

FACTUAL HISTORY

This case has previously been before the Board. On December 12, 2008 appellant, then a 44-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment. By decision dated March 9, 2009, OWCP denied the claim finding that the medical evidence was not sufficient to establish a diagnosis in connection to appellant's federal employment. Appellant, through her attorney, filed an appeal with the Board. On January 29, 2010 the Board dismissed the appeal finding that it was untimely filed.² On May 27, 2010 appellant, through her attorney, requested reconsideration. By decision dated July 29, 2010, OWCP denied the request on the basis that it was untimely filed and failed to present clear evidence of error. Subsequently, appellant's attorney filed an appeal with the Board. In a decision dated July 13, 2011, the Board affirmed OWCP's July 29, 2010 decision.³ The facts of the case, as set forth in the prior decisions, are incorporated by reference.

By letter dated September 7, 2011, appellant, through her attorney, requested reconsideration and submitted a September 13, 2010 report from Dr. James Sobeski, a Board-certified orthopedic hand surgeon, who examined her and found a positive Durkan's compression test bilaterally, a positive Phalen's test bilaterally, a negative Tinel's sign on the right and a positive Tinel's sign on the left over the median nerve at the wrist. He diagnosed bilateral carpal tunnel syndrome and indicated that appellant's duties included: repetitive motions; lifting letter trays weighing 7 to 10 pounds; picking up heavy magazine bundles frequently during the day; and grasping heavy bags weighing 10 to 70 pounds.

By decision dated February 15, 2013, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation provides that an application for reconsideration must be submitted within one year of the date of its decision for which review is sought.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

² Docket No. 10-299 (issued January 29, 2010).

³ Docket No. 10-2404 (issued July 13, 2011).

⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Jesus D. Sanchez*, *supra* note 4; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

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.⁸

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

To establish 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.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP regulations¹⁶ and procedures¹⁷ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. However, a right to reconsideration within one year also accompanies any subsequent merit

⁸ 20 C.F.R. § 10.607(b).

⁹ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹⁰ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ See *B.O.*, Docket No. 13-914 (issued July 15, 2013); *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁶ *Supra* note 6; see *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2004); see *Velvetta C. Coleman*, *supra* note 14.

decision on the issues,¹⁸ including any merit decision by the Board and any merit decision following action by the Board.¹⁹ The most recent merit decision was OWCP's March 9, 2009 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since she did not file her request until September 7, 2011, it was filed outside the one-year time period. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.²⁰

In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²¹ In its March 9, 2009 merit decision, OWCP denied appellant's occupational disease claim because the medical evidence was not sufficient to establish a diagnosis in connection to appellant's federal employment. The Board finds that the medical evidence submitted by appellant is not sufficient to establish clear error by OWCP in denying her claim.²²

In his September 13, 2010 report, Dr. Sobeski examined appellant and found a positive Durkan's compression test bilaterally, a positive Phalen's test bilaterally, a negative Tinel's sign on the right and a positive Tinel's sign on the left over the median nerve at the wrist. He diagnosed bilateral carpal tunnel syndrome and indicated that appellant's duties included: repetitive motions; lifting letter trays weighing 7 to 10 pounds; picking up heavy magazines bundles frequently during the day; and grasping heavy bags weighing 10 to 70 pounds. Although Dr. Sobeski provided a firm diagnosis, it is insufficient to meet the clear evidence of error standard. 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.²³

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.²⁴ The evidence submitted does not manifest on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

¹⁸ See *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ See Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.1602.3.b.

²⁰ *Supra* note 8; see *Debra McDavid*, 57 ECAB 149 (2005).

²¹ See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

²² See *J.R.*, Docket No. 10-2137 (issued July 12, 2011).

²³ *B.O.*, *supra* note 13.

²⁴ Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 9.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds the attorney's argument is not substantiated.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board