

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

_____	)	
<b>K.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 14-1195</b>
	)	<b>Issued: October 8, 2014</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF INVESTIGATION,</b>	)	
<b>Washington, DC, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
 CHRISTOPHER J. GODFREY, Chief Judge  
 COLLEEN DUFFY KIKO, Judge  
 PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On April 29, 2014 appellant filed a timely appeal from a January 28, 2014 decision of the Office of Workers' Compensation Programs (OWCP) which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days has elapsed between the most recent OWCP merit decision, dated January 10, 2013, and the filing of this appeal on April 29, 2014, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 9, 2012 appellant, then a 37-year-old special agent, filed a Form CA-2, occupational disease claim, alleging that she participated in a cardiovascular workout on November 1, 2012 and while at work she felt lightheaded and experienced chest pains and nausea and was taken to the hospital. She first became aware of her condition and realized it was causally related to her employment on November 1, 2012. Appellant stopped work on November 1, 2012.

Appellant was treated by Dr. Jonathan Reiner, a Board-certified cardiologist, on November 1, 2012 for chest pains which developed after working out. He performed a cardiovascular catheterization and successfully repaired an acutely occluded left anterior descending coronary artery. On November 1, 2012 appellant was treated by Dr. Allen Solomon, a Board-certified cardiologist, for severe chest pain and atrial fibrillation. Dr. Solomon noted that appellant underwent a catheterization and was found to have an occluded artery which was repaired. In a November 4, 2012 report, Dr. Richard J. Katz, a Board-certified cardiologist, performed a transthoracic echocardiogram and diagnosed small, circumferential pericardial effusion and left ventricular segmental wall motion abnormality, extensive injury or infarction of the septal, anterior and anterolateral walls.

In a letter dated December 5, 2012, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such evidence. It also requested the employing establishment provide comments from a knowledgeable supervisor addressing appellant's statements. No response was received.

In a decision dated January 10, 2013, OWCP denied appellant's claim as the evidence was not sufficient to establish that the injury and events occurred as alleged.

In an appeal form dated January 9, 2014, and received by OWCP on January 10, 2014, appellant requested reconsideration. In a statement dated January 8, 2013, she indicated that as part of her employment she was authorized to exercise for three hours per week and she participated in an approved exercise program which was followed by chest pain and a diagnosed myocardial infarction. Appellant asserted that as a result of the cardiovascular exercise required as part of her job she had a myocardial infarction.

Appellant submitted new evidence and evidence previously of record. New evidence included a report from Dr. Miriam L. Fishman, a cardiology fellow, who noted that on November 1, 2012 appellant was catheterized and diagnosed with an occlusion of the proximal left anterior descending artery which was stented and myocardial infarction. Appellant submitted discharge instructions from a nurse dated November 3, 2012, who diagnosed heart attack and returned appellant to restricted duty. A report from Dr. Reiner dated January 23, 2013 diagnosed status post myocardial infarction. In a May 3, 2013 report, Dr. Katz noted that an exercise stress test was normal.

By decision dated January 28, 2014, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

## LEGAL PRECEDENT

Section 8128(a) of FECA 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.”<sup>2</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing 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.<sup>3</sup> However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. 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 be manifest on its face that OWCP committed an error.<sup>4</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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>5</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.<sup>6</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>7</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>8</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>9</sup>

---

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *Id.* at 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>5</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>6</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

### **ANALYSIS**

OWCP issued its most recent merit decision on January 10, 2013 which denied appellant's claim for an occupational disease. The January 28, 2014 nonmerit decision found that appellant's request for reconsideration dated January 9, 2014, and received January 10, 2014, was untimely. Since her request for reconsideration was received by OWCP on January 10, 2014, it was filed within one year of OWCP's January 10, 2013 merit decision and therefore was timely. The Board finds that appellant's reconsideration request was timely filed.

On remand OWCP should treat as timely appellant's January 10, 2014 request for reconsideration and consider whether the request is sufficient to warrant a merit review under the standard for evaluating a timely reconsideration request.<sup>10</sup> Following this and such other development as necessary, it shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied as untimely appellant's request for reconsideration of the January 10, 2013 decision.

---

<sup>10</sup> See 20 C.F.R. § 10.606(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 28, 2014 decision of OWCP is set aside and remanded for further proceedings consistent with this decision of the Board.

Issued: October 8, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board