

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Los Angeles, CA,
Employer**

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**Docket No. 11-576
Issued: September 26, 2011**

Appearances:
M.H. Miles, 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 January 6, 2011 appellant filed a timely appeal of the August 18, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed between the most recent merit decision dated March 8, 2004 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case, pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to file a Board appeal. See 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. See 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant contends that OWCP failed to combine her claim under File No. xxxxxx115 with her other claims for an injury to the same body part as instructed by the Board's July 18, 2003 decision.

FACTUAL HISTORY

This case has previously been before the Board. In a July 18, 2003 decision, the Board affirmed in part and set aside in part OWCP's April 1, 2003 decision, finding that appellant did not sustain neck, arm and hand conditions causally related to factors of her federal employment under File No. xxxxxx115.³ The Board remanded the case to OWCP for development of the medical evidence as to whether she sustained an employment-related herniated disc at L5-S1 with associated leg symptoms. The Board directed OWCP to combine the claim under File No. xxxxxx115 with any other injury claims appellant filed for the same parts of the body. By order dated August 27, 2004, the Board dismissed her appeal of an OWCP notice dated February 2, 2004 which proposed to terminate her compensation related to the accepted employment-related back conditions on the grounds that the notice was not an appealable final decision.⁴ In a March 16, 2006 decision, the Board affirmed an August 12, 2005 OWCP decision which denied appellant's April 13, 2005 request for reconsideration as untimely filed and failing to establish clear evidence of error on the part of OWCP in the issuance of its March 8, 2004 decision which terminated her compensation effective that date on the grounds that she no longer had any residuals causally related to her January 27, 2003 employment-related injury.⁵ In an August 14, 2009 order, the Board dismissed her appeal of an October 23, 2007 OWCP decision, which denied her September 7, 2007 request for reconsideration, as untimely filed.⁶ The facts as set forth in the Board's prior decisions and orders are incorporated by reference.⁷ The relevant facts are set forth.

In a June 21, 2010 letter, appellant, through her representative, requested reconsideration of OWCP's termination decision. She contended that she sustained an injury while performing her work duties at the employing establishment for many years.

³ Docket No. 03-1325 (issued July 18, 2003).

⁴ Docket No. 04-971 (issued August 27, 2004).

⁵ Docket No. 06-271 (issued March 16, 2006).

⁶ Docket No. 09-464 (issued August 14, 2009).

⁷ On January 27, 2003 appellant, then a 53-year-old mail processor, filed an occupational disease claim alleging that she sustained a herniated disc at L5-S1, a condition at C2-3 and C4-5, painful knees, hips and legs and tendinitis of the hand and arm, with swelling, causally related to her federal employment. In a prior claim under File No. xxxxxx219, OWCP accepted that she sustained a work-related lumbosacral strain on or about April 2, 1985. In another claim under File No. xxxxxx115, OWCP accepted that appellant sustained employment-related temporary aggravation of a preexisting lumbosacral strain and lumbar degenerative disc disease on or about March 15, 1999.

In an August 18, 2010 decision, OWCP denied appellant's June 21, 2010 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated March 8, 2004.

LEGAL PRECEDENT

Section 8128(a) of FECA⁸ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁹ 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.¹⁰

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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹² The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁷ The Board makes an

⁸ 5 U.S.C. § 8128(a).

⁹ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Id.* at § 10.607(b).

¹² *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁴ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹⁸

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁹ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁰

The most recent merit decision in this case was OWCP's March 8, 2004 decision which terminated appellant's compensation on the grounds that she no longer had any residuals of her accepted January 27, 2003 employment injury. As appellant's June 21, 2010 letter requesting reconsideration of the merits of her claim by OWCP was more than one year after the March 8, 2004 merit decision,²¹ the Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP. In her June 21, 2010 reconsideration request, appellant asserted that she sustained an employment-related injury. While she addressed the nature of her injury, the Board finds that her general allegation does not raise a substantial question as to the correctness of OWCP's termination decision.

The Board notes that the underlying issue in this case is medical in nature and that appellant submitted no new medical evidence and she did not explain how the previously submitted evidence was sufficient to shift the weight of the evidence in her favor and establish that OWCP erred in terminating her compensation effective March 8, 2004. Therefore, appellant failed to meet her burden of proof to show clear evidence of error on the part of OWCP.

The Board finds that appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's termination decision.

On appeal appellant contended that OWCP failed to combine her claim under File No. xxxxxx115 with her other claims for an injury to the same body part as instructed on remand by the Board's July 18, 2003 decision. On September 22, 2003 OWCP requested the case record for File No. xxxxxx219 from the Federal Records Center to be considered with the case record for File No. xxxxxx115. Moreover, on September 29, 2003, OWCP doubled File No.

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁹ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

²⁰ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

²¹ Appellant had one year to request reconsideration by OWCP of its March 8, 2004 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

xxxxxx115 with File No. xxxxxx298 under master File No. xxxxxx298. The Board finds, therefore, that appellant's contention has not been established.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 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