

FACTUAL HISTORY

OWCP accepted that by mid-1997 appellant, then a 45-year-old letter production controller, sustained bilateral de Quervain's tenosynovitis of the thumbs, bilateral carpal tunnel syndrome, bilateral trigger finger and calcifying tendinitis of the shoulders. Appellant received compensation on the periodic rolls for periods of disability.³

On June 16, 2010 OWCP issued a formal loss of wage-earning capacity decision reducing appellant's compensation based on her ability to work in the constructed position of social services aide. It noted that she had successfully completed a vocational rehabilitation program and that her vocational rehabilitation counselor determined that the position was reasonably available in her general commuting area. OWCP indicated that the medical evidence of record showed that work-related conditions did not prevent appellant from performing the duties of the social services aide position.

In an April 21, 2011 letter, appellant requested reconsideration of her claim and requested modification of OWCP's June 16, 2010 loss of wage-earning capacity determination. She argued that the June 16, 2010 determination was in error and that her work-related condition had worsened such that she could not work in the rated position of social service aide. Appellant argued that she did not have the vocational skills to work as a social services aide and she questioned whether the position was actually available in her general commuting area. She asserted that reports of Dr. Paul C. Murphy, an attending Board-certified orthopedic surgeon, showed that she could not perform the physical duties of the social services aide position and she alleged that OWCP had not properly considered all of her work-related injuries in reaching its determination.

In an August 15, 2011 decision, OWCP denied appellant's request for modification of its June 16, 2010 loss of wage-earning capacity determination. It noted that she had not adequately supported her argument that she was vocationally and physically unable to work as a social services aide either at the time of the June 16, 2010 rating or at any point thereafter.

In a June 10, 2012 letter, appellant requested reconsideration of her claim and again requested modification of OWCP's June 16, 2010 loss of wage-earning capacity determination. She continued to argue that the June 16, 2010 determination was in error and that her work-related condition had worsened such that she could not work as a social service aide. Appellant repeated a number of the arguments she made in connection with her April 2011 request for modification of OWCP's June 16, 2010 determination.

By decision dated March 5, 2013, OWCP denied appellant's request for modification of its June 16, 2010 loss of wage-earning capacity determination. It again indicated that she did not

³ OWCP accepted that appellant sustained work-related injuries under case files other than the present case file: By November 1987, appellant sustained bilateral carpal tunnel syndrome (File No. xxxxxx830); by March 1996, she sustained right lateral epicondylitis (File No. xxxxxx672); by July 1996, she sustained bilateral rotator cuff syndrome and left lateral epicondylitis (File No. xxxxxx648); and on February 23, 2000, she sustained medial meniscus tear of the right knee, strain of the lumbar region and sprains of the right hip, right thigh, left ankle and the lateral collateral ligaments of both knees (File No. xxxxxx939).

adequately support her argument that she was vocationally and physically unable to work as a social services aide.

In a form dated February 26, 2014 and received March 7, 2014, appellant requested reconsideration of OWCP's March 5, 2013 decision. In a letter dated February 20, 2014 and received March 13, 2014, she also requested reconsideration of OWCP's March 5, 2013 decision. Appellant asserted that OWCP did not consider all her work-related conditions in making its June 16, 2010 loss of wage-earning capacity determination that she could work in the constructed position of social services aide. She claimed that documents were missing or placed in the wrong files with respect to her various work injuries. Appellant indicated that the job duties of the social service aide position exceeded the work duties recommended by her attending physicians. She discussed her physical limitations noting that she required assistance to help her carry out her activities of daily living. Appellant claimed that she had been totally disabled since February 15, 2012.

