

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

C.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Dayton, OR, Employer)

**Docket No. 13-462
Issued: June 6, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2012 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated November 19, 2012, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than 180 days have elapsed between the last merit decision dated July 18, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the second appeal before the Board.² Appellant injured her lower back on May 31, 2008 while lifting a tray of mail. OWCP accepted the claim for right lumbar sprain and displacement of a lumbar intervertebral disc without myelopathy. Appellant has not returned to work since September 24, 2008.

In a report dated March 20, 2009, Dr. Stephen J. Thomas, Board-certified in orthopedic surgery, restricted appellant from doing heavy physical work but found that she could work light duty with no lifting over 20 pounds and no standing for more than 10 minutes at a time; she would need to sit or stand as necessary. Appellant was referred for vocational rehabilitation services and on December 7, 2010 a vocational rehabilitation counselor issued a report summarizing his efforts to find vocational training or suitable alternate employment for her within her physical restrictions. The vocational counselor found that the position of general office clerk was within her restrictions and reasonably reflected her ability to earn wages. He found that appellant had the education, skills and training to qualify for job openings in this occupation. Appellant had worked for two months as a mail sorter with the employing establishment and had completed three months of computer and keyboarding courses at Chemeketa Community College in the fall of 2009. The vocational counselor stated that there were a number of clerk jobs within a reasonable commuting distance of her home and concluded that there was a positive labor market for the office clerk job. While appellant was provided with academic training and completed a term of computer/keyboarding classes, she did not obtain a position.

By decision dated February 9, 2011, OWCP reduced appellant's wage-loss compensation finding that the position of office clerk reasonably represented her wage-earning capacity. By decision dated July 18, 2011, an OWCP hearing representative affirmed the February 9, 2011 decision. By nonmerit decision dated October 27, 2011, OWCP denied reconsideration of the February 9 and July 18, 2011 decisions. By nonmerit decision dated August 21, 2012,³ the Board affirmed the October 27, 2011 OWCP decision. The complete facts of this case are set forth in the Board's August 21, 2012 decision and herein incorporated by reference.

On November 1, 2012 appellant's attorney requested reconsideration. Counsel argued that OWCP's loss of wage-earning capacity determination was erroneous because it incorrectly stated that appellant had earned a bachelor's degree, when in fact she had not earned a higher educational degree. Accompanying his letter was an October 18, 2012 e-mail from appellant to counsel which included this assertion.

By decision dated November 19, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding that the request was untimely and that she had not established clear evidence of error.

² Docket No. 12-795 (issued August 21, 2012).

³ *Id.*

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle an employee to a review of an OWCP decision as a matter of right.⁵ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease, or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP’s procedures state that it will reopen an appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if her application for review shows “clear evidence of error” on the part of OWCP.⁹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ 20 C.F.R. § 10.607(b).

⁷ See cases cited *supra* note 3.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 5.

so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination of whether an appellant 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.¹⁶

ANALYSIS

OWCP properly determined that appellant's November 1, 2012 request for reconsideration was untimely. It issued its most recent merit decision in this case on July 18, 2011, wherein an OWCP hearing representative affirmed the February 9, 2011 wage-earning capacity determination. OWCP received appellant's request for reconsideration on November 1, 2012; thus, the request is untimely as it was outside the one-year time limit.¹⁷

The Board finds that appellant's November 1, 2012 request for reconsideration failed to establish clear evidence of error. Appellant's attorney contended that OWCP had incorrect information regarding appellant's educational background because she did not have a bachelor's degree. This assertion is not correct. The February 9, 2011 wage-earning capacity determination was based on a proper evaluation of appellant's educational background. The vocational counselor's December 7, 2010 report stated that she had two months of experience at the employing establishment as a mail sorter, had completed three months of computer/keyboarding courses at Chemeketa Community College in the fall of 2009 and had completed a community college class during 2007 in keyboarding skill building.¹⁸ OWCP did not base the February 8, 2011 wage-earning capacity determination upon a finding that appellant had vocational qualifications which included a bachelor degree. Thus, appellant has failed to present any evidence sufficient to raise a substantial question as to the correctness of OWCP's decision. She

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Faidley*, *supra* note 5.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ A request for modification of a wage-earning capacity determination must be distinguished from a request for reconsideration of a prior decision. A request for modification of a wage-earning capacity determination, supported by new and relevant evidence requires a merit review and is not subject to a time limitation. See *Emmit Taylor*, Docket No. 03-1178 (issued July 21, 2004).

¹⁸ The only reference to a bachelor degree was made in the Board's August 21, 2012 decision, summarizing the hearing representative's July 18, 2011 decision. This reference is harmless error as OWCP's decisions were not predicated on a finding that appellant had a bachelor's degree.

has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated November 1, 2012. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on November 19, 2012.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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