

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

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C.D., Appellant )

and )

**DEPARTMENT OF THE NAVY, NORFOLK )  
NAVAL SHIPYARD, Portsmouth, VA, Employer )**

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**Docket No. 11-504  
Issued: September 15, 2011**

*Appearances:*  
*Paul H. Felser, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 22, 2010 appellant filed a timely appeal from a June 25, 2010 decision of the Office of Workers' Compensation Programs (OWCP) that denied her request for reconsideration because it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act (FECA)<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

**ISSUE**

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

On appeal her attorney asserts that OWCP erred in its denial.

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<sup>1</sup> 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On November 21, 2007 appellant, then a 65-year-old former supply clerk, filed an occupational disease claim alleging that constant use of typewriters and computers caused an inability to use her right hand for more than two to three minutes and that she had severe pain in her shoulder, neck and right arm. She first became aware of the condition in May 1990,<sup>3</sup> and an employing establishment human resource specialist advised that the date of last exposure was on October 1, 1993, when she retired.<sup>4</sup>

By letter dated February 15, 2008, OWCP informed appellant of the evidence needed to find that her claim was timely filed. In a statement dated November 1, 2007, appellant advised that she first became aware that she had fibromyalgia and myofascial pain syndrome on August 25, 1993, and indicated that she was also filing a claim for carpal tunnel syndrome. She submitted evidence regarding her work history and statements regarding her previous claim. In a March 26, 1993 report, Dr. Robert B. Hansen, an attending Board-certified neurologist who specializes in pain medicine, noted appellant's report that for the past year she had numbness in her hands which she thought could be carpal tunnel syndrome. He noted mild neurologic findings on examination, suggestive of median neuropathy at the wrist, with no loss of strength. In additional reports dated from February 28, 1994 to October 17, 2002, Dr. Hansen advised that he began treating appellant in 1993 for widespread myofascial pain consistent with a fibromyalgia syndrome.<sup>5</sup> In a November 28, 2007 report, Dr. Hossan Hassan, Board-certified in family medicine, advised that appellant suffered from headaches and widespread myofascial pain felt to be consistent with a fibromyalgia syndrome. He opined that she was totally disabled due to her chronic pain syndrome.

By decision dated March 18, 2008, OWCP denied the claim finding that it was untimely filed. It noted that she could not bypass the appeal process by filing almost identical claims for similar conditions and only making changes in the date of injury.

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<sup>3</sup> Appellant did not indicate when she first realized the claimed conditions were aggravated by her employment. A notification of personnel action stated that appellant resigned for personal reasons.

<sup>4</sup> In a similar claim, adjudicated under file number xxxxxx122, appellant filed an occupational disease claim on May 19, 1996, alleging that she sustained severe pain in her shoulders neck and right arm and was unable to use her right hand for more than two to three minutes due to constant use of computers and typewriters at work. In decisions dated November 12, 1996 and March 28, 1997, OWCP denied her claim for fibromyalgia and myofascial pain, and in a July 14, 1997 decision denied her request for reconsideration. By decision dated August 25, 1999, Docket No. 97-2798, the Board affirmed these decisions. On March 25, 2000 the Board denied appellant's petition for reconsideration. In October 7, 2004 and April 7, 2006 decisions, OWCP denied appellant's reconsideration requests on the grounds that they were untimely filed and failed to present clear evidence of error. By decision dated May 18, 2007, Docket No. 06-1849, the Board affirmed the April 7, 2006 decision. The law and the facts of the previous Board decisions and orders are incorporated herein by reference.

<sup>5</sup> Appellant also submitted a number of reports that contained no signature or an incomplete signature. These included a July 7, 1993 employing establishment clinic note noting left wrist complaints with a diagnosis of rule-out carpal tunnel syndrome, and a July 10, 1996 report noting that appellant's had worsening of bilateral wrist weakness and pain and negative Phalen's and Tinel's signs on physical examination. Both reports were incomplete and were not signed.

On July 23, 2008 appellant requested reconsideration, stating that she was in pain every day. In a nonmerit decision dated August 15, 2008, OWCP denied appellant's reconsideration request. On February 25, 2009 appellant requested reconsideration and submitted evidence previously of record. On April 2, 2009 OWCP denied her reconsideration request.

Appellant again requested reconsideration on October 6, 2009 and asserted that her claim was timely filed and that employment activities caused her condition. She again indicated that she was also filing a claim for carpal tunnel syndrome. Appellant noted that her neck and shoulders began hurting in 1992 and that her wrists became painful and swollen in 1993.

By decision dated June 25, 2010, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and that she failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>6</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>7</sup> Its procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of its regulations,<sup>8</sup> if the claimant's application for review shows "clear evidence of error" on the part of OWCP. In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.<sup>10</sup>

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<sup>6</sup> 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>7</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>10</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP procedures note that 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.<sup>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>12</sup>

### ANALYSIS

The Board finds that as, more than one year had elapsed from the date of issuance of the merit decision in this case on March 18, 2008, appellant’s request for reconsideration on October 6, 2009, was untimely filed.<sup>13</sup> Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for FECA benefits.<sup>14</sup>

The Board finds that appellant failed to establish clear evidence that the March 18, 2008 decision of OWCP was in error. The merit issue in this case is whether she timely filed her claim on November 21, 2007. While appellant asserted that her claim was timely filed, the evidence in both this case record and her previous claim,<sup>15</sup> establishes that she was aware that her claimed conditions could be employment-related no later than the date she resigned, on October 10, 1993. The instant claim is essentially a duplicate of the claim filed by her on May 19, 1996.<sup>16</sup> The denial of that claim was affirmed by the Board in its August 25, 1999 and May 18, 2007 decisions.<sup>17</sup> As to appellant’s current claim for carpal tunnel syndrome, in a report dated March 26, 1993, Dr. Hansen noted her complaints of hand numbness which she thought could be related to carpal tunnel syndrome, and the record does not contain a medical report in which a physician diagnosed carpal tunnel syndrome. Appellant submitted no evidence with her October 6, 2009 reconsideration request to establish that her November 21, 2007 claim was timely filed.

The term “clear evidence of error” is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.<sup>18</sup> As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a

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<sup>11</sup> *James R. Mirra*, 56 ECAB 738 (2005).

<sup>12</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>13</sup> *Supra* note 6.

<sup>14</sup> 20 C.F.R. § 10.607(b).

<sup>15</sup> *Supra* note 4

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Robert G. Burns*, *supra* note 10.

substantial question as to the correctness of the March 18, 2008 OWCP decision, she has not established that OWCP committed error by its June 25, 2010 decision.<sup>19</sup> The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument submitted by appellant with her October 6, 2009 reconsideration request to ascertain whether it demonstrated clear evidence of error in the March 18, 2008 decision and correctly determined that it did not, and thus denied her untimely request for a merit reconsideration on that basis.<sup>20</sup>

### **CONCLUSION**

The Board finds that, as appellant's October 6, 2009 reconsideration request was not timely filed and that she failed to establish clear evidence of error, OWCP properly denied a merit review of her claim by its June 25, 2010 decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 25, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 15, 2011  
Washington, DC

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

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

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

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<sup>19</sup> *Nancy Marcano*, *supra* note 12.

<sup>20</sup> 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).