In an April 11, 2013 report, Dr. Murphy diagnosed bilateral osteoarthritis of the hands, bilateral joint pain in the hands, bilateral carpal tunnel syndrome, bilateral calcifying tendinitis of the shoulders, bilateral lateral epicondylitis, trigger finger of the left long finger and bilateral sprain/strain of the wrists. He indicated that appellant was on partial temporary disability and recommended work restrictions.⁴

In a March 20, 2014 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 determined that her reconsideration was untimely filed because it was received on March 7, 2014, a date that was more than one year after the issuance of its March 5, 2013 decision. OWCP found that appellant had not shown clear evidence of error in its prior decisions and stated:

“Many of the arguments that you are advancing in your letter of February 20, 2014 (but not received until March 7, 2014) were arguments that you previously made and which were considered in the previous reconsideration decision. Therefore, there is nothing new about these arguments. With respect to your arguments about your other cases, these cases are combined with [xxxxxx100]. Therefore, your other conditions were considered in the decision regarding your wage[-]earning capacity.”

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.⁵

⁴ Dr. Murphy stated, “Activity restrictions include bending, climbing, no fine manipulation, they are to take frequent breaks, no repetitive grasping, firm grasping, no repetitive keyboarding, kneeling, reaching overhead, reaching above chest, repetitive manipulation, repetitive motion, lifting restrictions with the left arm, lifting restrictions with the right arm unable to lift due to bilateral thumb pain, no pulling, pushing, crawling. It is recommended that the activity restriction(s) are maintained for six weeks, recommended that the activity restriction(s) are maintained until the next appointment.”

⁵ 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.⁶ OWCP's regulations at 20 C.F.R. § 10.607(a) establish a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011.⁷

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."⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

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

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provide, "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."

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

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

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁵

ANALYSIS

In its March 20, 2014 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was received on March 7, 2014, more than one year after OWCP's March 5, 2013 decision, and therefore she must demonstrate clear evidence of error on the part of OWCP in issuing this decision.¹⁶

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its March 5, 2013 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.

Appellant argued that OWCP did not consider all her work-related conditions in making its June 16, 2010 loss of wage-earning capacity determination that she could work in the constructed position of social services aide. She claimed that medical documents were missing or placed in the wrong files and that the job duties of the social service aide position exceeded her work restrictions. Appellant discussed her physical limitations and indicated that she had been totally disabled since February 15, 2012. The Board notes that her arguments did not show clear evidence of error in OWCP's March 5, 2013 decision which denied her request for modification of its June 16, 2010 loss of wage-earning capacity determination. Appellant's argument did not show that the original June 16, 2010 determination was in error or that her work-related condition had worsened such that she could no longer perform the duties of the social service aide position.¹⁷ Her argument was vague and general in nature and she did not adequately explain her belief that OWCP failed to consider some of her work-related conditions.¹⁸

Appellant submitted an April 11, 2013 report in which Dr. Murphy, an attending Board-certified orthopedic surgeon, diagnosed various medical conditions, indicated that she was on partial temporary disability and recommended work restrictions. A medical report indicating a material change in the nature and extent of the injury-related condition of appellant, such that she could no longer perform the duties of the wage-earning capacity position, could require OWCP to evaluate whether the wage-earning capacity should be modified.¹⁹ However, although

¹⁵ See *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁶ Appellant's reconsideration request was received by OWCP on March 7, 2014 and therefore her reconsideration request was filed on March 7, 2014 according to OWCP's regulations. See *supra* notes 5 through 7. On appeal, appellant argued that her reconsideration request was timely filed, but she did not adequately explain how the evidence of record showed that her request was timely filed.

¹⁷ See *supra* note 15.

¹⁸ Moreover, appellant did not identify specific medical reports which showed that work-related conditions prevented her from working as a social services aide at the time of the original rating in June 2010 or at any point thereafter.

¹⁹ *C.R.*, Docket No. 14-111 (issued April 4, 2014).

Dr. Murphy recommended extensive work restrictions, he did not provide a clear opinion that they were necessitated by accepted work-related conditions nor that they would have prevented appellant's performance of the constructed position of social services aide.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's March 5, 2013 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 March 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 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