



## **FACTUAL HISTORY**

This case has previously been before the Board on appeal.<sup>2</sup> In a February 8, 2007 decision, the Board affirmed OWCP's December 15, 2005 decision, finding that it properly denied appellant's claim for a schedule award following her refusal of suitable work under section 8106(c). In a January 11, 2000 decision, the Board affirmed OWCP's February 28 and August 12, 1998 decisions, which terminated her compensation effective February 28, 1998 on the grounds that she refused suitable work. The Board also affirmed OWCP's February 18, 1999 decision finding that it did not abuse its discretion by refusing to reopen appellant's claim for merit review. The facts and history contained in the prior decisions are incorporated by reference.

OWCP received treatment notes dated from February 16, 2009 to January 18, 2013, together with diagnostic studies and physical therapy notes. Appellant provided OWCP with copies of letters sent to various federal agencies and representatives in which she requested assistance with her claim.

On June 6, 2013 appellant requested reconsideration. She contended that she was under "extreme duress during the period when her compensation was denied." Appellant stated that she was hospitalized and could not adequately function. She argued that this was not considered when her compensation was terminated. Appellant stated that she could not perform her duties and that "depression" had no set time to occur and she did the best she could under the circumstances. She contended that OWCP did not consider these matters and refused to develop her case. Appellant stated that she sustained a new injury that occurred due to the duties that she performed in a modified job that was unsuitable. She also argued that her injuries were exacerbated by the work she was charged to do.

Appellant submitted a May 5, 2001 report from Dr. Rafael E. Sacasa Ph.D., a clinical psychologist, who diagnosed pain disorder and recurrent major depression. Dr. Sacasa noted the history of her work injury and found that she was not coping well with her injury.

In a decision dated June 27, 2013, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present 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>3</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of the

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<sup>2</sup> Docket No. 06-886 (issued February 8, 2007) and Docket No. 99-2506 (issued February 8, 2007).

<sup>3</sup> 5 U.S.C. § 8128(a); Y.S., Docket No. 08-440 (issued March 16, 2009).

OWCP decision for which review is sought.<sup>4</sup> Imposition of the one-year filing limitation does not constitute an abuse of discretion.<sup>5</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, OWCP 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>6</sup>

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>7</sup> is positive, precise and explicit and manifests on its face that OWCP committed an error.<sup>8</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>9</sup>

### ANALYSIS

In its June 27, 2013 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its last merit decision on December 15, 2005. Appellant's June 6, 2013 letter requesting reconsideration was submitted more than one year after the December 15, 2005 merit decision and was, therefore, untimely. To the extent that she asserts that her depression prevented her from filing a timely reconsideration request, the Board finds this argument to be without merit. Appellant did not provide medical evidence to support that her depression or other condition rendered her unable to communicate in any way such that she could not timely request reconsideration.<sup>10</sup> She submitted Dr. Sacasa's May 5, 2001 report

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<sup>4</sup> 20 C.F.R. § 10.607(a). *See also D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

<sup>5</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</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 2.1602.3(c) (September 2011) (the term 'clear evidence of error' is intended to represent a difficult standard).

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

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

<sup>9</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>10</sup> *See* 20 C.F.R. § 10.607(c).

on reconsideration but this report predates the one-year period that appellant had for requesting reconsideration following the December 15, 2005 OWCP decision.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. It reviewed the evidence submitted by her in support of her application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the evidence and arguments submitted by appellant do not raise a substantial question as to the correctness of OWCP's most recent merit decision and are insufficient to demonstrate clear evidence of error. The issue is whether appellant has shown clear evidence of error in OWCP's December 15, 2005 decision that denied her claim for a schedule award due to her refusal of suitable work under 5 U.S.C. § 8106(c). She reiterated her prior arguments that the modified position was not suitable, that OWCP did not properly develop her claim and that she suffered from severe depression which prevented her from working. The Board finds that these assertions do not raise a substantial question concerning the correctness of OWCP's December 15, 2005 decision. At the time of the December 15, 2005 decision, OWCP denied modification of a prior decision denying appellant's claim for a schedule award following her refusal of suitable work under section 8106(c). The suitability issue was previously adjudicated and affirmed by the Board.<sup>11</sup> Appellant's assertions with regard to the development of her claim are unsupported by the record and do not raise a substantial question as to the correctness of OWCP's December 15, 2005 decision. Her assertions that her depression was not properly considered in developing the claim does not establish clear evidence of error. Dr. Sacasa's May 5, 2001 report diagnosed depression and advised that appellant was not coping well with her injury. It does not shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of OWCP's decision. The Board notes that the term "clear evidence of error" is intended to represent a difficult standard. Appellant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.<sup>12</sup>

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred by denying her claim for a schedule award following her refusal of suitable work under section 8106(c). Therefore, the Board finds that she has not presented clear evidence of error.

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<sup>11</sup> See *supra* note 1.

<sup>12</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 28, 2014  
Washington, DC

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

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

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