

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

M.D., Appellant	)	
	)	
and	)	<b>Docket No. 13-1629</b>
	)	<b>Issued: December 20, 2013</b>
DEPARTMENT OF THE ARMY, U.S.	)	
MEDICAL COMMAND, Fort Gordon, GA,	)	
Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 28, 2013 appellant filed a timely appeal from the April 12, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed from March 8, 2012, the date of the most recent merit decision, to the filing of this appeal and pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 19, 2012 appellant, then a 57-year-old dental purchase care coordinator, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury in the performance of duties on October 4, 2011. She stated that she received an annual mandatory flu immunization and that this procedure resulted in cardiomyopathy. Appellant did not submit any other factual or medical evidence in support of her claim. Her employing establishment controverted continuation of pay, stating that appellant did not file a CA-1 form within 30 days of her injury; that she did not miss work until she was outside the 45-day continuation of pay time frame; and that the vaccine she received on October 4, 2011 was a killed vaccine, not a live vaccine.

On January 27, 2012 OWCP requested additional factual and medical evidence from appellant, on the grounds that she had not submitted any factual or medical evidence apart from her CA-1 form. It afforded appellant 30 days to submit additional evidence.

By letter dated January 9, 2012, Dr. Anthony Burke, a Board-certified osteopath, stated that appellant developed cardiomyopathy after she received a flu shot and that because that shot was a live attenuated virus, “the possibility exists that it was a direct cause of the cardiomyopathy.”

By letter dated January 26, 2012, Dr. Robert M. Clark, a Board-certified osteopath, stated that he had seen appellant on August 22, 2011, before she received the influenza vaccination and that she was in her usual state of health and was stable. On October 27, 2011 appellant returned to Dr. Clark for a follow-up visit and was found to be tachycardic along with having a pleural effusion, cardiomyopathy and congestive heart failure. Dr. Clark opined that, after her reaction to an influenza vaccine, her health deteriorated because she had a compromised immune system as a result of long-term rheumatoid arthritis.

On January 30, 2012 the Civilian Personnel Advisory Center sent a letter to OWCP confirming that appellant received Aflaira, which is a killed vaccine and not a live one as indicated in Dr. Burke’s January 9, 2012 letter.

By letter dated February 8, 2012, Dr. Burke stated that appellant’s blood work and echocardiogram revealed cardiomyopathy with systolic congestive heart failure. He noted that she told him that her symptoms began a few weeks after having a flu vaccination on October 4, 2011. Dr. Burke maintained that he could “only deduce that [appellant’s] cardiomyopathy was likely viral in origin given the fact that she had received the flu vaccine, which [he understood] to be a live attenuated virus” and that “based on the objective data pertaining to [appellant], he felt] that likely flu vaccine resulted in her cardiomyopathy.”

In an undated narrative statement, appellant stated that, immediately after she received her flu vaccination, she began to feel dizzy. Several days after the vaccination, she noted that she began seeing blue lines, feeling nausea and weakness and experiencing difficulty breathing, in addition to her dizziness. On November 18, 2011 appellant was admitted to a hospital and diagnosed with congestive heart failure. She also asserted that Dr. Clark had later given her a clean bill of health and that she had no symptoms before the flu shot was administered.

In several statements dated February 7 and 8, 2013, appellant's coworkers described her nausea, lightheadedness, fatigue and shortness of breath following her flu vaccination on October 4, 2011.

By decision dated March 8, 2012, OWCP denied appellant's claim, finding that the medical evidence was not sufficient to support her claim for compensation because it did not establish that her medical condition was causally related to her mandatory flu vaccination. It found that Dr. Burke's January 9 and February 8, 2012 letters were of little probative value due to his use of speculative or equivocal language in describing whether the October 4, 2011 employment event was related to her condition and that Dr. Clark's January 26, 2012 letter did not provide a detailed explanation of how her alleged condition was the direct result of the employment event. OWCP accepted that appellant was a federal civilian employee who filed a timely claim; that the traumatic event occurred as described; that a medical condition had been diagnosed; and that she was within the performance of duty.

By letter dated March 1, 2013, received by OWCP on March 11, 2013, appellant requested reconsideration of OWCP's March 8, 2012 decision. In support of her request, she submitted a narrative statement describing her own research and a statement from Dr. Burke. In Dr. Burke's statement, dated January 17, 2013, he asserted that, "in [his] professional medical opinion, after reasonable deduction and our ability to remove certain etiologies as the possible cause of [appellant's] cardiomyopathy, [he could] only at this point deduce that it was likely caused by the influenza vaccination" and that "through her testing, we were only able to deduce with reasonable certainty that her flu vaccination was the likely cause of her cardiomyopathy."

By decision dated April 12, 2013, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and did not 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.<sup>2</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>3</sup> Imposition of this one year receipt limitation does not constitute an abuse of discretion.<sup>4</sup>

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, it must 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.<sup>5</sup>

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<sup>2</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> See *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> *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).

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>6</sup> is positive, precise and explicit and manifests on its face that OWCP committed an error.<sup>7</sup> 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 OWCP's 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.<sup>8</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision in this case was issued by OWCP on March 8, 2012. According to the case record before OWCP, appellant's request for reconsideration was received on March 11, 2013, over a year after the most recent merit decision. Accordingly, OWCP properly found that her request for reconsideration was not timely filed.

The Board further finds that appellant failed to establish clear evidence of error. In its March 8, 2012 decision, OWCP denied her traumatic injury claim on the grounds that the medical evidence did not establish that a work factor, namely a mandatory flu vaccination, caused or contributed to cardiomyopathy. It noted that Dr. Burke's reports of January 9 and February 8, 2012 were of little probative value because they were accompanied by terms that were speculative or equivocal in nature, such as "possibly" or "likely." Thereafter, appellant submitted a statement from him dated January 17, 2013. In this statement, Dr. Burke asserted that, "in [his] professional medical opinion, after reasonable deduction and our ability to remove certain etiologies as the possible cause of her cardiomyopathy, [he could] only at this point deduce that it was likely caused by the influenza vaccination" and that "through her testing, we were only able to deduce with reasonable certainty that her flu vaccination was the likely cause of her cardiomyopathy."

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 bears on the evidence previously of record. Dr. Burke's January 17, 2013 statement does not differ in relevant part from the evidence previously of record because it also uses speculative or equivocal language such as "likely" and does not manifest on its face that OWCP erred in denying appellant's claim in view of the earlier case record. Because the evidence submitted with appellant's request for reconsideration did not shift the weight of the evidence in favor of her and

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<sup>6</sup> *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

<sup>7</sup> *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>8</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

raise a substantial question as to the correctness of the March 8, 2012 decision, OWCP properly determined that the untimely request failed to establish clear evidence of error.

Appellant contends on appeal that OWCP received her reconsideration request in a timely manner and submitted new evidence. The Board lacks jurisdiction to review evidence for the first time on appeal.<sup>9</sup> Appellant may submit new evidence to OWCP with a written request for reconsideration in order to determine whether this new evidence establishes clear evidence of error in its most recent merit decision, pursuant to 20 C.F.R. § 10.607(b).

**CONCLUSION**

The Board finds that appellant's request for reconsideration dated March 2, 2013 was untimely received and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2013  
Washington, DC

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

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

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

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<sup>9</sup> 20 C.F.R. § 501.2(c).