

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

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**M.Y., Appellant**

**and**

**U.S. POSTAL SERVICE, CIVIC CENTER  
STATION, Oakland, CA, Employer**

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**Docket No. 11-1262  
Issued: December 8, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 27, 2011 appellant, through his representative, filed a timely appeal of a January 12, 2011 decision of the Office of Workers' Compensation Programs (OWCP), finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. § 501.3, the Board has jurisdiction over the January 12, 2011 decision. The Board does not have jurisdiction over a decision on the merits of the claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The last merit decision was an OWCP decision dated August 17, 2007. For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

## **FACTUAL HISTORY**

Appellant filed an occupational disease claim for compensation (Form CA-2) on July 1, 2005, alleging that he sustained an emotional condition as a result of treatment he received from supervisors at the employing establishment. By decision dated July 25, 2006, OWCP denied the claim on the grounds that no compensable work factors had been established.

In a decision dated July 2, 2007, OWCP declined to review the claim on the underlying merits of the claim for compensation. Appellant again requested reconsideration and, by decision dated August 17, 2007, OWCP reviewed the merits of the claim for compensation. OWCP denied modification of its decision to deny the claim, finding that no compensable work factors were established.

By decision dated September 5, 2008, OWCP found that appellant's application for reconsideration was insufficient to warrant a merit review of the claim. Appellant filed an appeal with the Board, but the appeal was dismissed by order dated March 20, 2009, on the grounds that attorney authorization had not been received.<sup>3</sup>

In a letter dated April 19, 2010, appellant's representative stated that he had filed for reconsideration in December 2009, but had not received a decision. By letters dated October 22 and December 28, 2010, the representative again indicated that he had not received a decision on reconsideration.

By decision dated January 12, 2011, OWCP determined that the application for reconsideration was untimely. It denied the application without merit review on the grounds that appellant had not shown clear evidence of error by OWCP.

## **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>4</sup> The employee shall exercise this right through a request to the district OWCP. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>5</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>6</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> OWCP, through regulations, has imposed

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<sup>3</sup> Docket No. 09-48 (issued March 20, 2009).

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.605 (1999).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</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 [her] own motion or on application."

limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>8</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>9</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>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

The record reflects that appellant's representative submitted a letter dated April 19, 2010 stating that he had requested reconsideration in December 2009. There is no evidence in the record of a December 2009 reconsideration request. Even if it were established that a December 2009 letter was properly addressed and mailed, it would be untimely with respect to the last merit decision dated August 17, 2007.<sup>14</sup> As noted above, an application for reconsideration must be filed within one year of the merit decision to be considered a timely application. The Board finds that the application for reconsideration was properly found to be untimely in this case.

As an untimely application for reconsideration, appellant must establish clear evidence of error by OWCP with respect to the claim. In this case, he provided no evidence or argument with respect to error by OWCP. The claim for compensation was denied on the grounds that appellant did not establish a compensable work factor. If appellant has evidence or argument regarding error by OWCP, he may submit it with an application for reconsideration to OWCP.

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<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *D.O.*, Docket No. 08-1057 (issued June 23, 2009).

<sup>10</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>11</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>12</sup> *Id.*

<sup>13</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>14</sup> A letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The Board finds that appellant did not establish clear evidence of error based on the evidence of record and therefore OWCP properly denied the application for reconsideration.

**CONCLUSION**

The Board finds that the application for reconsideration was untimely and failed to show clear evidence of error by OWCP.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 12, 2011 is affirmed.

Issued: December 8, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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