

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

J.G., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION FACILITY, Medford, OR,
Employer**

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**Docket No. 13-919
Issued: August 26, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2013 appellant, through her attorney, filed a timely appeal of a February 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed from January 14, 2011, the date of the most recent OWCP merit decision, to March 11, 2013, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a January 14, 2011 decision, the Board affirmed OWCP's February 1, 2010 denial of appellant's traumatic injury claim on the basis that the medical evidence did not establish that the accepted employment incident, pushing a mail container on May 25, 2009, caused or contributed to a lower back, hip or leg condition.² Following this decision, counsel filed a request for reconsideration before OWCP on April 18, 2012 and submitted new evidence.

In June 13 and September 6, 2011 reports, Dr. Stephen L. Nelson, a Board-certified family practitioner, related that appellant sustained lower back and left lower extremity symptoms at work on May 25, 2009 when she pushed postal equipment that was stuck to a rubber floor mat. A magnetic resonance imaging (MRI) scan exhibited disc herniation while a neurological evaluation confirmed lumbar radiculopathy. Dr. Nelson opined that the May 25, 2009 work event resulted in appellant's disability.

Dr. James O. Nelson, a Board-certified physiatrist, advised in an August 24, 2011 report that appellant sustained job-related left L5-S1 radiculopathy on May 25, 2009. In a March 6, 2012 report, he reiterated that she was moving a heavy mail container on the date of injury and specified that prior clinical findings, an MRI scan, and an electromyogram (EMG) indicated acute to subacute left radiculopathy. Dr. Nelson stated that appellant's condition "appears to be directly related to her work exposure," but conceded that he was "not present at the time of her original injury" and "did not become involved until approximately two years post injury."

By decision dated February 11, 2013, OWCP denied appellant's request for reconsideration, finding that it was not filed within one year of the Board's January 14, 2011 decision and did not otherwise establish clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, OWCP must

² Docket No. 10-1006 (issued January 14, 2011). The findings contained in the Board's prior decision are incorporated by reference.

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a). See also *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁸ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the OWCP decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The most recent merit decision in this case was issued by the Board on January 14, 2011. Counsel filed an application to reopen this decision for further merit review on April 18, 2012. Because more than one year elapsed from January 14, 2011 to April 18, 2012, OWCP properly determined that the reconsideration request was not timely filed.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its January 14, 2011 decision, the Board affirmed OWCP's February 1, 2010 denial of her traumatic injury claim on the grounds that the medical evidence did not establish that the accepted May 25, 2009 employment incident caused or contributed to a lower back, hip or leg condition. Thereafter, counsel submitted reports from Dr. Stephen L. Nelson and Dr. James O. Nelson for the period June 13, 2011 to March 6, 2012. As noted, the question of whether a claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record. None of the physicians' reports, however, manifested on its face that the Board erred in denying appellant's claim in view of the earlier, deficient case record.¹⁰ Since this new evidence did not

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011) ("The term 'clear evidence of error' is intended to represent a difficult standard.").

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁰ See also *D.G.*, 59 ECAB 455, 460 (2008) (the submission of a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted before the denial was issued, is not clear evidence of error; the evidence must shift the weight of the evidence in favor of the claimant).

raise a substantial question as to the correctness of the January 14, 2011 merit decision, OWCP properly determined that the untimely request failed to establish clear evidence of error.

Counsel contends on appeal that the February 11, 2013 decision was contrary to fact and law. The Board has already addressed the deficiencies of the reconsideration request.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2013 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 26, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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