

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

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K.S., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Ann Arbor, MI, Employer )

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**Docket No. 14-257  
Issued: April 15, 2014**

*Appearances:*  
Timothy E. McDaniel, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On November 4, 2013 appellant, through counsel, filed a timely appeal from the June 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Appellant submitted additional evidence after OWCP's June 11, 2013 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

On February 5, 2007 OWCP accepted that appellant, then a 46-year-old food service worker, sustained rotator cuff tendinitis of her left shoulder due to performing her repetitive work duties over time, including placing dirty dishes in a dish washer and then putting away the clean dishes. Appellant received compensation on the daily rolls for periods of partial and total disability.<sup>3</sup>

In a November 17, 2009 letter, OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits based on its determination that she ceased to have residuals of her accepted work injury. It indicated that the weight of the medical evidence with respect to this matter rested with the well-rationalized May 14, 2009 report of Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon serving as an impartial medical specialist.<sup>4</sup> Appellant was provided 30 days from the date of the letter to submit evidence and argument challenging the proposed termination action.

Appellant submitted a November 3, 2009 report in which Dr. James Richardson, an attending Board-certified physical medicine and rehabilitation physician, reported his examination findings on that date and indicated that it might take “months to years” before her left shoulder was “fully optimized.”

In a December 17, 2009 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective December 17, 2009. It indicated that the report of Dr. Richardson was of limited probative value and that the weight of the medical evidence continued to rest with the opinion of Dr. Obianwu.

On June 6, 2013 OWCP received a May 31, 2013 letter in which appellant, through counsel, requested reconsideration of OWCP’s December 17, 2009 decision terminating her compensation. Counsel stated that appellant wished to appeal OWCP’s “denial of her right to file her CA-2a [n]otice of [r]ecurrence on the grounds that the original injury sustained while employed at the [employing establishment] Hospital in Ann Arbor has become a permanent injury.” Counsel asserted that he only discovered in 2013 that certain medical records submitted by appellant to Tracy Sockow, an official of the employing establishment, were wrongfully withheld by Ms. Sockow and were not submitted in a timely manner to OWCP. Therefore, appellant’s compensation was terminated without OWCP having received all the evidence that was submitted. Counsel indicated that on December 1, 2009 appellant was treated by Dr. Mary Theisen-Goodvich, an attending clinical psychologist, and that on December 8, 2009 she was

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<sup>3</sup> In January 2008, appellant began working 20 hours per week in a limited-duty position for the employing establishment.

<sup>4</sup> Dr. Obianwu stated that, based on the clinical examination, appellant’s left rotator cuff tendinitis had completely resolved. He noted that nonwork-related conditions were responsible for appellant’s continuing left shoulder problems.

treated by Dr. Richardson and Dr. Ryan Topham, both Board-certified physical medicine and rehabilitation physicians. He asserted that appellant took each record to Ms. Sockow well within 30 days of OWCP's November 17, 2009 preliminary determination letter and stated:

“However, Ms. Sockow, intentionally withheld these records and submitted them to OWCP after the 30-day deadline had passed. In the trial hearing of [appellant's Equal Employment Opportunity Commission (EEOC) case], ... the trial testimony established that [Ms. Sockow] failed to submit [appellant's] medical information to OWCP in a timely manner, as required. Ms. Sockow deliberately sent in some medical records almost one year after receiving them from [appellant].

“In the instant case, Ms. Sockow intentionally withheld sending [appellant's] medical records to OWCP in order to make sure the decision to terminate her from workers' compensation benefits was made final. [She] did everything she could to prevent [appellant] from receiving a fair hearing. The evidence from the transcripts and testimony of the previously mentioned EEOC case is overwhelming that Ms. Sockow engaged in a corrupt manner and deliberately engaged in a manner to sabotage [appellant's] chances of receiving workers' compensation benefits.... [Appellant] was denied due process and equal protection of the laws.... Therefore, we are requesting that [appellant] be given a fair opportunity to appeal and have all the medical records considered as part of her appeal or any other relief this office may deem appropriate.”

Appellant submitted a portion of a transcript of a June 3, 2011 hearing held in conjunction with an EEOC case she filed. The transcript reveals that counsel questioned Kara Szirotnyak, an employing establishment official, regarding why a December 21, 2006 medical report was not received by OWCP until October 4, 2007. Ms. Szirotnyak indicated that she did not know when this report was given to Ms. Sockow and noted that only Ms. Sockow could answer that question. She stated that she did not know why there was a time lapse between the production of the medical report and its receipt by OWCP.

In a June 11, 2013 decision, OWCP denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. It noted that her reconsideration request was untimely because her June 2013 request was not filed within one year of OWCP's December 17, 2009 decision. OWCP stated that appellant's submitted evidence and argument did not show clear evidence of error in its December 17, 2009 decision.<sup>5</sup>

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP 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>6</sup>

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<sup>5</sup> OWCP stated, “[T]he allegations and references in [counsel's] letter discuss potential errors or wrongdoing committed by another federal agency and not [OWCP].”

<sup>6</sup> 20 C.F.R. § 10.607(a).

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>7</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>8</sup> OWCP regulations and procedure provide that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of OWCP.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</sup>

### ANALYSIS

In its June 11, 2013 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was filed on June 6, 2013, more than one year after OWCP’s December 17, 2009 decision terminating her compensation, and therefore she must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

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<sup>7</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>8</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>9</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedure further provides, “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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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.”

<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>11</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its December 17, 2009 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.

Appellant, through counsel, alleged that in December 2009 she submitted relevant medical evidence to Ms. Sockow, an official of the employing establishment, but that Ms. Sockow intentionally failed to submit this evidence to OWCP in a timely manner. She claimed that her compensation was wrongfully terminated because OWCP did not have all the relevant medical evidence to consider before reaching its termination decision. Appellant submitted the transcript of a June 3, 2011 EEOC hearing in which Ms. Szirotnyak, an employing establishment official, indicated that she did not know why a December 21, 2006 medical report was not received by OWCP until October 4, 2007. Ms. Szirotnyak indicated that she did not know when the December 21, 2006 medical report was given to Ms. Sockow and stated that she did not know why there was a lapse between the production of the medical report and its receipt by OWCP in October 2007.

The Board notes that appellant's wage-loss compensation and medical benefits were terminated effective December 17, 2009 based on a May 14, 2009 report of Dr. Obianwu, a Board-certified orthopedic surgeon serving as an impartial medical specialist. The evidence and argument submitted by appellant in connection with her untimely reconsideration request does not show clear evidence of error in OWCP's determination that the opinion of Dr. Obianwu justified its termination action. Appellant has alleged that certain medical evidence she submitted to an employing establishment official in December 2009 was not passed on to OWCP in a timely matter. The evidence she submitted does not establish this allegation and it remains unclear how the potential actions of another agency would show clear evidence of error in OWCP's December 17, 2009 termination decision.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's December 17, 2009 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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