

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration dated February 23, 2010 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On November 2, 1990 appellant, then a 40-year-old part-time flexible clerk, filed a traumatic injury claim alleging that on November 1, 1990 she tripped over postal supplies and injured her neck and back. OWCP accepted her claim for cervical strain, right triceps strain and herniated disc. Appellant stopped work on November 1, 1990 and returned to a limited-duty position on November 2, 1990.

By decision dated September 26, 1997, OWCP terminated appellant's compensation benefits effective that date. It found that the opinion of Dr. Frederick J. Lieb, a Board-certified orthopedic surgeon, who provided a second opinion examination, established that she had no further residuals of her November 1, 1990 work injury.

On October 3, 1997 appellant requested an oral hearing. In a decision dated April 29, 1998, OWCP's hearing representative affirmed the September 26, 1997 OWCP decision. On April 22, 1999, April 14, 2000, November 9, 2001, January 7, 2003 and November 19, 2007 appellant requested reconsideration and submitted additional medical evidence. In decisions dated April 30, 1999, December 20, 2000, January 28, 2002, December 7, 2006 and February 20, 2008, OWCP denied modification of the prior decision.

On February 19, 2009 appellant requested reconsideration. In a February 26, 2009 decision, OWCP denied her reconsideration request finding that the request was insufficient to warrant a merit review of the prior decision.

On February 23, 2010 appellant requested reconsideration. She indicated that she had sought assistance from her senator with regard to her compensation claim. Appellant noted that she was treated by Mountain Chiropractic and a Dr. Randall J. Meredith and was submitting a copy of her physicians notes which documented her continuing work-related neck injury of November 1, 1990. She asserted that OWCP changed the date of her reconsideration request and was requesting assistance from the Attorney General's Office to investigate why she has been repeatedly denied compensation for her injuries. Appellant further noted that OWCP failed to properly consider reports from Dr. Meredith and Mountain Chiropractic.

By decision dated May 28, 2010, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.⁴ However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁵

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.⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ *Id.*; *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² As appellant's February 23, 2010 request for reconsideration was submitted more than one year after the last merit decision of February 20, 2008 it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹³

Appellant asserted that she sought assistance from her senator with regard to her compensation claim. She further noted receiving treatment from Mountain Chiropractic and Dr. Randall J. Meredith and was submitting a copy of her physician's notes which documented her continuing work-related neck injury of November 1, 1990. Appellant further asserted that she was requesting assistance from the Attorney General's Office to investigate why she has been repeatedly denied compensation for her injuries. No additional evidence accompanied the reconsideration request.

While appellant addressed her disagreement with OWCP's decision to terminate her compensation benefits, her general allegations do not establish clear evidence of error as her arguments do not raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature and appellant submitted no new medical evidence sufficient to shift the weight of the evidence in her favor and establish that OWCP erred in terminating her compensation on September 26, 1997. Additionally, appellant did not point to any specific report by an attending physician addressing disability at the time of OWCP's termination or refer to any findings made by an attending physician. She also did not identify any error by OWCP in adjudicating her claim. Appellant did not explain how any of her arguments or any of the evidence of record raised a substantial question concerning the correctness of OWCP's decision.

On appeal, appellant asserts that appellant was disabled due to her work injury at the time of OWCP's termination of her compensation. She disagreed with the findings of the second opinion physician and believed his examination was cursory. Appellant further noted that she was granted social security disability and disability retirement with the same evidence for which OWCP terminated her compensation benefits. As discussed, however, appellant has not raised any argument or submitted any evidence sufficient to raise a substantial question regarding the correctness of OWCP's last merit decision. With regard to appellant's argument that she obtained social security disability and disability retirement benefits, the Board has held that decisions of other federal agencies, while instructive, are not binding on OWCP or the Board.¹⁴

¹¹ 20 C.F.R. § 10.607(a).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

¹³ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁴ See *Anneliese Ross*, 42 ECAB 371 (1991).

The Board has also held that entitlement to benefits under another act does not establish entitlement to benefits under FECA.¹⁵ The Board has noted that there are different standards for medical proof on the question of disability under FECA and under the Social Security Act.¹⁶

Appellant, therefore, has not submitted evidence on reconsideration that meets the standard for establishing clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration dated February 23, 2010 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 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

¹⁵ *Freddie Mosley*, 54 ECAB 255 (2002).

¹⁶ *Daniel Deparini*, 44 ECAB 657 (1993).