

ISSUE

The issue is whether OWCP properly denied appellant's October 29, 2010 request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

In the prior appeal,³ the Board affirmed OWCP's February 22, 2008 denial of appellant's claim that an employer-scheduled functional capacity evaluation on June 21, 2005 injured her left hand and wrist. The Board found that she failed to meet her burden of proof because the evidence raised too many doubts about whether the injury occurred as alleged. Although medical opinion evidence supported the claim, it failed to establish the critical element of causal relationship. The facts of this case as set out in the Board's prior decision are hereby incorporated by reference.

On October 29, 2010 appellant requested reconsideration. She stated that she had submitted a new medical report on December 10, 2009. Appellant noted that she was also submitting a new medical report dated October 24, 2010. She added: "I am suffering daily from this left wrist/hand injury."

In a decision dated November 29, 2010, OWCP denied appellant's October 29, 2010 request for reconsideration of its February 22, 2008 decision on the grounds that it was untimely and failed to present clear evidence of error. It noted that the medical evidence to which she referred was not received.

On appeal, appellant noted that she was not requesting reconsideration of the OWCP's February 22, 2008 decision. She submitted a copy of OWCP's November 29, 2010 denial and labeled February 22, 2008 as the "wrong date." Appellant argued that her request for reconsideration was timely from the Board's June 17, 2009 order denying her petition for reconsideration. She argues that OWCP did not acknowledge her attending physician's report. Appellant alleged that OWCP mishandled her claim. She alleged that OWCP did not review important information. Appellant alleged that important information was missing. She reiterated that she was injured during the functional capacity evaluation on June 21, 2005.

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

³ Docket No. 08-1167 (issued October 7, 2008), *petition for recon. denied*, June 17, 2009.

(2) award compensation previously refused or discontinued.”⁴

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 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought.⁵ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include pre-recoupment hearing decisions.⁶

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 application must establish, on its face, that such decision was erroneous.⁷

The term “clear evidence of error” is intended to represent a difficult standard.⁸ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁹

ANALYSIS

The most recent merit review of appellant’s case is the Board’s October 7, 2008 decision affirming the February 22, 2008 denial of her claim for compensation. Appellant had one year from that decision, or until October 7, 2009, to file a timely request for reconsideration with OWCP. Her October 29, 2010 request for reconsideration was more than a year too late. The question for determination is whether this untimely request shows on its face that the most recent merit decision was erroneous.

The request at issue is a single handwritten page, four sentences long. It stated that appellant requested reconsideration and had submitted new medical evidence.

On its face, this request is merely informational. It advised what action appellant took with a declaration that she still had pain. This brief correspondence does not establish that OWCP’s denial of her claim for compensation was erroneous. In its October 7, 2008 decision affirming OWCP’s denial, the Board explained the problems with appellant’s case and why too

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004). (Emphasis deleted.)

⁷ 20 C.F.R. § 10.607.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁹ *Id.* at Chapter 2.1602.3.d(1).

many doubts remained about whether she injured her left hand and wrist as alleged. Appellant's untimely request does not resolve these doubts. It does not show that OWCP's February 22, 2008 decision, as affirmed by the Board, was clearly erroneous. It does not meet the standard of review for untimely requests.

The Board notes that appellant's October 29, 2010 request provided no accompanying evidence. Appellant submitted an October 24, 2010 medical report with her appeal to the Board, but the Board has no jurisdiction to consider new evidence on appeal.¹⁰

Because appellant's October 29, 2010 request for reconsideration is untimely and fails to show clear evidence of error on the part of OWCP in its most recent merit decision, the Board finds that OWCP properly denied that request. The Board will affirm OWCP's November 29, 2010 decision.

Appellant takes issue on appeal with OWCP's statement that she was requesting reconsideration of its February 22, 2008 decision, but OWCP is correct. OWCP's February 22, 2008 decision is the last merit decision that provided her with a right to reconsideration within one year. Appellant suggested that her request is timely from the Board's June 17, 2009 order denying her petition for reconsideration, but (1) the one-year period for requesting reconsideration did not run from the Board's June 17, 2009 nonmerit order and (2) appellant's October 29, 2010 request would still have been untimely. She repeats her argument that OWCP mishandled her claim and that important information is missing, but none of that is relevant to the issue before this Board, which is whether her October 29, 2010 correspondence satisfies the difficult standard of review for untimely requests and warrants a reopening of her case for a review on its merits. That is the only issue the Board may review on this appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's October 29, 2010 request for reconsideration. The request was untimely and failed to show clear evidence of error in OWCP's most recent merit decision.

¹⁰ See *supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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