fax transmission containing an April 30, 2006 report from Dr. McQueen, a clinical psychologist. The Board could not review this evidence as its review of the case was limited to the evidence which was before OWCP at the time of its final decision. The facts and circumstances surrounding the prior appeal are hereby incorporated by reference.

The May 30, 2006 fax transmission also contained a copy of a May 4, 2006 fax in which appellant requested reconsideration of the May 5, 2005 OWCP decision. Appellant requested that Dr. McQueen's report be added to her record in her appeal of the denial of her claim.

On April 15, 2010 appellant's attorney requested reconsideration and submitted a 23-page brief. He noted that on or about May 4, 2006 appellant submitted a 10-page faxed reconsideration request with contemporaneous medical evidence. This included a five-page medical report from Dr. Lila McQueen, a clinical psychologist. Counsel noted that the claim file contained only the first five pages of the faxed documents, but not Dr. McQueen's five-page report. He argued that the claim should be reopened as appellant's proof of faxing on May 4, 2006, which noted 10 pages were faxed, raised an inference that Dr. McQueen's five-page report was faxed on May 4, 2006 but lost. Counsel also argued that the record did not contain any contradictory facts that would discredit appellant's statement that she faxed Dr. McQueen's report on May 4, 2006 and OWCP was obligated to review Dr. McQueen's report. Counsel also presented arguments that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

Appellant submitted statements pertaining to her claim, Dr. McQueen's April 30, 2006 report; and a copy of the May 4, 2006 facsimile cover sheet, which noted appellant's desire for reconsideration and that a report from Dr. McQueen was included. Dr. McQueen advised that appellant still had chronic adjustment disorder causally related to the accepted work stressors. She also disagreed with the opinion of the impartial medical specialist, to whom special weight was accorded in terminating appellant's benefits.

By decision dated July 20, 2010, OWCP denied appellant's request on the grounds it was untimely and insufficient to show clear evidence of error in the most recent merit decision of May 5, 2005.³

² Docket No. 07-229 (issued May 1, 2007). OWCP accepted that appellant sustained an adjustment disorder in the performance of her federal duties and placed appellant on the compensation rolls. By decision dated May 5, 2005, OWCP terminated appellant's compensation for wage loss and medical benefits effective that day.

³ *See id.*

LEGAL PRECEDENT

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.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 be manifest on its face that OWCP committed an error.⁹ Evidence that 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

To show 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 OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a). *See also Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ *Leona N. Travis*, *supra* note 9.

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

¹³ *Darletha Coleman*, *supra* note 10.

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

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.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision.¹⁶ As appellant's April 15, 2010 request for reconsideration was submitted more than one year after the last merit decision of record dated May 5, 2005, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in its May 5, 2005 decision.¹⁷

Appellant argued before OWCP and on appeal that she was entitled to further merit review as Dr. McQueen's April 30, 2006 report was part of the fax sent May 4, 2006. Her attorney contends that the fax coversheet of May 4, 2006 and appellant's statements raised an uncontroverted inference of submission and OWCP was required to review the report. The record contains a copy of the May 4, 2006 fax coversheet in which appellant stated she was including a report from Dr. McQueen, as well as a May 30, 2006 fax which verifies that a fax was transmitted on May 4, 2006. The record, however, contains no independent verification that Dr. McQueen's report was actually sent to OWCP on May 4, 2006. The May 4, 2006 fax coversheet references a report from Dr. McQueen but the case record does not contain a copy of any report sent to OWCP on May 4, 2006. The coversheet, on its face, does not establish error on the part of OWCP and is insufficient to raise a substantial question concerning the correctness of OWCP's denial of her claim or to shift the weight of the evidence in her favor. The record reflects that Dr. McQueen's April 30, 2006 report was first received by OWCP on May 31, 2006,¹⁸ over one year following OWCP's merit decision of May 5, 2005. Appellant has not established clear evidence of error by OWCP in this regard.

The Board finds that Dr. McQueen's report is insufficient to establish clear error by OWCP in denying her claim. In her report, Dr. McQueen indicated that appellant still suffered from chronic adjustment disorder causally related to the accepted work stressors. She also disagreed with the opinion of the impartial medical specialist whom OWCP accorded special weight in terminating appellant's benefits. OWCP procedure 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 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 evidence of error.¹⁹ Thus, Dr. McQueen's report does not raise a substantial question as to the correctness of OWCP's decision and does not establish clear evidence of error.

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005). The Board's decision dated May 1, 2007 was a nonmerit decision.

¹⁸ The facsimile date indicates Dr. McQueen's report was sent May 30, 2006.

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c. (January 2004).

On appeal, appellant reiterates the contentions made in her request for reconsideration. The Board, however, only has jurisdiction over whether appellant's request for reconsideration was timely filed and whether it established clear evidence of error. For the reasons discussed above, the evidence and argument submitted by appellant does not establish that the reconsideration request was timely filed and it also does not raise a substantial question concerning the correctness of OWCP's May 5, 2005 decision. OWCP properly determined that she did not show clear evidence of error in that decision. Appellant's attorney also raises arguments addressing the merits of the case. However, the Board does not have jurisdiction over the merits of this case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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