

On appeal, appellant's counsel argues that the request for reconsideration was timely filed. She also contends that the decision from which she requested reconsideration was dated July 15, 2011, not July 15, 2012.

FACTUAL HISTORY

On March 8, 2007 appellant, then a 41-year-old information management specialist, filed a traumatic injury claim alleging that on February 20, 2007, while walking in the parking lot near the entrance of the employing establishment's building, she slipped and fell to the sidewalk and injured both knees, her wrist, lower back, right ribs and right arm. On August 15, 2007 OWCP accepted appellant's claim for sprain of back, lumbar region. It later accepted appellant's claim for bilateral knee medial meniscus tear.

On April 1, 2010 OWCP proposed terminating appellant's medical and compensation benefits as it determined that the weight of the medical evidence established that appellant no longer had any disability or residuals due to her accepted work condition. The proposed termination of benefits was made final in a decision dated May 13, 2010. The termination of benefits was affirmed by a hearing representative in a decision dated December 1, 2010. OWCP denied modification of this decision on July 15, 2011.

By letter to OWCP dated September 11, 2012, appellant's counsel indicated that he had received no response to his request for reconsideration dated June 7, 2012, and asked OWCP to advise him of the status of the request. On October 16, 2012 OWCP responded to counsel's letter and indicated that a decision was issued on "July 15, 2012."²

By letter dated January 11, 2013, appellant's counsel stated that on June 7, 2012, her law firm sent a request for reconsideration of the July 15, 2011 decision to OWCP. She asked that as more than six months have already passed since submitting the request for reconsideration, that OWCP render a decision on her request at its earliest opportunity. Counsel forwarded a copy of a letter to OWCP dated June 7, 2012 requesting reconsideration of the July 15, 2011 decision, as well as a June 4, 2012 report by appellant's treating physician. She also forwarded a copy of a June 13, 2012 note from the "DOL OWCP Central Mail Room" which checked a box indicating "Request for Adjustment(s) must be submitted on the Adjustment Request template." Counsel alleged that the petition for reconsideration was returned to her along with this template. She concluded that OWCP had "obviously received" the reconsideration request based on the response from the mail room.

By decision dated January 15, 2013, OWCP denied the request for reconsideration as it was untimely filed and failed to establish clear evidence of error. It noted that appellant alleged that she requested reconsideration in a timely manner, but that OWCP did not receive the reconsideration request in a timely manner, and received no new evidence from the time of the July 15, 2011 decision until appellant's counsel contacted them in September 2012.

By letter dated January 28, 2013, appellant, through counsel, contended that the June 7, 2012 request for reconsideration was obviously timely received by OWCP as evidenced by the

² OWCP appears to have erroneously referred to the July 15, 2011 decision.

letter from OWCP's mail room. She argued that OWCP clearly erred and requested a review of appellant's claim and that OWCP render a decision on the timely request for reconsideration at its earliest opportunity.

By decision dated April 10, 2013, OWCP denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

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.³ 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.⁴

OWCP, however, 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, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ OWCP regulations and procedures 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record

³ 20 C.F.R. § 10.607(a).

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

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that 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.

⁷ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ *See Leona D. Travis*, *supra* note 8.

and whether the new evidence demonstrates clear error on the part of OWCP.¹¹ 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 *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.¹²

ANALYSIS

The one-year time limitation begins to run on the date following the date of the original OWCP decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³ Therefore, appellant had one year from July 15, 2011 to timely request reconsideration. OWCP's FECA regulations were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹⁴ OWCP found that it did not receive appellant's request for reconsideration within one year of the July 15, 2011 decision, and proceeded to deny appellant's request under the clear evidence of error standard.

However, appellant's counsel contends that OWCP received the request for reconsideration in a timely manner. Counsel forwarded a copy of a June 7, 2012 request for reconsideration, a request that was accompanied by a June 4, 2012 report by appellant's physician. She argues that it is evident that OWCP received appellant's request no later than June 13, 2012 as counsel's firm received a letter of that date from OWCP's mail room along with a copy of the reconsideration request indicating that it needed to be filed on an adjustment request template. Although this letter is not a model of clarity, it is clear that correspondence was received by OWCP from the office of appellant's counsel, and appellant's counsel alleges that it was the request for reconsideration. As June 13, 2012 would be within one year of the July 15, 2011 merit decision, the Board finds that, based on the totality of the circumstances, appellant timely requested reconsideration.

As appellant timely requested reconsideration, the Board finds that OWCP improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to OWCP for review of the new medical evidence under the proper standard of review for a timely reconsideration request and to undertake any appropriate additional development as necessary, followed by an appropriate decision.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ *Donna M. Campbell*, 55 ECAB 241 (2004).

¹⁴ 20 C.F.R. § 10.607.

CONCLUSION

The Board finds that appellant timely requested reconsideration of the July 15, 2011 decision by OWCP. The Board will remand the case for consideration under the proper standard for review for a timely reconsideration request¹⁵ and to issue an appropriate decision following any additional development.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 10 and January 15, 2013 are set aside and the case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: December 19, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁵ See 20 C.F.R. § 10.606(b)(3).