



## **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 erroneously refused to accept the diagnosed conditions provided by an attending physician as causally related to the accepted work injuries but instead accepted the diagnosis of a chiropractor who is not a physician as defined under FECA. She further contended that it erroneously terminated her compensation based on incorrect accepted conditions.

## **FACTUAL HISTORY**

This case was previously before the Board with respect to the denial of appellant's claim for a recurrence of disability. In decisions dated September 14, 2000,<sup>4</sup> August 4, 2003<sup>5</sup> and February 9, 2005,<sup>6</sup> the Board found that OWCP properly denied her requests for reconsideration regarding a recurrence of disability on November 7, 1986 causally related to her accepted May 7, 1985 injuries on the grounds that they were not timely filed and failed to establish clear evidence of error. This case was also previously on appeal before the Board with respect to the denial of appellant's traumatic injury claim (Form CA-1). In a July 16, 2010 decision, the Board affirmed OWCP's denial of her claim as untimely filed under 5 U.S.C. § 8122.<sup>7</sup> The case was previously on appeal before the Board regarding the termination of appellant's medical benefits. In a May 9, 2008 decision,<sup>8</sup> the Board affirmed OWCP decisions dated January 18 and November 15, 2007 which terminated her medical benefits on the grounds that she no longer had any residuals or disability causally related to her May 7, 1985 employment-related injuries.<sup>9</sup> The Board accorded special weight to the impartial medical opinion of Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, who found that appellant no longer had any residuals of her accepted conditions. The Board found that the medical evidence she submitted was insufficient to establish that she had any work-related residuals after January 18, 2007. On April 15, 2009 the Board issued an order remanding case to OWCP for consolidation of appellant's prior claims.<sup>10</sup> The facts and history relevant to the present appeal are hereafter set forth.

On remand, OWCP combined the files into OWCP File No. xxxxxx086 as the master claim number.

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<sup>4</sup> Docket No. 99-958 (issued September 14, 2000).

<sup>5</sup> Docket No. 03-956 (issued August 4, 2003).

<sup>6</sup> Docket No. 04-1741 (issued February 9, 2005).

<sup>7</sup> Docket No. 09-2174 (issued July 16, 2010).

<sup>8</sup> Docket No. 08-571 (issued May 9, 2008). On September 24, 2008 the Board denied appellant's petition for reconsideration. Order Denying Petition for Reconsideration, Docket No. 08-571 (issued September 24, 2008).

<sup>9</sup> OWCP accepted that on May 7, 1985 appellant, then a 28-year-old letter sorter machine operator, sustained cervical and lumbar strains and left hip and ankle sprains as a result of slipping down a flight of stairs. Subsequently, it accepted that she sustained a recurrence of disability on July 24, 1985.

<sup>10</sup> Docket No. 09-42 (issued April 15, 2009).

In a July 29, 2009 decision, OWCP denied appellant's January 22, 2009 request for reconsideration of the termination decision, finding that the arguments and evidence submitted were insufficient to warrant further merit review of her claim. On August 3, 2009 it reissued the July 29, 2009 decision and sent it to her correct address.

Appellant requested reconsideration on January 25, 2011. By decision dated March 1, 2011, OWCP denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

In a March 15, 2011 decision, OWCP's Branch of Hearings and Review denied appellant's February 11, 2011 request for an oral hearing as she had previously requested reconsideration.

On April 19, 2011 OWCP reissued the March 15, 2011 decision and noted that it mistakenly advised appellant in the March 15, 2011 decision that she was entitled to request reconsideration. Appellant was advised that her only appeal right was to file an appeal with the Board.

In decisions dated August 29 and December 5, 2011, OWCP denied appellant's April 29 and September 7, 2011 requests for reconsideration, respectively, of its termination decision. The requests were found to be untimely filed and failed to establish clear evidence of error.

On December 10, 2011 appellant again requested reconsideration. She contended that OWCP erred in not accepting any employment-related injuries she sustained on May 7, 1985 as diagnosed by her attending physician. Instead, it accepted conditions diagnosed by a chiropractor who is not a physician as defined under FECA. Appellant contended that OWCP erred in terminating her compensation based on incorrect accepted conditions.

