



## **FACTUAL HISTORY**

OWCP accepted that appellant, then a 40-year-old budget financial analyst, sustained bilateral wrist sprain, left shoulder tendinitis and cervical strain due to factors of her federal employment. Appellant sustained intermittent periods of disability until December 27, 2001, when she stopped work and did not return.<sup>3</sup> OWCP paid her compensation beginning June 16, 2002.

By decision dated May 1, 2009, OWCP terminated appellant's compensation and authorization for medical benefits effective May 10, 2009. It found that the opinion of Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, who provided a second opinion examination, represented the weight of the evidence and established that she had no further disability or need for medical treatment due to her accepted work injury. OWCP recited the statutory provisions, which provide that an employee whose recovery took more than one year is entitled to priority consideration, provided they apply for reemployment within 30 days after compensation ends.<sup>4</sup>

On July 30, 2009 appellant requested reconsideration. In a decision dated August 13, 2009, OWCP denied her reconsideration request after determining that she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further merit review under 5 U.S.C. § 8128.

On October 26, 2011 appellant requested reconsideration.<sup>5</sup> She argued that the employing establishment failed to comply with OWCP's instructions in its May 1, 2009 decision to provide her with priority reemployment and ignored letters that she sent in June 2009 in her effort to obtain another position. Appellant described in detail her efforts to obtain reemployment and her attempt to get the employing establishment to respond to her applications for positions. She asserted that the employing establishment treated her unfairly and asked OWCP to assist her to get rehired. Appellant maintained that her employer did not receive OWCP's May 1, 2009 decision terminating her compensation until May 19, 2009 and never received the August 13, 2009 decision denying her request for reconsideration. She alleged that OWCP "poorly reviewed" her prior request for reconsideration and maintained that physicians provided false medical reports. Appellant requested both current and retroactive disability and medical benefits.

Accompanying her request for reconsideration, appellant submitted June 3 and 10, 2009 correspondence that she sent to the employing establishment inquiring about reinstatement. Copies of OWCP decisions, a complaint of discrimination by OWCP, a dismissal of the complaint by the Department of Labor and certificates recognizing her work performance. On December 18, 2010 appellant received treatment after police brought her to the emergency room

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<sup>3</sup> By decision dated June 18, 2002, OWCP denied appellant's claim for compensation from January 14 to February 14, 2000 after finding that she was suspended as part of disciplinary action by the employing establishment and was not totally disabled.

<sup>4</sup> 5 U.S.C. § 8151(b)(2).

<sup>5</sup> Appellant also requested reconsideration of another file number and raised arguments pertaining to that claim.

following her eviction from her home. In a letter dated April 1, 2011, the employing establishment advised her that priority placement was valid for one year and noted that it told her in May 2009 to apply for positions and attach her résumé. In letters dated February 23 and April 7 2011, the employing establishment indicated that it was inquiring about priority placement and sent appellant a list of open positions.

By decision dated January 30, 2012, OWCP denied appellant's request for reconsideration after finding that it was untimely and did not establish clear evidence of error.

On appeal, appellant argues that OWCP failed to adequately review her request for reconsideration and the supporting evidence and argument. She further contends that OWCP violated various state and federal laws.

### **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 benefit unless the application for review is filed within one year of the date of that decision.<sup>7</sup> When an application for review is untimely, it undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.<sup>8</sup> OWCP's procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.<sup>9</sup> In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</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.<sup>11</sup> 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

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<sup>6</sup> *Supra* note 1.

<sup>7</sup> 20 C.F.R. § 10.607; *see also* Alan G. Williams, 52 ECAB 180 (2000).

<sup>8</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>9</sup> *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[OWCP] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>10</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

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.<sup>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.<sup>13</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>14</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>15</sup> As appellant's October 26, 2011 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in terminating her compensation.<sup>16</sup>

Appellant primarily argued on reconsideration that the employing establishment and OWCP erred in failing to provide her with priority reemployment. She described difficulties communicating with the employing establishment in attempting to apply for positions. Appellant submitted correspondence between herself and the employing establishment addressing possible priority reemployment. OWCP's May 1, 2009 decision terminating her compensation notified her of her restoration rights under 5 U.S.C. § 8151(b).<sup>17</sup> The issue of appellant's restoration rights is for the employing establishment or Office of Personnel Management to address as OWCP lacks the authority to order priority consideration.<sup>18</sup> As neither OWCP nor the Board have jurisdiction over this issue,<sup>19</sup> appellant's contentions do not establish any error by OWCP in the last merit decision.

Appellant maintained that the employing establishment did not receive the May 1, 2009 termination decision until May 19, 2009 and failed to receive the August 13, 2009 decision

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<sup>12</sup> *Id.*

<sup>13</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>16</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *Supra* note 4. This section of FECA provides an injured employee with the right to resume her former or an equivalent position if she overcomes her injury or disability within one year after the date of commencement of compensation. 5 U.S.C. § 8151(b)(1). For an employee who recovers from her injury or disability more than one year after the date of commencement of compensation, the employing establishment must make all reasonable efforts to place and accord priority to placing the employee in her former or equivalent position. *Supra* note 4.

<sup>18</sup> See *Pedro Beltran*, 44 ECAB 222 (1992); *Charles J. McCuiston*, 37 ECAB 193 (1985) (claims for job restoration are not within the scope of FECA).

<sup>19</sup> See *Nathan Stelly*, 46 ECAB 396, 401 (1995).

denying her request for reconsideration under section 8128. Both decisions, however, were properly addressed and mailed in the ordinary course of business and thus presumed received in due course by the intended recipient.<sup>20</sup>

Appellant generally alleged that OWCP erred in terminating her compensation and failed to properly review her request for reconsideration. She further maintained that physicians did not provide accurate medical reports. Appellant, however, did not identify any specific error by OWCP in evaluating either the medical evidence or her request for reconsideration. It is not enough to merely allege that the evidence could be construed to produce a different conclusion. Appellant must submit evidence or raise an argument that manifests on its fact that OWCP committed an error in terminating her compensation benefits.<sup>21</sup> She did not raise any substantial question concerning OWCP's prior decision and thus failed to establish clear evidence of error.

Appellant submitted copies of OWCP decisions, recognition of performance by the employing establishment, a complaint against OWCP and a December 18, 2010 report regarding her treatment in an emergency room after she was evicted from her home. The underlying issue in this case, however, is whether she has further employment-related disability due to her accepted bilateral wrist sprain, left shoulder tendinitis and cervical strain. Appellant did not submit any evidence addressing this issue. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>22</sup>

On appeal, appellant contends that OWCP did not properly review her request for reconsideration and violated state and federal laws. She did not, however, specify any particular legal or factual error or violation of the law by OWCP. In order to establish clear evidence of error, the evidence submitted must raise a substantial question as to the correctness of OWCP's decision.<sup>23</sup> The evidence appellant submitted on reconsideration fails to meet this standard.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely and did not show clear evidence of error.

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<sup>20</sup> See *Kenneth E. Harris*, 54 ECAB 502 (2003). This presumption is commonly referred to as the mailbox rule. It arises when the record reflects that correspondence was properly addressed and duly mailed.

<sup>21</sup> See *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>22</sup> See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>23</sup> See *Veletta C. Coleman*, *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board