



## **FACTUAL HISTORY**

This case was previously before the Board. By decision dated July 2, 2012, the Board affirmed an August 11, 2011 nonmerit OWCP decision which found that it properly denied appellant's May 12, 2011 request for reconsideration under 5 U.S.C. § 8128(a). The Board also affirmed a September 7, 2011 nonmerit decision denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.<sup>2</sup>

On October 11, 2012 appellant filed a request for reconsideration. By decision dated October 26, 2012, OWCP denied her reconsideration request as untimely filed and failing to establish clear evidence of error. Appellant appealed to the Board and by decision dated May 13, 2013, the Board affirmed OWCP's October 26, 2012 nonmerit decision denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.<sup>3</sup> The findings of fact and conclusions of law from the prior decisions and orders are hereby incorporated by reference.

By letter dated November 15, 2013, appellant, through counsel, filed a request for reconsideration before OWCP. Counsel argued that appellant had established clear evidence of error on the part of OWCP in its May 27, 2010 merit decision. He repeated his assertion that her May 12, 2011 request for reconsideration was accompanied with new and relevant medical evidence, with enclosures included. Counsel noted that review of the disc containing appellant's case file revealed that OWCP scanned certain documents twice. He argued that this was evidence of errors made by OWCP and established that the medical evidence submitted with her May 12, 2011 request for reconsideration was not scanned.

Counsel further repeated arguments previously made. He stated that appellant filed a timely appeal of the May 27, 2010 merit decision on May 12, 2011. Counsel further noted that OWCP's system and scanning process was flawed because there were missing documents and errors made where certain documents were scanned twice. He also argued that Dr. Bhayani's medical reports supported appellant's traumatic injury claim.

By decision dated January 21, 2014, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

## **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's 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>4</sup>

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<sup>2</sup> Docket No. 12-90 (issued July 2, 2012). On October 9, 2007 appellant, then a 57-year-old postmaster relief, filed a traumatic injury claim (Form CA-1) alleging that she developed a left shoulder injury on October 6, 2007 when she picked up an oblong box off the floor with her left arm. By decisions dated March 5, 2008, March 12 and November 17, 2009 and May 27, 2010, OWCP denied her claim finding that the medical evidence of record failed to establish that her left shoulder condition was causally related to the October 6, 2007 employment incident.

<sup>3</sup> Docket No. 13-470 (issued May 13, 2013).

<sup>4</sup> 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.<sup>5</sup>

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 decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>6</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>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</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>10</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>11</sup>

### ANALYSIS

In its January 21, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.<sup>12</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>13</sup> Appellant's November 15, 2013 request for reconsideration was submitted more than one year after the last merit decision of record, dated

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

<sup>6</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>7</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>8</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>12</sup> *Supra* note 4.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

May 27, 2010, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.<sup>14</sup>

The Board finds that appellant has not established clear evidence of error on the part of OWCP. Appellant's counsel submitted a reconsideration request dated November 15, 2013. He argued that appellant established clear evidence of error on the part of OWCP in its May 27, 2010 merit decision. Counsel repeated his assertion that her May 12, 2011 appeal letter was accompanied with new and relevant medical evidence. He noted that review of the disc containing appellant's case file revealed that OWCP scanned certain documents twice. Counsel argued that this was evidence of errors made by OWCP and established that the medical evidence submitted with her May 12, 2011 appeal was not scanned.

Appellant has not provided evidence to establish that OWCP received additional medical evidence which allegedly accompanied her May 12, 2011 reconsideration request, but was not scanned into the record.<sup>15</sup> The Board notes that the fact that OWCP scanned certain documents twice does not establish that additional medical evidence accompanied the May 12, 2011 reconsideration request. Furthermore, the fact that the May 12, 2011 letter mentions enclosures also does not establish that additional medical evidence accompanied the letter. Counsel submitted a sworn affidavit from Paula Kerr, counsel's secretary, who attested that "nothing that was sent is missing until sometime in 2011 when things were not scanned." The affidavit goes on to describe the documents that she reviewed from the "claimant's dis[c]." In reviewing the contents of the disc, appellant attests as to what documents she saw scanned in from six submissions which consisted of four appeal letters and two requests for reconsideration. She indicated that portions of these submissions were not on the disc from the documents submitted. However, appellant did not specifically attest that the documents in their totality were originally sent.

Counsel's remaining arguments have previously been addressed by the Board in its July 2, 2012 and May 13, 2013 decisions.<sup>16</sup> The subject matter previously reviewed by the Board in its May 13, 2013 decision, absent further merit review by OWCP, is *res judicata*.<sup>17</sup> The Board has also previously reviewed the reports of Dr. Bhayani and found that the medical evidence failed to establish clear evidence of error.

As noted above, the Board finds that appellant has not provided any evidence to establish that additional medical evidence was submitted in a timely manner accompanying her May 12, 2011 reconsideration request.<sup>18</sup> Moreover, these arguments have been presented on numerous prior occasions and are not sufficient to establish clear evidence of error.

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<sup>14</sup> See *Debra McDavid*, 57 ECAB 149 (2005).

<sup>15</sup> *J.M.*, Docket No. 12-1919 (issued February 8, 2013).

<sup>16</sup> *Supra* notes 2 and 3.

<sup>17</sup> 5 U.S.C. § 8128; see also *D.S.*, Docket No. 14-12 (issued March 18, 2014).

<sup>18</sup> *G.D.*, Docket No. 07-1101 (issued September 11, 2007).

As none of the evidence raises a substantial question concerning the correctness of OWCP's decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.<sup>19</sup>

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2015  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>19</sup> A.S., Docket No. 11-356 (issued September 16, 2011).