

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

B.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 12-1065
Issued: October 12, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2012 appellant filed a timely appeal of a March 5, 2012 decision of the Office of Workers' Compensation Programs (OWCP), finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 5, 2012 decision. The Board does not have jurisdiction over a decision on the merits of the claim.²

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The last merit decision was OWCP's decision dated March 25, 1993. For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This is the 10th appeal in the case. OWCP terminated appellant's compensation on the grounds that she refused an offer of suitable work in an April 17, 1992 decision and denied modification in a March 25, 1993 decision. In a decision dated October 1, 1998, the Board affirmed its January 12, 1996 decision finding that appellant's reconsideration request was untimely and failed to show clear evidence of error.³ By decision dated January 23, 2003, the Board affirmed OWCP's decisions dated April 26 and September 7, 2001 and April 11 and July 26, 2002 denying appellant's requests for reconsideration as untimely and failure to establish clear evidence of error.⁴ In the next appeal, the Board affirmed an August 8, 2003 OWCP decision that found her June 28, 2003 reconsideration request was untimely and failed to show clear evidence of error.⁵ By decision dated November 23, 2004, the Board affirmed decisions dated April 30 and May 17, 2004, finding that appellant's requests for reconsideration were untimely and failed to show clear evidence of error.⁶ In a decision dated December 27, 2007, the Board affirmed OWCP decisions dated May 10 and 29, 2007, finding that appellant's applications for reconsideration were untimely and failed to show clear evidence of error.⁷ By decision dated January 6, 2009, the Board affirmed an April 4, 2008 OWCP decision again finding the request for reconsideration untimely and failing to show clear evidence of error.⁸ In a decision dated February 16, 2010, again the Board found appellant's application for reconsideration was untimely and failed to show clear evidence of error.⁹ The next Board decision was dated February 8, 2011, where the Board found that a March 4, 2010 application or reconsideration was untimely and failed to show clear evidence of error.¹⁰ The last decision was dated December 6, 2011, and the Board affirmed OWCP decisions dated March 1 and 29, 2011, again finding the application was untimely and failed to show clear evidence of error.¹¹ The history of the case is contained in the Boards prior decisions and is incorporated herein by reference.

By letter dated February 1, 2012, appellant requested reconsideration of her claim. She argued that the job offer made to her was invalid as there was no date on the offer and no time stating when the job was available. Appellant cited 20 C.F.R. § 10.507 and argued that the offered position did not meet the requirements under OWCP regulations. She argued that

³ Docket No. 92-2518 (issued October 1, 1998).

⁴ Docket No. 02-1814 (issued January 23, 2003).

⁵ Docket No. 03-2128 (issued October 30, 2003).

⁶ Docket No. 04-1429 (issued November 23, 2004).

⁷ Docket No. 07-1697 (issued December 27, 2007).

⁸ Docket No. 08-1420 (issued January 6, 2009).

⁹ Docket No. 09-1497 (issued February 16, 2010).

¹⁰ Docket No. 10-1335 (issued February 8, 2011).

¹¹ Docket No. 11-1261 (issued December 6, 2011).

OWCP erred in developing the suitable work issue and not vacating the April 17, 1992 OWCP decision.

In a decision dated March 5, 2012, OWCP found the application for reconsideration was untimely and failed to show clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.¹² The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”¹³

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of OWCP’s decision as a matter of right.¹⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁶ 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. 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 evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁷

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ The Board makes an independent

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.605 (1999).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

¹⁶ 5 U.S.C. §§ 8101-8193.

¹⁷ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

²⁰ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.²¹

ANALYSIS

The last merit decision in the case was dated March 25, 1993. The application for reconsideration was dated February 1, 2012, and since this is more than one year after the last merit decision, it is untimely filed. As an untimely application for reconsideration, appellant must establish clear evidence of error by OWCP.

The February 1, 2012 application for reconsideration reiterates appellant's prior arguments that the job offer was invalid under OWCP regulations. The Board notes that she cited 20 C.F.R. § 507, which is a current regulation that was not in effect at the time of the April 17, 1992 suitable work termination.²² As noted, the case has been before the Board on numerous appeals and the Board has previously considered appellant's arguments as to the validity of the job offer and the development of the evidence. The February 1, 2012 application for reconsideration does not provide any new evidence or relevant argument and is not sufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly found that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

²¹ *Thankamma Mathews*, 44 ECAB 765 (1993).

²² The applicable regulations at the time of the April 19, 1992 and March 25, 1993 merit decisions was 20 C.F.R. § 10.123 (1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 5, 2012 is affirmed.

Issued: October 12, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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