

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

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<b>A.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 12-223</b>
	)	<b>Issued: June 13, 2012</b>
<b>DEPARTMENT OF AGRICULTURE,</b>	)	
<b>FARMERS HOME ADMINISTRATION,</b>	)	
<b>Lares, PR, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 24, 2011 appellant filed a timely appeal from the June 22, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. Because more than one year has elapsed between the last OWCP merit decision dated August 5, 1996 and the filing of the appeal, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> For 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 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).

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated May 27, 1998, the Board affirmed OWCP decisions dated March 18 and August 5, 1996 which found appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on October 14, 1994.<sup>3</sup> The Board noted that on October 14, 1994 appellant slipped and fell on a flooded floor; however, she did not submit sufficient medical evidence to establish that she sustained an employment injury due to this incident. The Board noted that the record did not contain any statement or medical evidence around the time of the October 14, 1994 fall which indicated that appellant reported hitting her head during the fall. In a May 29, 2008 order remanding the case, the Board found that the record was incomplete and remanded the case for reconstruction and proper assemblage of the record.<sup>4</sup> By decision dated November 8, 2010, the Board affirmed a November 3, 2009 OWCP decision which found appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.<sup>5</sup> The facts and the circumstances of the case as set forth in the Board's previous determinations are incorporated herein by reference.

In a May 20, 2011 letter, appellant requested reconsideration. She noted the history of her case and stated that she had a valid claim. Appellant asserted that she submitted sufficient evidence establishing causal relation and on the error made. She asserted that the medical evidence she submitted was probative and OWCP erred by failing to undertake the proper development on remand. Appellant referenced previously submitted reports from her physicians which addressed the causal relationship of her physical and emotional conditions and argued that they were supportive of her claim. She argued that she was not subject to time limitations and the clear evidence of error standard as she was a disabled worker and was under a disability by the time OWCP denied her claim. Appellant contended that the employer and OWCP committed numerous errors in the handling of her claim and that there is missing documentation from the record. She argued that OWCP did not request the necessary information from her physicians or her and erred by making a determination on her case with insufficient information. Appellant argued that OWCP acted unreasonably and erred in denying a valid claim. No new evidence was submitted.

By decision dated June 22, 2011, OWCP denied appellant's request for reconsideration on as it was not timely filed and failed to demonstrate 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.<sup>6</sup> It will not review a decision denying or terminating a

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<sup>3</sup> Docket No. 97-853 (issued May 27, 1998).

<sup>4</sup> Docket No. 08-491 (issued May 29, 2009), *order denying petition for recon.* (issued December 2, 2008). Appellant appealed from September 11 and November 7, 2007 OWCP decisions that found that her requests for reconsideration were untimely and did not present clear evidence of error.

<sup>5</sup> Docket No. 10-526 (issued November 8, 2010).

<sup>6</sup> 5 U.S.C. § 8128(a).

benefit unless the application for review is filed within one year of the date of that decision.<sup>7</sup> In implementing the one-year time limitation, OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>8</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>9</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>10</sup> 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>11</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 which 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 merely to 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 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 raise a substantial question as to the correctness of OWCP's decision. The Board makes an 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.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to 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.<sup>13</sup> However a right

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<sup>7</sup> 20 C.F.R. § 10.607; *see also* *D.K.*, 59 ECAB 141 (2007).

<sup>8</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

<sup>9</sup> *A.F.*, 59 ECAB 714 (2008).

<sup>10</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (January 2004).

<sup>11</sup> *D.G.*, 59 ECAB 455 (2008).

<sup>12</sup> *Id.* *See James R. Mirra*, 56 ECAB 738 (2005).

<sup>13</sup> *Supra* note 8; *D.G.*, 59 ECAB 734 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>14</sup> The most recent merit decision was the Board's May 27, 1998 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. As she did not file her request until May 20, 2011, it was filed outside the one-year time period.

As her request was untimely, appellant must submit evidence or argument that shows clear evidence of error in OWCP's decision denying her claim. The term clear evidence of error is intended to represent a difficult standard.<sup>15</sup> Appellant's request would have to establish on its face that OWCP's denial of her claim was erroneous. As noted, the occurrence of the employment incident on October 14, 1994, when she slipped and fell on a flooded floor, has been accepted. The claim was denied because there was insufficient medical evidence to establish that the accepted slip and fall caused left hip, back, right knee or other medical conditions. Appellant's statements do not raise a substantial question as to the correctness of OWCP's decision in denying her claim as they do not address the reason that the claim was originally denied, insufficient medical evidence. Although she asserts that her claim was improperly developed and that OWCP committed errors, she has not submitted sufficient supporting evidence that is so positive, precise and explicit that it manifests on its face that OWCP committed an error in denying her request for merit review.<sup>16</sup>

The medical evidence referenced by appellant is also insufficient to establish clear evidence of error. While she reference reports which addressed causal relationship and argued that it was supportive of her claim, OWCP previously weighed this evidence and found it insufficient to establish causal relationship. Appellant also presented arguments which were repetition of her previous statements involving missing documentation and errors she believed the employing establishment and OWCP committed in the handling of her claim. These arguments were previously considered and, as previously noted, failed to address the reason OWCP denied her claim, the lack of causal relation and the need to submit medical evidence based on an accurate history of the injury. Appellant did not submit any new medical evidence or legal arguments sufficient to raise a substantial question as to the correctness of OWCP's decision. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>17</sup> Appellant did not submit such evidence. Consequently, OWCP properly denied appellant's reconsideration request as it does not establish clear evidence of error.

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<sup>14</sup> See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

<sup>15</sup> *D.L.*, Docket No. 08-1057 (issued June 23, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>16</sup> *Robert F. Stone*, *supra* note 13.

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

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her May 20, 2011 request for reconsideration.<sup>18</sup>

Appellant's arguments on appeal largely reiterate her previous statements and request for reconsideration. She focuses on what she believes is missing documentation (both medical and administrative) from the record and numerous errors which she believed the employing establishment and OWCP committed in handling her claim. As previously noted, these arguments do not establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2012  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).