



## **FACTUAL HISTORY**

This case has previously been on appeal to the Board. On February 7, 2003 the Board issued a decision affirming an October 8, 2002 decision of OWCP, which denied appellant's claim for wage-loss compensation for the period March 2 to 12, 2002 due to the lack of competent medical evidence supporting her disability claim.<sup>2</sup> In the second appeal on March 11, 2010, the Board found an unresolved conflict in the medical opinion evidence between Dr. Robert W. Macht, an examining Board-certified surgeon and Dr. Arnold T. Berman, an OWCP medical adviser and Board-certified orthopedic surgeon, regarding the extent of appellant's left leg impairment.<sup>3</sup> Thus, the Board set aside the March 14 and October 6, 2008 OWCP decisions affirming the schedule award issued for a one percent impairment initially awarded on January 14, 2008 and remanded the case for resolution of the unresolved conflict in the medical opinion evidence. The Board, in a third appeal issued on July 8, 2011, affirmed a May 14, 2010 OWCP decision which found appellant was not entitled to a schedule award greater than one percent impairment of the left lower extremity.<sup>4</sup> The Board found the opinion of Dr. Barry J. Waldman, an impartial medical specialist and Board-certified orthopedic surgeon, was entitled to special weight as his report was sufficiently well rationalized and based upon a proper factual background. The Board also affirmed a July 1, 2010 decision denying her request for a merit review. The Board found that appellant's arguments that Dr. Waldman was unqualified to serve as an impartial medical adviser was insufficient to warrant reopening her case for merit review. Her argument was rejected as she provided no evidence of any disciplinary action or a suspended license that would have precluded Dr. Waldman from examining her and rendering a decision. By decision dated January 23, 2013, the Board affirmed nonmerit decisions dated March 30 and June 18, 2012 denying her request for reconsideration.<sup>5</sup> The Board found that OWCP properly determined that appellant was not entitled to further consideration of the merits of her claim pursuant to any of the three criteria set forth at 20 C.F.R. § 10.606(b)(3). Specifically, the Board found that the December 9, 2010 statement of charges by the New York Bureau of Professional Misconduct did not establish that Dr. Waldman had been put on probation nor was there any evidence of any disciplinary action by the State of Maryland against Dr. Waldman. On June 14, 2013 the Board issued an order denying appellant's petition for reconsideration. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In a letter dated July 20, 2013, appellant requested reconsideration on her claim. She argued that the report from Dr. Waldman, the impartial medical adviser, negating any causal

---

<sup>2</sup> Docket No. 03-139 (issued February 7, 2003). On May 9, 2002 appellant, then a 46-year-old mail processor, filed a traumatic injury claim alleging that she injured her lower back on January 26, 2002 while bending over to pull a full tray of mail. OWCP accepted the claim for a lumbar strain/sprain on September 24, 2002. She resigned from the employing establishment effective June 14, 2003.

<sup>3</sup> Docket 09-1142 (issued March 11, 2010).

<sup>4</sup> Docket No. 10-1926 (issued July 8, 2011).

<sup>5</sup> Docket No. 12-1487 (issued January 23, 2013), *denying petition for recon.*, Docket No. 12-1487 (issued June 14, 2013).

relationship between her medical condition and the accepted employment injury, was speculative and vague. Appellant contended that she continues to have symptoms from her employment injury and that “[t]here has never been an unequivocal diagnosis to [her] occupational history or medical rationale” concerning her employment disability. Lastly, she related that she has been diagnosed with radiculopathy, partial L5 sacralization and piriformis syndrome.

By decision dated August 7, 2013, OWCP denied appellant’s request for reconsideration finding it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP’s 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> The Board has found that the imposition of the one-year time 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 procedures provide that OWCP 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

---

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

<sup>9</sup> *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide that 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 that a schedule award was miscalculated). 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. *Id.* at Chapter 2.1602.3c.

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

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

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> 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.<sup>15</sup>

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.<sup>16</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As OWCP did not receive appellant's July 20, 2013 request for reconsideration until July 26, 2013, which was more than one year after the last merit decision issued on July 8, 2011, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for an increased schedule award.<sup>17</sup>

The Board further finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of her claim was erroneous. Appellant has not shown how OWCP committed any error in denying her claim for an additional schedule award. In her July 20, 2013 request for reconsideration, she did not identify what OWCP decision she was appealing. Appellant argued that Dr. Waldman's opinion was vague and speculative, but submitted no evidence in support of this argument. She stated that she was entitled to disability and that there has never been an unequivocal diagnosis made in her case. In prior decisions, the Board found that Dr. Waldman was entitled to special weight as an impartial medical specialist as his report was sufficiently well rationalized and based upon a proper factual background. Appellant has not established that OWCP made an error in prior decisions by relying on Dr. Waldman's opinion. Consequently, OWCP properly denied appellant's reconsideration request as it was untimely filed and failed to establish clear evidence of error.

---

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

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

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>16</sup> 20 C.F.R. § 10.607.

<sup>17</sup> *Id.* at § 10.607(a); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 7, 2013 is affirmed.

Issued: March 6, 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