

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

<p><b>A.D., Appellant</b></p> <p><b>and</b></p> <p><b>U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Docket No. 12-1656</b></p> <p><b>Issued: March 21, 2013</b></p>
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*Appearances:*  
 William Hackney, for the appellant  
 Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
 COLLEEN DUFFY KIKO, Judge  
 PATRICIA HOWARD FITZGERALD, Judge  
 JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 20, 2012 appellant, through her representative, filed a timely appeal from an August 6, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed since the most recent merit decision dated June 27, 2011 and the filing of this appeal on August 20, 2012, the Board lacks jurisdiction to review the merits of the case, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the basis that it was not timely filed and did not establish clear evidence of error.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

On appeal, appellant's representative submits new evidence and argues the merits of the case.

### **FACTUAL HISTORY**

On March 18, 2011 appellant, then a 55-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition due to factors of her federal employment, including age and sex discrimination and a hostile work environment.

By decision dated June 27, 2011, OWCP denied appellant's emotional condition claim on the basis that she had not established any compensable factors of employment. It found that the factors presented were administrative issues and appellant had not submitted sufficient evidence to show error or abuse by the employing establishment.

On July 29, 2011 appellant, through her representative, requested reconsideration and submitted additional evidence.

By decision dated August 9, 2011, OWCP denied appellant's request for reconsideration of the merits finding that she had not submitted pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

On July 25, 2012 appellant, through her representative, requested reconsideration and submitted a March 8, 2011 report by Dr. Gary K. Arthur, a Board-certified psychiatrist, who diagnosed depression and anxiety disorder and opined that her emotional conditions were directly precipitated by her work environment and management's treatment of her. He opined that she was totally disabled for any work and would need a considerable amount of treatment and a sense of fairness about her work environment to stabilize.

In an April 27, 2012 report, Dr. Paul Hughes, an attending physician, diagnosed lumbago.

On May 3, 2012 Nancy Paladino, a registered nurse, diagnosed lumbar disc degeneration.

In a May 6, 2012 report, Dr. Jazbeen Mahmood, a Board-certified family medicine physician, diagnosed disc herniation.

Appellant also submitted witness statements and grievance documentation regarding the employing establishment's controversion to her emotional condition claim. On July 23, 2011 a witness testified that he saw appellant running an operation that required a minimum of three people to operate by herself on July 2, 2011.

By decision dated August 6, 2012, OWCP denied appellant's request for reconsideration on the basis 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.<sup>3</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> 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).<sup>6</sup>

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.<sup>7</sup>

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

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.<sup>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence

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<sup>3</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> See *Jesus D. Sanchez*, *supra* note 3; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>7</sup> 20 C.F.R. § 10.607(b).

<sup>8</sup> See *Nancy Marciano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

<sup>9</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>10</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>12</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>15</sup> However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>16</sup> The most recent merit decision was OWCP's June 27, 2011 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. She did not file her request until July 25, 2012. As appellant's July 25, 2012 request for reconsideration was submitted more than one year after the June 27, 2011 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.<sup>17</sup>

In the June 27, 2011 merit decision, OWCP found that appellant failed to establish any compensable employment factors that caused her emotional condition. The Board finds that she has not submitted evidence establishing clear evidence of error by OWCP in its finding that she did not establish any compensable employment factors that caused or contributed to her emotional condition.<sup>18</sup>

In support of her request for reconsideration, appellant submitted a March 8, 2011 report from Dr. Arthur who diagnosed depression and anxiety disorder and opined that her emotional conditions were directly precipitated by her work environment and management's treatment of her. She also submitted grievance documentation and witness statements, including a statement dated July 23, 2011 from a witness who testified that he saw appellant running an operation that required a minimum of three people to operate by herself on July 2, 2011. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>19</sup> Appellant contended that she was discriminated against based on age and sex and worked in a hostile environment. Her allegations were previously considered by OWCP and not established as factual. In its June 27, 2011 decision, OWCP found that the factors presented were administrative issues and that appellant had not submitted sufficient evidence to show that the employing establishment acted improperly. Appellant did not submit any probative evidence to establish the allegations as compensable.<sup>20</sup> The Board finds that Dr. Arthur's report and the

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<sup>14</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>15</sup> See *Veletta C. Coleman*, *supra* note 13; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (March 2011). See also 20 C.F.R. § 10.607(a); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>16</sup> See *D.G.*, 59 ECAB 734 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>17</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>18</sup> See *D.R.*, Docket No. 12-1288 (issued October 17, 2012).

<sup>19</sup> See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>20</sup> See *D.D.*, Docket No. 11-1799 (issued April 3, 2012).

witness statements do not establish clear evidence of error in the denial of appellant's emotional condition claim.<sup>21</sup>

Appellant also submitted an April 27, 2012 report from Dr. Hughes who diagnosed lumbago and a May 6, 2012 report from Dr. Mahmood who diagnosed disc herniation. These reports are not relevant to the issue of whether appellant established a compensable employment factor supporting her emotional condition claim.<sup>22</sup> Thus, the Board finds that the reports of Drs. Mahmood and Hughes do not raise a substantial question as to the correctness of OWCP's decision and appellant failed to meet her burden of proof with these submissions.

The May 3, 2012 report from Ms. Paladino, a registered nurse, has no probative value as a nurse is not considered to be a physician as defined by FECA.<sup>23</sup> Thus, the Board finds that this report does not raise a substantial question as to the correctness of OWCP's decision.

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. The Board finds that the arguments and evidence submitted by appellant in support of her untimely request for reconsideration do not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant failed to meet her burden of proof to show clear evidence of error on the part of OWCP.

On appeal appellant's representative submits new evidence and argues the merits of the case. As noted above, because more than 180 days has elapsed since the most recent merit decision dated June 27, 2011 and the filing of this appeal on August 20, 2012, the Board lacks jurisdiction to review the merits of appellant's case.<sup>24</sup> Thus, the representative's arguments are not substantiated.

### **CONCLUSION**

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

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<sup>21</sup> *Id.*

<sup>22</sup> *See F.R., supra* note 6.

<sup>23</sup> *See* 5 U.S.C. § 8101(2); *G.G.*, 58 ECAB 389 (2007).

<sup>24</sup> *See supra* notes 1 & 2.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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