

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

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V.N., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Fayetteville, NC, Employer )

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**Docket No. 15-649  
Issued: June 10, 2015**

*Appearances:*  
Martin Kaplan, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 29, 2015 appellant, through counsel, filed a timely appeal of a December 3, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision in the matter was issued on January 14, 2011. Since more than 180 days elapsed since the date of the last merit decision and the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

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

## **FACTUAL HISTORY**

The case has been before the Board on prior appeals. Appellant filed a claim on January 3, 2006 alleging that she sustained a bilateral wrist condition causally related to her work as a patient services assistant. OWCP accepted the claim for bilateral carpal tunnel syndrome and a keloid scar. By decision dated August 16, 2012, the Board set aside an October 19, 2011 OWCP decision denying a claim for a recurrence of disability from May 13 to June 5, 2010.<sup>2</sup> The Board found that OWCP had failed to address medical reports regarding her carpal tunnel syndrome. By decision dated July 29, 2014, the Board affirmed a May 24, 2013 OWCP decision denying the claim for compensation commencing May 13, 2010.<sup>3</sup> The Board found that appellant had not met her burden of proof.

The Board has also reviewed OWCP decisions regarding travel reimbursement for medical treatment. In a decision dated May 21, 2013, the Board set aside a September 14, 2012 OWCP decision denying appellant's claim for reimbursement of travel expenses.<sup>4</sup> The Board found the record did not contain documentation regarding appropriate physicians closer to appellant's home. By decision dated June 11, 2014, the Board affirmed a December 16, 2013 OWCP decision denying reimbursement for travel expenses.<sup>5</sup> The Board found that OWCP did not abuse its discretion.

With respect to a consequential injury, appellant submitted a letter dated April 26, 2010 stating that she had been diagnosed with major depression and anxiety, and she wished to expand her claim. In a note dated April 28, 2010, Dr. Steven Dudley, a psychiatrist, stated that appellant needed to be out of work from May 6 to July 5, 2010 for treatment of her depression and anxiety secondary to her carpal tunnel syndrome. The note stated that appellant's pain had become unbearable and she could not perform her job duties. Appellant also submitted reports from Dr. Donald Maharty, a Board-certified family practitioner, and May Ellen Lavoie, a social worker. In a report dated October 21, 2009, Dr. Maharty indicated that appellant's chief complaint was stress over the prior three months. He diagnosed major depression, recurrent carpal tunnel syndrome, and hypertension.

In a report dated July 12, 2010, Dr. Dudley reported that appellant was being treated for major depression and adjustment disorder with depression and anxiety. He reported that appellant had carpal tunnel syndrome and chronic pain when she performed work duties. Dr. Dudley found that the pain and change in level of functioning were the cause of appellant's depression. In a note dated July 12, 2010, he responded to questions from OWCP and diagnosed major depressive disorder, moderate recurrent. Dr. Dudley indicated that appellant has carpal tunnel syndrome and that the pain caused by her job led to depression.

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<sup>2</sup> Docket No. 12-687 (issued August 16, 2012).

<sup>3</sup> Docket No. 13-909 (issued July 29, 2014).

<sup>4</sup> Docket No. 13-50 (issued May 21, 2013).

<sup>5</sup> Docket No. 14-575 (issued June 11, 2014).

By decision dated September 21, 2010, OWCP found that the evidence was insufficient to establish a consequential emotional condition.

In a letter dated October 22, 2010, appellant requested reconsideration. She submitted an October 20, 2010 report from Dr. Dudley diagnosing major depressive disorder, moderate recurrent. Dr. Dudley stated, “It appeared her diagnosis and dysfunction had been caused as a direct result of her injuries (*i.e.*, carpal tunnel syndrome) incurred during the course of her employment.” Appellant also submitted an October 18, 2010 report from Dr. Maharty, who diagnosed major depression recurrent. As to the diagnosis, he stated, “Attribute to Carpal Tunnel issues. Secondary stressor of job stress.”

By decision dated January 14, 2011, OWCP reviewed the merits of the claim. It found that the evidence of record was insufficient to warrant modification of the prior decision.

In a letter dated December 1, 2014, received by OWCP on that date, appellant’s representative requested reconsideration. Appellant submitted two reports dated October 18, 2011 from Dr. Dudley. One report simply stated that appellant was being treated for major depressive disorder and anxiety disorder. The second October 18, 2011 report opined that appellant was suffering from an emotional condition due to her carpal tunnel syndrome. Dr. Dudley stated that the triggering event appeared to be in May 2008, when appellant reported nightmares and the possibility of future worsening of her condition. He also referred to May 2009 when appellant had an issue regarding her headset. Dr. Dudley stated that the onset of the psychiatric condition was simultaneous with her carpal tunnel syndrome and there did not appear to be outside factors associated with appellant’s depression.

By decision dated December 3, 2014, OWCP denied appellant’s request for reconsideration without merit review of the claim. It found that the request was untimely and failed to show clear evidence of error.

### **LEGAL PRECEDENT**

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>6</sup> The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>7</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.<sup>8</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>9</sup> OWCP, through

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.605 (2012).

<sup>8</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>10</sup> As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>11</sup> OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>12</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 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>13</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>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>16</sup>

### ANALYSIS

In the present case, the last merit decision with respect to a consequential emotional condition was dated January 14, 2011. Appellant's request for reconsideration was received on December 1, 2014. Since this is more than one year after the January 14, 2011 decision, it is untimely filed.

As appellant's request for reconsideration was untimely, appellant must show clear evidence of error by OWCP. The Board finds that appellant has not shown clear evidence of error in this case. Appellant submitted an October 18, 2011 report from Dr. Dudley. Clear evidence of error requires appellant to submit evidence of such probative value that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the challenged OWCP decision. The evidence from Dr. Dudley does not meet that standard. He reiterates his prior opinion that appellant's depression was casually related to her accepted carpal tunnel syndrome. Dr. Dudley does not provide a complete history or a complete factual and medical background. He refers to events in May 2008 and May 2009, without clearly explaining their relationship to the employment injury. A consequential injury must be the direct

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<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> 20 C.F.R. § 10.607 (2012).

<sup>12</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>13</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>14</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>15</sup> *Id.*

<sup>16</sup> *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

and natural result of the primary injury, without an independent intervening cause which is attributable to the employee's own conduct.<sup>17</sup> Dr. Dudley does not provide a complete report that is sufficient to show clear evidence of error by OWCP. As noted above, even if the evidence can be construed to produce a conclusion contrary to OWCP's determination, it is not clear evidence of error.

The Board accordingly finds that OWCP properly denied merit review in this case. Appellant's request for reconsideration was untimely filed and failed to show clear evidence of error. On appeal, appellant's counsel states that Dr. Dudley raised a substantial question as to the correctness of OWCP's decision. For the reasons noted above, the Board finds that appellant did not show clear evidence of error in this case.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 3, 2014 is affirmed.

Issued: June 10, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> *Carlos A. Marrero*, 50 ECAB 117, 120 (1998); 1 A. Larson, *The Law of Workers' Compensation* § 10.01 (2002). See also *Debra L. Dillworth*, 57 ECAB 516, 519 (2006).