

FACTUAL HISTORY

This case has previously been on appeal before the Board.² In a March 4, 2011 decision, the Board affirmed the January 11, 2010 decision of OWCP, finding that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed within one year of OWCP's October 6, 2008 decision and failed to show clear evidence of error in OWCP's decision that terminated her compensation benefits due to her refusal of suitable work. The facts and history contained in the prior appeal are incorporated by reference.

Appellant continued to submit evidence, including evidence previously of record and claims for compensation subsequent to the termination of her benefits for refusing suitable work.³ OWCP also received a newspaper clipping on identity theft and an order of protection against domestic violence.

On March 20, 2013 appellant's attorney requested reconsideration of OWCP's October 6, 2008 decision. He argued that OWCP misapplied, or failed to apply the law in determining that she was no longer entitled to disability or benefits compensation. Counsel also argued that appellant was entitled to a merit review and he renewed her previous arguments in support of the new evidence and requested that all of the prior statements and all previously submitted evidence be made a part of the reconsideration request. He argued that OWCP in its January 11, 2010 decision erroneously indicated that the injury occurred in 1997, rather than 1987, and that she was employed in Tampa as opposed to Venice, Florida. Counsel argued that the second opinion physician, Dr. James Roy Edgar, a Board-certified psychiatrist, whose report was used to terminate benefits, was charged with aggravated assault (involving a shotgun) on September 10, 2009 and on March 30, 2010 entered into a program that could lead to the charges being dropped. He further argued that the modified position offered to appellant was represented to be in Venice but was actually in North Port, Florida, 10 miles further away, and more than 50 miles from her residence at that time. Counsel argued that no provision was made for relocation. He also indicated that, at the time, appellant kept her actual place of residence private as she was being stalked and abused by a significant other. Counsel argued that the employing establishment knew it was using an old and irrelevant address where she had not lived for more than 15 years. He also alleged that OWCP's hearing representative used this incorrect information deciding that appellant refused suitable employment. Counsel argued that appellant lived further than 50 miles away from the offered position and contested the conclusion that she voluntarily moved. He also argued that appellant was the victim of domestic violence and had several protection orders in place, and moved on several occasions. Counsel asserted that the location of the offered work station required her to travel through communities in which one or more persons were located and who had abused her in the past and against whom she had one or more orders of protection from abuse. He further argued that OWCP did not meet its burden to

² Docket No. 10-1811 (issued March 4, 2011); *petition for recon. denied* (June 28, 2011).

³ On May 6, 2011, OWCP advised appellant that, as her entitlement to wage-loss and schedule award compensation was terminated on January 2, 2008, there was no continuing entitlement to monetary compensation and that her claim forms would be filed without further action.

establish that the offered employment was suitable. Counsel requested that the October 6, 2008 decision be vacated and appellant's compensation be reinstated.

OWCP received a copy of an article related to Dr. Edgar and documents pertaining to court orders for domestic abuse.

In a decision dated March 29, 2013, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ 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.”⁵

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁶ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁷

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.⁸

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision 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. 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.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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.¹⁰

ANALYSIS

In its March 29, 2013 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on October 6, 2008. Appellant's March 20, 2013 letter requesting reconsideration was submitted more than one year after the October 6, 2008 merit decision and was, therefore, untimely.

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 appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. OWCP reviewed the evidence submitted by appellant 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 submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether she has shown clear evidence of error in OWCP's October 6, 2008 decision that affirmed the January 2, 2008 termination of her monetary compensation benefits on the grounds that she refused suitable work.

In his March 20, 2013 request for reconsideration, appellant's attorney alleged that OWCP's January 2, 2008 decision to terminate benefits was in error and that appellant was entitled to a merit review. He argued that OWCP improperly relied upon the report of its second opinion psychiatrist, Dr. Edgar, who was subsequently involved in an altercation that involved being charged with assault. Counsel also provided a newspaper article on the assault, which occurred in 2009. The Board notes that these arguments do not raise a substantial question

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

concerning the correctness of OWCP's January 2, 2008 or October 6, 2008 decision or establish clear evidence of error. At the time of the January 2, 2008 decision, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits based on its determination that appellant refused suitable work. The Board notes that the second opinion examination provided by Dr. Edgar occurred in 2007, two years prior to the physician's alleged assault. There is no evidence to suggest that the medical findings provided by Dr. Edgar were erroneous or that he was not qualified to render a medical opinion at the time he examined appellant. Thus, counsel's argument does not establish clear evidence of error.

Appellant's arguments pertaining to the location of the offered position, her various residences, which she did not wish to disclose due to a protective order, do not raise a substantial question as to the correctness of OWCP's decision. The hearing representative previously considered arguments concerning appellant's location in her October 6, 2008 decision and appellant has not sufficiently explained how raising such allegations again establish clear evidence of error.¹¹ These assertions do not shift the weight of the evidence to show that the offered position was beyond her physical capabilities or otherwise suitable at the time her monetary compensation was terminated. Likewise, arguments that appellant was fearful of traveling to work in communities where people may reside or had abused her in the past, do not raise a substantial question as to the correctness of OWCP's October 6, 2008 decision, which affirmed the termination of her compensation because she refused suitable work.

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.¹²

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 in terminating appellant's compensation benefits on the grounds that she refused to accept suitable work. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant's representative repeated the arguments submitted on reconsideration. However, as found above, they were insufficient to establish clear evidence of error.

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.

¹¹ See *A.M.*, Docket No. 10-526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision).

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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