Appellant submitted duplicate copies of medical records from Dr. Michael R. Treister, an attending Board-certified orthopedic surgeon. On October 8, 1986 Dr. Treister advised that photographic images of the cervical spine and upper extremities did not reveal any pathology. On October 9, 1986 he reported that although appellant had subjective complaints of a chronic cervical strain, there were no objective findings to substantiate this diagnosis. Dr. Treister advised that she could work with restrictions. In a November 7, 1986 disability certificate, he advised that appellant could return to work with restrictions.

Duplicate copies of unsigned treatment notes dated May 8 and 13, 1985 and a May 13, 1985 note containing an illegible signature submitted by appellant stated that she had a sprain of the left hip and knee and lumbosacral region. Appellant was unable to work from May 8 to 13, 1985.

Appellant submitted an undated Form CA-1 signed by her for the May 7, 1985 injury.

In a decision dated December 15, 2011, OWCP denied appellant's December 10, 2011 request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

## LEGAL PRECEDENT

Section 8128(a) of FECA<sup>11</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>12</sup> 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 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought.<sup>13</sup>

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.<sup>14</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>15</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>16</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>17</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>18</sup> 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.<sup>19</sup>

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 *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>20</sup> 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>21</sup>

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<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *Id.* at § 10.607(b).

<sup>15</sup> *Nancy Marciano*, 50 ECAB 110, 114 (1998).

<sup>16</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>17</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>18</sup> *Leona N. Travis*, *supra* note 16.

<sup>19</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>20</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>21</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>22</sup> However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>23</sup>

The most recent merit decision in this case regarding the OWCP's January 18 and November 15, 2007 termination is the Board's May 9, 2008 decision which affirmed the decisions. The Board found that appellant no longer had any residuals as of or after January 18, 2007 causally related to the accepted May 7, 1985 employment-related injuries. As appellant's December 10, 2011 letter requesting reconsideration of the merits of her claim by OWCP was made more than one year after the May 9, 2008 merit decision,<sup>24</sup> the Board finds that it was not timely filed.

The Board further finds that appellant's December 10, 2011 letter and identical contentions on appeal do not raise a substantial question as to whether OWCP's decision finding that she no longer had any employment-related residuals was erroneous. Appellant contended that it erroneously refused to accept the diagnosed conditions provided by her attending physician as causally related to the accepted work injuries and instead accepted the diagnosis of a chiropractor who is not defined as a physician under FECA. She further contended that OWCP erroneously terminated her compensation based on incorrect accepted conditions. These contentions were previously raised do not establish error on the part of OWCP, but merely repeat arguments previously considered. Appellant's arguments on reconsideration are insufficient to raise a substantial question concerning the correctness of OWCP's termination of her medical benefits or to shift the weight of the evidence in her favor.

Similarly, the medical evidence submitted by appellant in support of her untimely request for reconsideration is insufficient to establish clear evidence of error on the part of OWCP. The duplicate medical records from Dr. Treister and treatment notes were previously of record and considered by OWCP in its prior decisions. The Board finds that as this evidence is duplicative it is insufficient to establish clear evidence of error.

Appellant's undated traumatic Form CA-1 is not relevant to the issue decided by the Board, namely whether she had any continuing disability or residuals due to the May 7, 1985 injuries. The Board finds, therefore, that the document cannot establish clear evidence of error as to the correctness of the termination decision.<sup>25</sup> Appellant has not presented any additional evidence to establish that she had any continuing employment-related disability or residuals as of or after January 18, 2007.

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<sup>22</sup> 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

<sup>23</sup> *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>24</sup> Appellant had one year to request reconsideration by OWCP of the Board's May 8, 2008 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

<sup>25</sup> *See G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

The Board finds that the arguments and evidence submitted by appellant in support of her untimely request for reconsideration do not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet her burden of proof to show clear evidence of error on the part of OWCP.

**CONCLUSION**

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

**ORDER**

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

Issued: March 13, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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