



## **FACTUAL HISTORY**

OWCP accepted that on May 4, 1998 appellant sustained a right ankle crush injury and fracture of the right fifth metatarsal while in the performance of duty. Appellant returned to a light-duty position, then stopped working as of May 31, 2003 when the employing establishment withdrew the position. She received compensation for wage loss from May 31, 2003.

The medical evidence was developed and appellant was referred to Dr. David Johnson, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated February 23, 2006, Dr. Johnson opined that the accepted conditions had resolved and appellant's current condition was unrelated to the May 4, 1998 injury.

On March 1, 2006 OWCP accepted major depressive disorder as a consequential injury. By decision dated May 22, 2006, it terminated compensation for medical benefits based on the accepted orthopedic conditions.<sup>3</sup> In a separate decision dated May 22, 2006, OWCP found that the following conditions were not causally related to the May 4, 1998 employment injuries: stress fracture second metatarsal right foot; left foot plantar fasciitis; left posterior tibial tendinitis and Achilles tendinitis; colon resection; neck and shoulder strain; memory loss; blurred vision and fatigue. Both of the decisions found that Dr. Johnson represented the weight of the medical evidence.

On June 20, 2006 appellant requested reconsideration. She stated that she did not believe Dr. Johnson was provided with a complete medical history. By decision dated August 30, 2006, OWCP declined to review the merits of the claim. It found that appellant's application for reconsideration was insufficient to warrant merit review.

By letter dated November 20, 2006, appellant stated that there were conflicting statements regarding appeal rights in the August 30, 2006 decision.<sup>4</sup> She stated that she was "requesting reconsideration and am exercising my right to appeal to ECAB. I am doing this by fax and [U.S.] mail with copies to appropriate individuals." Appellant stated that she had not been able to have OWCP physicians release her medical records. By letter dated December 11, 2006, OWCP requested clarification. It stated that the right to reconsideration was with respect to the May 22, 2006 decision. If appellant wished to appeal the decision, she was advised to submit a reconsideration request on the enclosed appeal rights form. OWCP also advised her that she could file an appeal with the Board of the August 30, 2006 decision.

In a letter dated May 19, 2007, appellant requested a hearing before OWCP's hearing representative. By decision dated June 26, 2007, OWCP's Branch of Hearings and Review denied her a request for a hearing as she had previously requested reconsideration.

In a letter dated August 17, 2007, appellant requested reconsideration of her claim. She stated that she felt documents relating to her case were not sent to the second opinion and referee physicians. Appellant also indicated that she wished to subpoena documents from OWCP.

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<sup>3</sup> Appellant continued to receive compensation for wage loss.

<sup>4</sup> The letter was addressed to a senior claims examiner in London, Kentucky.

By decision dated September 20, 2007, OWCP found the application for reconsideration was untimely. It denied the reconsideration without merit review of the claim on the grounds appellant did not show clear evidence of error.

Appellant requested an appeal before the Board, which was docketed as No. 08-511. By order dated October 9, 2008, the Board remanded the case for an appropriate decision as the case record had not been received by the Board.

By decision dated June 23, 2010, OWCP found appellant's August 17, 2007 application for reconsideration was untimely and failed to show clear evidence of error.

### **LEGAL PRECEDENT**

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>5</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>6</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of OWCP decision as a matter of right.<sup>7</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>9</sup> As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.605 (1999).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> Under section 8128 of FECA, "[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."

<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>11</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>12</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

construed so as to produce a contrary conclusion.<sup>13</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>14</sup>

### ANALYSIS

OWCP issued two merit decisions dated May 22, 2006. Appellant initially requested reconsideration by letter dated June 20, 2006, which was denied by OWCP, without further review of the underlying merits of the claim, by decision dated August 30, 2006. The record contains a letter dated November 20, 2006 from appellant regarding the August 30, 2006 decision, in which she indicated that she wished to request reconsideration of the decision as well as appeal to the Board.<sup>15</sup> OWCP explained in a December 11, 2006 letter to appellant that the appeal right regarding reconsideration accompanied the May 22, 2006 decisions, and she was provided an opportunity to timely request reconsideration of the May 22, 2006 decisions.

The application for reconsideration, however, was dated August 17, 2007. Since this is more than one year after the May 22, 2006 decisions, it is untimely.<sup>16</sup> Therefore the issue is whether appellant has shown clear evidence of error by OWCP in the denial of her claims. In an August 17, 2007 letter, appellant again contended that documents relating to her case were not sent to the second opinion and referee physicians, and she wished to subpoena documents. She acknowledged that she did not know what specific evidence had been provided to the physicians. The Board notes that both the second opinion physician, Dr. Smith, and the referee physician, Dr. Johnson, provided detailed medical histories. There was no evidence that they lacked a sufficient background to render an opinion on the medical issues presented. To the extent that appellant is arguing that the reports of Drs. Smith and Johnson are of diminished probative value due to an incomplete or inaccurate history, there is no clear evidence of error in this regard.

As noted above, to establish clear evidence of error the evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. The Board finds that the evidence is not sufficient to establish clear evidence of error. Appellant was therefore not entitled to a merit review of her claim and OWCP properly denied the untimely application for reconsideration.

### CONCLUSION

The Board finds that appellant's August 17, 2007 request for reconsideration was untimely and failed to show clear evidence of error by OWCP.

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<sup>13</sup> *Id.*

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>15</sup> A request for reconsideration need not be on a particular form, but must be in writing, identify the decision and the issues for which reconsideration is being requested. *See C.K.*, Docket No. 10-1665 (issued May 25, 2011).

<sup>16</sup> *See* 20 C.F.R. § 10.607.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 23, 2010 is affirmed.

Issued: August 23, 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