



## ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further merit review of her claim on the grounds that her requests were untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant, through counsel, contends that, although her requests for review were untimely filed, OWCP's failure to follow proper procedural requirements when it terminated her compensation benefits constituted clear evidence of error.

## FACTUAL HISTORY

On October 19, 1998 appellant, then a 56-year-old nursing assistant, filed a traumatic injury claim alleging that, while pulling a patient without assistance, she suffered an injury to her right neck down to her right shoulder. OWCP accepted the claim for right shoulder sprain and cervical strain. It later accepted appellant's claim for cervical herniated discs at C3-4, C4-5, C5-6, C6-7 and C7-T1. OWCP paid compensation and medical benefits.

By letter to appellant dated April 18, 2000, OWCP noted that she had been offered a position as a laundry worker for the employing establishment and that this position was found to be suitable to her work capabilities as set forth by the medical evidence of record. It informed her that she had 30 days to either accept this position or offer an explanation as to her reasons for refusing it. OWCP further informed appellant that, at the expiration of 30 days, a final decision would be made.

On April 20, 2000 OWCP received a note signed by appellant indicating that Jerial Watts, a union representative, was her representative. This note was forwarded to OWCP by Mr. Watts with an unsigned cover memorandum which provided his telephone number. The memorandum was sent on the letterhead of the American Federation of Government Employees (AFGE) in Dallas, Texas. On the same date, there is a note in the record that indicated that appellant and Mr. Watts, spoke with OWCP and stated that the pay rate appeared to be different and discussed the position offered by the employing establishment. OWCP noted that appellant's concerns would be addressed with the employing establishment.

By decision dated May 22, 2000, OWCP terminated appellant's compensation effective June 18, 2000 pursuant to 5 U.S.C. § 8106(c)(2), because she refused suitable employment as a laundry worker. This decision was sent to him with a note indicating that OWCP did not have an address for Mr. Watts, that there was no authorization in the record and that an extra copy of the decision was attached in case appellant wished for him to have a copy. On May 25, 2000 OWCP issued a new decision that terminated appellant's compensation effective June 18, 2000, and indicated that this decision replaced the May 22, 2000 decision. Although OWCP listed Mr. Watts on this decision, it did not list an address.

Appellant requested reconsideration on February 22, 2001.

On May 23, 2001 OWCP denied modification affirming the holding that compensation remained termination as appellant had refused suitable employment. On September 25 and October 31, 2001 also it denied modification of the decision terminating compensation.

On June 22, 2011 appellant, through her representative, requested reconsideration and alleged that clear evidence of error had been established. He contended that OWCP erred in weighing the medical evidence. Appellant's representative further argued that it erred in finding that appellant had refused suitable work and erred as he was not properly served a copy of the termination decision.

By decision dated November 15, 2011, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error.

By letter dated January 11, 2012, appellant, through her representative, filed another request for reconsideration. He contended that OWCP did not follow proper procedural guidelines with regards to serving appellant's then representative and that OWCP was required to give further notice prior to termination of benefits. In support of his argument, appellant's representative resubmitted an April 17, 2000 memorandum of the return to work conference wherein appellant neither accepted nor declined a position in the laundry section and an OWCP report of an April 20, 2000 telephone call between appellant, Mr. Watt and OWCP wherein the representative expressed concerns about appellant's pay rate and the duties of the offered position, including the production level of the position.

By decision dated April 5, 2012, OWCP denied appellant's request for reconsideration as it was not timely filed and did not show clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>3</sup> 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.<sup>4</sup>

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>5</sup> OWCP's regulations and procedure provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20

---

<sup>3</sup> 20 C.F.R. § 10.607(a).

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

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

C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>8</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

OWCP regulations and Board case law require OWCP to send a copy of its decision to appellant and the authorized representative.<sup>13</sup>

### ANALYSIS

OWCP determined, and appellant does not contest, that she failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for

---

<sup>6</sup> *Id.* at § 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.

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

<sup>8</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> *See supra* note 8.

<sup>11</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>13</sup> 20 C.F.R. § 10.127 provides, a copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. *See also M.R.*, Docket No. 11-632 (issued September 28, 2011). In *George R. Bryan*, Docket No. 03-2241 (issued April 19, 2005), the Board found that OWCP did not properly issue its June 18, 2003 decision when it did not send a copy of that decision to the authorized representative. In *James Consentino*, Docket No. 04-1774 (issued October 2, 2004), the Board found that it improperly issued a decision terminating compensation because it did not mail the decision to appellant's representative and declared the termination decision null and void.

reconsideration begins on the date of OWCP's decision.<sup>14</sup> As appellant's June 22, 2011 and January 11, 2012 requests for reconsideration were submitted more than one year after the October 31, 2001 merit decision denying modification of the termination decision, her request was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her request for reconsideration.

OWCP terminated appellant's compensation benefits effective June 18, 2000 as it found that she refused employment deemed to be suitable in violation of the provisions of Section 8106(c)(2) of FECA. Initially, the Board notes that, as a penalty provision, Section 8106(c)(2) must be narrowly construed.<sup>15</sup>

The Board finds that appellant has established clear evidence of error. The decision terminating her compensation benefits was improperly issued as OWCP did not provide proper service on her representative. On April 20, 2000 OWCP received a note signed by appellant designating Mr. Watts as her representative. The note was forwarded with an unsigned cover memorandum which indicated that it was being sent from Mr. Watts and giving his telephone number. The memorandum was on the letterhead of AFGE in Dallas, TX. Although OWCP indicated that it could not send appellant's representative a copy of the decision because it did not have an address, but Mr. Watts informed OWCP of his representation of appellant and provided the note on the letterhead of the union office, which clearly indicated that her address. If OWCP also spoke with Mr. Watts on the telephone and could have obtained the address at that time. In addition, the Board notes that OWCP had Mr. Watt's telephone number.

At the time appellant submitted her authorization, the Code of Federal Regulations provided that a claimant may appoint an individual to represent his or her interests, but that the appointment must be in writing. The regulations also noted that any notice requirement contained in the regulations or FECA was fully satisfied if served on the representative, and has the same force and effect as if sent to the claimant.<sup>16</sup> The regulations and Board case law require OWCP to send a copy of its decision to the authorized representative. The Board has held that, under FECA, a decision is not properly issued unless both appellant and the authorized representative have been sent copies of the decision.<sup>17</sup> Appellant was entitled to an opportunity to contest the termination of benefits with the assistance of a representative and was denied the right to do so.<sup>18</sup> OWCP did not send the May 22, 2000 decision terminating her compensation benefits to her duly authorized representative, it was not properly issued. The decision terminating benefits is null and void. Therefore, appellant has established clear evidence of error.

---

<sup>14</sup> *Supra* note 5.

<sup>15</sup> *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

<sup>16</sup> 20 C.F.R. § 10.700.

<sup>17</sup> *W.S.*, Docket No. 12-1502 (issued March 12, 2013); *R.J.*, Docket No. 12-174 (issued June 25, 2012); *Travis L. Chambers*, 55 ECAB 138 (2003).

<sup>18</sup> *See Stefanian P. Efflandt*, Docket No. 04-2088 (January 28, 2005).

**CONCLUSION**

The Board finds that appellant has established clear evidence of error in the improper issuance of OWCP's decision terminating her compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 5, 2012 and November 15, 2011 are reversed.

Issued: July 5, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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