

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

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**T.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cincinnati, OH, Employer**

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**Docket No. 12-471  
Issued: October 2, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 3, 2012 appellant appealed from an August 2, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying her request for review of the merits of her case. As more than one year elapsed from the last merit decision of March 2, 2001 to the filing of this appeal,<sup>1</sup> pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.3, the Board does not have jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

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<sup>1</sup> For final adverse decisions of OWCP issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP 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).

<sup>2</sup> 5 U.S.C. §8101 *et seq.*

On appeal, appellant contends that OWCP's decision terminating her benefits was based on an incomplete medical record; that the factual and medical evidence was not properly developed or weighed; that the physicians improperly concealed information; and that there were unreasonable delays in processing her claim. She further contends that her request for reconsideration was not untimely filed.

### **FACTUAL HISTORY**

This case has previously been before the Board. OWCP terminated appellant's wage-loss compensation in a decision dated November 18, 1999 finding that she failed to accept an offer of suitable employment. In a decision dated December 3, 2003, the Board found that it properly refused to reopen appellant's case for further review of the merits of her claim as it was untimely filed and failed to show clear evidence of error. The facts as set forth in the Board's prior decision are incorporated by reference.<sup>3</sup>

By letter dated June 16, 2011, appellant requested reconsideration. She argued the merits of her claim, and contended that her to compensation was improperly terminated.

Appellant submitted additional progress notes from her treating physician. In a March 3, 2006 note, Dr. Michael Porody, a Board-certified internist and rheumatologist, stated that she was under his care. Appellant most recently saw him on February 22, 2006 and was experiencing generalized aching as well as weakness in her lower extremities. Dr. Porody noted a history of myopathy secondary to sarcoidosis. He also noted osteoarthritis of appellant's hands, bilateral carpal tunnel syndrome, lumbar spondylosis and rotator cuff tendinitis of the shoulders. Dr. Porody opined that the conditions failed to improve significantly after treatment and for that reason, she was unable to return to work.

In a March 26, 2007 progress note, Dr. Alan V. Safdi, a Board-certified internist with a subspecialty in gastroenterology, noted that appellant was not having further dysphasia or odynophagia and that the dilation appeared to have been successful. Appellant had a history of sarcoidosis fibromyalgia and costochondritis. Dr. Safdi noted that she was to follow up with Dr. Porody. In an April 21, 2008 note, Dr. Porody stated that appellant continued to experience generalized aching, with pain in her shoulders, arms, hips, thighs and back. He noted that she has failed to respond adequately to treatment. Dr. Porody also advised that appellant experienced chest pains secondary to costochondritis. He opined that she remained unable to return to work.

By decision dated August 2, 2011, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error.

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<sup>3</sup> Docket No. 03-1651 (issued December 3, 2003). On November 15, 1995 appellant filed an occupational disease claim for tendinitis due to the repetitive stretching and reaching involved in her federal employment. OWCP accepted this claim for bilateral sprain/strain of both hands and wrists and right shoulder. On May 18, 1997 appellant filed a traumatic injury claim alleging that on April 19, 1997 she sustained an injury to her left shoulder, arms and hands as a result of her federal duties. Her claim was accepted for sprain and tendinitis of her left arm/shoulder. The claims were combined on May 31, 2002. Appellant received compensation for medical and wage-loss benefits.

## LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>5</sup>

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>6</sup> OWCP regulations and procedure provide 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>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</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 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>13</sup>

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>6</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>7</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's Federal (FECA) Procedure Manual further provides: "The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [OWCP] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>11</sup> *See Leona D. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

## ANALYSIS

In its August 2, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. Appellant must file her application for review within one year of the last merit decision of OWCP.<sup>14</sup> The most recent merit decision is dated March 2, 2001.<sup>15</sup> Appellant's request for reconsideration was dated June 16, 2011, some 10 years after the most recent merit decision. Accordingly, her request for reconsideration was not timely filed.

The Board further finds that appellant failed to establish clear evidence of error. In order to establish clear evidence of error, a claimant, must submit evidence that is positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>16</sup> Appellant has not submitted such evidence. Her benefits were terminated because she failed to accept suitable employment. None of the medical reports in support of appellant's most recent request for reconsideration are sufficient to establish clear evidence of error. The new reports of Dr. Porody and Dr. Safdi do not address the critical issue of whether appellant properly refused suitable employment. Dr. Safdi reaches no conclusion with regards to appellant's disability and her accepted employment injuries. Dr. Porody does opine that she remains disabled in his progress reports, but fails to provide rationalized medical evidence in support of this conclusion. Although there are some notations in Dr. Porody's report indicating that appellant was receiving medical treatment, OWCP did not terminate her medical compensation but only her compensation for wage loss. Other medical reports and other evidence are duplicative of reports already in the record. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim.<sup>17</sup>

The term clear evidence of error is intended to represent a difficult standard.<sup>18</sup> In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.<sup>19</sup> The evidence appellant submitted on reconsideration fails to meet this standard.

On appeal, appellant asserts that it was not her fault that her reconsideration request was untimely filed. The Board notes that she was clearly advised of her one-year time limitation for seeking further review before OWCP.<sup>20</sup> Appellant's remaining arguments concern the weighing

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<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> OWCP erroneously stated that the last merit decision was the Board's decision of December 3, 2003. However, in this decision, the Board did not review the merits of appellant's claim. *Id.* at n3.

<sup>16</sup> 20 C.F.R. § 10.607(a); *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

<sup>17</sup> *A.F.*, *supra* note 16.

<sup>18</sup> *S.S.*, Docket No. 11-1579 (issued April 24, 2012).

<sup>19</sup> *See Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>20</sup> *S.B.*, Docket No. 08-2464 (issued July 9, 2009) (ignorance of statutory requirements will not be an excuse for noncompliance with those regulations).

of the medical and factual evidence. These arguments address the merits of the claim, and as stated previously, the Board does not have jurisdiction over the merits of this case.<sup>21</sup>

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that it was untimely filed and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 2, 2011 is affirmed.

Issued: October 2, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>21</sup> 20 C.F.R. § 501.3(d)(2).