



## **FACTUAL HISTORY**

In a prior appeal,<sup>3</sup> the Board found that appellant had not met her burden of proof to establish an injury to her left wrist in her capacity as a modified clerk, during a June 21, 2005 functional capacity evaluation (FCE), scheduled because she requested reasonable accommodation. The Board found that the evidence raised too many doubts as to whether the injury occurred as alleged and the medical evidence failed to establish the critical element of causal relationship. The facts of the case, as set out in the Board's prior decision, are hereby incorporated by reference.

Appellant thereafter requested reconsideration, which OWCP denied. In the most recent appeal,<sup>4</sup> the Board found that OWCP properly denied her October 29, 2010 reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

On October 15, 2012 OWCP received a medical note from Dr. James Eichel, appellant's family physician,<sup>5</sup> who stated that appellant had chronic pain in her neck and left arm. Dr. Eichel explained that she was not on bed rest: appellant had to drive short distances because of her two children. He stated that appellant could drive and carry light objects, but she did these activities only when her pain levels were low enough. "The low level of activity she does is an *essential* distraction from her chronic pain." (Emphasis in the original.)

On December 13, 2012 appellant requested reconsideration. She contended that her claim was mishandled. Appellant alleged defamation and stated that her allegations and the evidence that she submitted were never addressed. She stated that she was injured during the FCE and no one was taking responsibility. Appellant was not able to work or do things she used to be able to do. She stated that she did not have a history of prior injury before the FCE. She stated that she submitted witness statements and medical reports. Appellant alleged that a U.S. Postal Inspection Service investigation was fraudulent and incomplete, as was the FCE report. She stated that the fraud and defamation in her claim's investigation were errors of fact and findings that were never addressed.

In an April 8, 2013 decision, OWCP denied appellant's request. It found that her request was untimely and did not present clear evidence of error.

On appeal, appellant argued that her request was timely because she has been filing every year: "I have filed from 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and if you look in my file and yours you will see that my correspondence has been ongoing and timely." She reiterated her objection to the allegedly altered and edited and bogus and fraudulent surveillance video. "My clear evidence is the Surveillance Video that you have on file already and it shows me carrying pizza in my injured left hand, but I was carrying them in my Right hand and the report

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<sup>3</sup> Docket No. 08-1167 (issued October 7, 2008), *petition for recon. denied*, Docket No. 08-1167 (issued June 17, 2009).

<sup>4</sup> Docket No. 11-685 (issued September 21, 2011), *petition for recon. denied*, Docket No. 11-686 (issued August 30, 2012).

<sup>5</sup> The date of the note is unclear.

says different. The mirror reverse images in the Video shows opposite of what I was doing and that is Error of Facts and Findings. Review the Video and the Reports and you will find the Clear Evidence of Error.” Appellant added that there were weeks of video that were erased.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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 awarded; or
- (2) award compensation previously refused or discontinued.”<sup>6</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.<sup>7</sup>

The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.<sup>8</sup>

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>9</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>10</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004) (emphasis deleted).

<sup>9</sup> *Id.* § 10.607(b).

<sup>10</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.3.c.

<sup>11</sup> *Id.* at Chapter 2.1602.3.d(1).

## ANALYSIS

The most recent decision on the merits of appellant's case was the Board's October 7, 2008 decision finding that appellant did not meet her burden of proof to establish that she injured her left wrist during a June 21, 2005 FCE. Appellant had one year or until October 7, 2009, to file a timely reconsideration request with OWCP. Her December 13, 2012 request is therefore untimely.

The one-year period for requesting reconsideration is not extended by filing requests every year. The time period began to run with the most recent decision on the merits of her case, which was the October 7, 2008 decision. When appellant requested reconsideration on December 13, 2012, she was over three years past the expiration date.

Following the Board's October 7, 2008 decision, OWCP nonmerit decisions in 2010 denying reconsideration, but those decisions did not restart the time period. They did not provide appellant any further right to request reconsideration. Indeed, the decisions explained that appellant's only appeal right was to appeal to the Board.

The Board issued a nonmerit decision on the prior appeal and denied appellant's petition for reconsideration. This was not a decision on the merits of her case -- the Board found only that OWCP had properly denied her most recent request. The Board's prior decision did not give her another year to request reconsideration. The reconsideration requests filed since October 7, 2009 have been untimely.

Because appellant's December 13, 2012 reconsideration request is untimely, OWCP will not reopen the merits of her claim without her establishing clear evidence of error in its decision to deny her injury claim. Clear evidence of error is a difficult standard. Appellant's request must convincingly show, on its face, that OWCP's decision was wrong.

The Board finds that appellant's request does not establish clear evidence of error. Appellant's request is repetitious. She reiterates arguments of record since 2007, that the surveillance video was tampered with and since 2009 that the FCE report is missing important information. Appellant reiterated that she submitted witness statements and medical reports. The request presents nothing new or persuasive. It is simply a restatement of appellant's disagreement with the denial of her claim. Appellant's request does not show clear evidence of error in the denial of her injury claim.

Appellant makes much of the surveillance video, but this was not the only reason OWCP denied her injury claim. There were other reasons provided for finding that the injury did not occur as alleged. The FCE report did not document an injury during the evaluation. Instead, it raised a substantial question about appellant's reliability. Also, a treatment note the following day, made no mention of a left wrist injury. As the Board observed in its October 7, 2008 decision, it was reasonable to expect that a person who sustained a severely painful and significantly disabling ligament injury to her left wrist on one day would mention it to her physician on the following day. Further, a consulting psychiatrist, Dr. Timothy C. Shen, reported that appellant demonstrated significant pain behavior on examination and that she gave minimal effort. He reported evidence of nonorganic factors.

The additional note from Dr. Eichel, the attending family physician, while relevant to appellant's ability to drive and carry light objects, does not establish that she injured her wrist on June 21, 2005 while undergoing a FCE. The Board finds that her December 13, 2012 reconsideration request fails to show clear evidence of error in OWCP's denial of her injury claim. The Board will therefore affirm OWCP's April 8, 2013 decision to deny that request.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's December 13, 2012 reconsideration request on the grounds that it was untimely and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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