

FACTUAL HISTORY

This case has previously been on appeal before the Board.³ In a May 25, 2011 decision, it found that appellant's November 20, 2009 letter constituted a request for reconsideration which was timely filed within one year of OWCP's December 2, 2008 decision. The Board remanded the case for review of the evidence under the proper standard of review for a timely reconsideration request. The facts and history contained in the prior appeal are incorporated by reference.

In a decision dated September 13, 2011, OWCP noted that appellant was an industrial hygienist and a manpower program specialist with the employing establishment who filed an occupational disease claim for bilateral carpal tunnel syndrome due to repetitive upper extremity work involving keyboarding. It noted that, although the claim was denied on December 2, 2008 because she had not submitted sufficient evidence, she had now submitted sufficient evidence to support that her keyboard activities caused her bilateral carpal tunnel syndrome. OWCP vacated the December 2, 2008 decision. On September 13, 2011 it accepted the claim for bilateral carpal tunnel syndrome.

In a letter dated September 24, 2011, appellant noted that she was submitting claims for wage loss from August 16, 2010 to the present. She noted that her employment was terminated on September 5, 2008 for failure to perform. Appellant continued to contact OWCP with regard to continuing wage-loss compensation.

In a letter dated October 7, 2011, the employing establishment noted that appellant was removed for cause on September 5, 2008 due to failure to perform and lack of candor.

In letters dated November 1, 3 and 15, 2011, OWCP advised appellant that it was unable to process her claims for wage loss due to a lack of medical evidence and lack of clarity of reasons for termination.

In a letter dated December 2, 2011, OWCP advised appellant that the prior letters dated November 1, 3 and 15, 2011 were being rescinded. It advised her that the notification of personnel action indicated that she was removed as an employee from the employing establishment due to failure to perform and lack of candor and thus she was not entitled to compensation after September 4, 2008.

In a decision dated December 2, 2011, OWCP denied appellant's claims for compensation for intermittent periods from July 13, 2006 to October 7, 2011. It noted that she was advised to submit medical evidence supporting disability during the periods claimed; however, no response was received. OWCP also notified appellant that she was removed from the employing establishment due to failure to perform and lack of candor. It advised her that she was not entitled to compensation for the period September 6, 2008 through October 7, 2011.

On December 5, 2011 OWCP received a December 1, 2011 letter from appellant outlining her total disability from work following her termination. Appellant indicated that she

³ Docket No. 10-1665 (issued May 25, 2011).

had submitted the appropriate medical evidence. In letters dated December 4 and 10, 2011, she repeated her claim for compensation.

In a letter dated December 16, 2011, OWCP advised appellant that it had received her letters and that, if she did not agree with the December 2, 2011 decision, she should follow her appeal rights which were attached to that decision.

OWCP received several medical records. They included a December 12, 2005 verification of treatment form from Dr. Laurie Ellen Duncan, a Board-certified internist, who noted that appellant received medical treatment from December 10 to 12, 2005. She advised that appellant was ill and unable to work but could return to work on December 13, 2005 with restrictions to include no keyboarding through December 17, 2005.

In a June 2, 2006 report, Dr. Hazel Tape, a Board-certified internist, noted appellant's history of injury and treatment. She noted that appellant's condition was chronic and she was advised to avoid prolonged walking, standing, climbing, sitting and to limit lifting to less than five pounds, with frequent breaks. In an October 12, 2006 report, Dr. Susan Leggett-Johnson, a Board-certified internist, noted appellant's history and reiterated that appellant required restrictions for work.

In a June 22, 2007 verification of treatment form, Dr. Daniel R. Glor, a Board-certified psychiatrist and neurologist, noted that appellant received medical treatment that date. He diagnosed carpal tunnel syndrome and noted that nerve conduction studies revealed moderately severe bilateral carpal tunnel syndrome, which worsened considerably compared to a previous study from September 9, 2005. Dr. Glor provided work restrictions to include no keyboarding or writing until reasonable accommodations to include training and use of voice recognition software. He also recommended an ergonomic workstation and chair.

On November 29, 2012 appellant requested reconsideration of OWCP's December 2, 2011 decision. Her request was received by OWCP on December 4, 2012. Appellant outlined the history of her claim and argued that medical evidence demonstrated that she continued to remain disabled due to her work injury. She referred to several of the Board's cases and argued that being fired for cause was not a bar to receiving compensation if one was totally disabled for the job held on the date of injury or partially disabled and suitable work was not provided.

In a December 7, 2012 decision, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of its implementing

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁶

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.⁷

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

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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

Appellant had one year from December 2, 2011 to submit a timely request for reconsideration. The Board finds that, as OWCP received her request for reconsideration on

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

December 4, 2012, more than one year after the December 2, 2011 merit decision, the request was properly found to be untimely.¹⁵

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 his application. It reviewed the evidence submitted by her in support of his application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue her entitlement to wage-loss compensation for intermittent periods from July 13, 2006 to October 7, 2011. OWCP also noted that appellant was removed for cause on September 4, 2008.¹⁶

Appellant argued that she continued to remain disabled due to her work injury and being fired for cause was not a bar to receiving compensation if she was totally disabled and suitable work was not provided. This argument does not raise a substantial question as to the correctness of OWCP's decision as the record does not establish that she was totally disabled due to her accepted condition during the period for which she is claiming compensation.

The medical evidence submitted included the October 12, 2005 report from Dr. Leggett-Johnson who noted that appellant required restrictions for work and the June 22, 2007 treatment note from Dr. Glor, who noted that appellant received medical treatment on that date. These reports do not find that appellant was totally disabled due to the accepted condition. 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 an error (for example, proof of a miscalculation in a schedule award). 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.¹⁷

The Board finds that OWCP properly denied appellant's reconsideration request as it does not establish clear evidence of error.

On appeal, appellant asserted that she provided sufficient factual and medical evidence to rebut OWCP's decision. However, as noted, the Board does not have jurisdiction over the merits of the claim.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4)(b) (October 2011).

¹⁶ See *John W. Normand*, 39 ECAB 1378 (1988) (there was no disability within the meaning FECA where the claimant was removed for disciplinary reasons and there was no evidence of a work stoppage due to the work-related physical condition).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board