

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

L.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Oakland, CA, Employer)

Docket No. 12-1193
Issued: December 28, 2012

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 3, 2012 appellant, through her representative, filed a timely appeal from the November 15, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her reconsideration request. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's July 13, 2011 reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

In the prior appeal,² on July 17, 2008 the Board found that OWCP properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) on the grounds that she refused

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 07-1333 (issued July 17, 2008), *petition for recon. denied*, Docket No. 07-1333 (issued January 23, 2009).

an offer of suitable work. On January 23, 2009 the Board issued an order denying her petition for reconsideration. The facts of this case as set out in the Board's prior decision are hereby incorporated by reference.³ The relevant facts are set forth below.

On July 13, 2011 appellant, through her representative, requested reconsideration of OWCP's July 19, 2005 decision terminating her compensation. She also requested reconsideration of the Board's July 17, 2008 decision.

Appellant argued that, after receiving OWCP's June 16, 2005 notice that she had 15 days to accept the offered position, she attempted to contact her employer by telephone on June 29 and 30, 2005 but received no response. She argued that she sent a letter by certified mail on July 1, 2005 stating that she would accept the position under protest and would return to work on July 14, 2005. Appellant further argued that she reported to work on July 16, 2005, evidence of which she presented. Citing to Board precedent, she argued that the Board had erroneously decided the prior appeal.

In a November 15, 2011 decision, OWCP denied appellant's reconsideration request without reopening her case for a merit review. It found that her request was untimely and did not present clear evidence of error.

Appellant's representative repeats on appeal the argument he made in the reconsideration request.

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.”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 OWCP's decision for which review is sought.⁵

³ On January 24, 1996 appellant, a 39-year-old distribution clerk, sustained a traumatic injury in the performance of duty, which OWCP accepted for left shoulder strain and adhesive capsulitis. She underwent surgery, received a schedule award and received compensation for temporary total disability on the periodic rolls.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

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 a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment 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 decision in this case was the Board’s July 17, 2008 decision that found OWCP properly terminated appellant’s compensation benefits under 5 U.S.C. § 8106(c)(2). Appellant had one calendar year, or until July 17, 2009, to request reconsideration of OWCP’s termination decision. Her July 13, 2011 reconsideration request missed the deadline by two years. Therefore, it was untimely filed.

The question is whether appellant’s untimely request showed clear evidence of error in OWCP’s termination of compensation. The Board has carefully considered her request and finds that it did not establish, on its face, that OWCP’s decision was erroneous. Appellant’s request raised an argument previously made before OWCP’s hearing representative, before OWCP on reconsideration, before OWCP on a second reconsideration and before the Board on the prior appeal.

The Board previously reviewed the merits of appellant’s case and found that OWCP properly terminated her compensation benefits under 5 U.S.C. § 8106(c)(2). The Board also denied appellant’s petition for reconsideration. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. The decisions and orders of the Board will be final upon the expiration of 30 days from the date of issuance unless the Board has fixed a different period of time therein.¹⁰ The decision or order of the Board will stand as final unless vacated or modified by the vote of at

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

⁷ 20 C.F.R. § 10.607(b).

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).

¹⁰ 20 C.F.R. § 501.6(d); *see* 5 U.S.C. § 8149 (rules and regulations shall provide for a Board of three individuals designated or appointed by the Secretary with authority to hear and, subject to applicable law and the rules and regulations of the Secretary, make final decisions on appeals taken from determinations and awards with respect to claims of employees).

least two members of the reconsideration panel.¹¹ The Board's final decision in 2008 thus settled the matter.¹² Simply raising the issue once again in an untimely reconsideration request does not entitle appellant to a merit review of her case. Her request did not show, on its face, that OWCP's termination of compensation was erroneous.

Accordingly, the Board finds that OWCP properly denied that request. The Board will affirm OWCP's November 15, 2011 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's July 13, 2011 reconsideration request as untimely filed and failing to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹¹ *Id.* at § 501.7(d).

¹² Although appellant was within her rights to ask OWCP to reconsider its termination of compensation benefits, she had no legal grounds to ask OWCP to review the Board's decision. OWCP has no such jurisdiction.