



filing of this appeal on August 20, 2014, the Board lacks jurisdiction to review the merits of OWCP's termination decision.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim as it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On November 18, 2008 appellant, then a 43-year-old rural carrier, filed an occupational disease claim alleging an injury to her arms due to performing her repetitive job duties over time. OWCP accepted that appellant sustained bilateral sprains of her right shoulders, upper arms and rotator cuffs, bilateral disorder of bursae and tendons in the shoulders (specified and unspecified), and chronic impingement, tendinopathy, and subacromial bursitis of her right shoulder.

On December 23, 2006 appellant underwent OWCP-authorized right shoulder surgery, including diagnostic arthroscopy and subacromial decompression and micro-debridement of the supraspinatus using a Topaz system.

In an April 18, 2011 report, Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon serving as an OWCP referral physician, detailed appellant's medical history and findings on physical examination and determined that she ceased to have residuals of her accepted work injuries. Dr. Lampert stated that appellant showed signs of symptom magnification during the physical examination and did not have any objective signs of an orthopedic condition. He indicated that, but for her psychological problems, appellant could return to her regular work as a rural carrier.

Given the content of the Dr. Lampert's report, appellant was referred to Dr. Alvin C. Burstein, a Board-certified psychiatrist, to clarify whether she had a work-related psychological condition. In a September 22, 2011 report, Dr. Burstein determined that appellant did not have any psychological condition related to her accepted physical injuries and noted that she engaged in malingering conduct which was not related to any work factor. OWCP has not accepted that appellant has a work-related psychological condition.

In an October 5, 2011 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the reports of the second opinion physicians, Dr. Lampert and Dr. Burstein. It provided appellant an opportunity to submit evidence and argument challenging the proposed termination action. No response was received.

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<sup>3</sup> See 20 C.F.R. §§ 501.2(c) and 501.3. In her appeal papers, appellant also suggested that she wished to appeal August 4, November 23, 2011 and February 5, 2013 OWCP decisions regarding the approval of attorney's fees and a January 24, 2014 OWCP decision granting her a schedule award for a seven percent permanent impairment of her right arm and a seven percent permanent impairment of her left arm. The Board does not have jurisdiction over these decisions as appellant has not filed an appeal of these decisions within 180 days of the issuance of these decisions. See 20 C.F.R. § 501.3(e).

In a November 7, 2011 decision, OWCP terminated appellant's wage-loss compensation and medical benefits based on the reports of Dr. Lampert and Dr. Burstein. It noted that appellant had not submitted any medical evidence showing work-related residuals.

Appellant filed a request for reconsideration. In a February 5, 2013 decision, OWCP denied appellant's request for review of OWCP's November 7, 2011 termination decision on the merits.

In a February 4, 2014 letter received on February 10, 2014, appellant again requested reconsideration of OWCP's November 7, 2011 termination decision. She argued that the reports of Dr. Lampert and Dr. Burstein did not provide an adequate basis to terminate her compensation effective November 7, 2011. Appellant asserted that Dr. Lampert and Dr. Burstein did not adequately examine her. She indicated that it was "a lie" that she had been enrolled in a chronic pain management program and generally indicated that OWCP treated her in a "horrendous fashion" with respect to her claim.<sup>4</sup>

In a February 27, 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 found that appellant filed an untimely request for reconsideration as it was filed on February 10, 2014, more than one year after the November 7, 2011 termination decision. OWCP determined that the evidence and argument appellant submitted in support of her untimely reconsideration request did not show clear evidence of error in the November 7, 2011 decision. It indicated that appellant's own opinion about the probative value of the reports of Dr. Lampert and Dr. Burstein was of no probative value. The April 8, 2010 and October 24, 2012 reports of Dr. Tauber had already been considered and did not tend to show that the November 7, 2011 termination decision was improper.

### **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.<sup>5</sup> 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.<sup>6</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, OWCP must nevertheless undertake a limited review to determine whether the application establishes "clear

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<sup>4</sup> Shortly prior to filing her February 10, 2014 reconsideration request appellant submitted various records which were previously of record and considered by OWCP, including April 8, 2010 and October 24, 2012 reports of Dr. Jacob Tauber, an attending Board-certified orthopedic surgeon. In these reports, Dr. Tauber discussed appellant's bilateral shoulder condition, but did not provide an opinion that appellant continued to have work-related residuals.

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

evidence of error.”<sup>7</sup> OWCP regulations and procedure 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>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup>

### ANALYSIS

In its February 27, 2014 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was filed on February 10, 2014, more than one year after OWCP’s November 7, 2011 termination decision, and therefore she must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its November 7, 2011 termination decision. She did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error.

In connection with her untimely reconsideration request, appellant argued that the reports of Dr. Lampert and Dr. Burstein did not provide an adequate basis to terminate her wage-loss

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<sup>7</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedure further provides, “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.”

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

compensation and medical benefits effective November 7, 2011.<sup>14</sup> The Board notes that the main issue of this case is medical in nature and would generally be resolved by the submission of probative medical evidence. Appellant's own opinion on the sufficiency of the medical evidence would not tend to show that OWCP erred in terminating her compensation. She submitted various records which were previously of record and considered by OWCP, including April 8, 2010 and October 24, 2012 reports of Dr. Tauber, an attending Board-certified orthopedic surgeon. However, in these reports, Dr. Tauber did not provide an opinion that appellant continued to have work-related residuals and therefore the reports would not show clear evidence with respect to OWCP's termination of her compensation. Appellant indicated that it was "a lie" that she had been enrolled in a chronic pain management program and generally indicated that OWCP treated her in a "horrendous fashion" with respect to her claim. She did not provide support for these assertions or explain how they manifested, on its face, that OWCP committed an error in its decision terminating her compensation effective November 7, 2011 which, as noted, is primarily a medical matter.<sup>15</sup>

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's November 7, 2011 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 as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>14</sup> Dr. Lampert was a Board-certified orthopedic surgeon who served as an OWCP referral physician and Dr. Burstein was a Board-certified psychiatrist who served as an OWCP referral physician.

<sup>15</sup> On appeal, appellant provided similar arguments that she was "harassed" and "bullied" by OWCP with respect to her claim, but she did not indicate how the evidence of record supported the occurrence of these acts or adequately explain the relevance of her arguments to OWCP's November 7, 2011 termination determination. Appellant also discussed matters relating to attorney's fees and schedule award compensation which are not currently within the Board's jurisdiction.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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