



## **FACTUAL HISTORY**

On June 11, 2014 appellant, then a 20-year-old Air Force Reserve Officer Training Corps (ROTC) instructor, filed a traumatic injury claim (Form CA-1) alleging that on June 10, 2014 she experienced pain in her upper right side under the ribs while attending officer training school.

In a June 11, 2014 narrative statement a field training commander explained that during combative class on June 10, 2014 appellant complained of pain in her right side just below the rib cage after a drill. He related that appellant went to the emergency room and was treated for potential issues with her gallbladder. The commander opined that appellant was injured “in the line of duty.”

In June 10, 2014 emergency room records, Dr. Steven G. O’Mara, an osteopathic physician specializing in emergency medicine, noted appellant’s complaints of abdominal pain and nausea. He indicated that a review of appellant’s systems was negative and physical examination revealed tenderness of appellant’s abdomen. Dr. O’Mara indicated that appellant sustained acute abdominal pain and biliary colic. He related that he did not believe this condition was caused or aggravated by appellant’s employment. In a June 11, 2014 attending physician’s report (Form CA-20), he noted diagnosis of biliary colic and marked that appellant could return to work.

A June 10, 2014 diagnostic examination of the abdomen by Dr. Donald H. Dahlene, a Board-certified diagnostic radiologist, revealed no evidence of an intestinal obstruction or perforation and no soft tissue mass or radiopaque calculus. Another diagnostic examination by Dr. George Wakefield, III, a Board-certified diagnostic radiologist, demonstrated a partially contracted gallbladder.

In a June 11, 2014 hepatobiliary gallbladder study, Dr. Gary Wayne Scott, a Board-certified diagnostic radiologist, observed homogenous activity in the liver and one peak intensity of the gallbladder.

By letter dated July 8, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It provided appellant with a questionnaire for completion in order to substantiate that the June 10, 2014 incident occurred as alleged and submit medical evidence to establish that she sustained a diagnosed condition causally related to the employment incident. No response was received.

OWCP denied appellant’s claim in a decision dated August 13, 2014. It found that the evidence was insufficient to establish that the June 10, 2014 incident occurred as alleged because appellant failed to respond to the questionnaire. OWCP also determined that the medical evidence failed to establish that she sustained a medical condition as a result of the described incident.

On November 20, 2015 OWCP received a narrative letter from the employing establishment which related that it had submitted this claim on appellant’s behalf. It was also noted that the employing establishment individual assisting with the claim missed the

questionnaire requesting further information from appellant. Therefore appellant's answers to the questionnaire were now being submitted.

In an e-mail dated November 18, 2015, appellant responded to OWCP's questionnaire for completion. She noted that she did not have any similar disability of symptoms before the injury. Appellant explained that she believed the biliary colic was due to her work duties because the food that was prepared at the dining facility was not what her typical diet consisted of prior to the training. She believed that after a few weeks of consuming that food it affected her gallbladder and caused biliary colic.

In a December 2, 2015 telephone call memorandum (Form CA-110), OWCP informed the employing establishment that appellant's case could be reopened based upon her statement received on November 20, 2015. It advised that appellant should utilize the appeal rights previously provided.

On December 9, 2015 OWCP received appellant's request for reconsideration. Appellant resubmitted the November 18, 2015 e-mail, which included her responses to OWCP's questionnaire for completion.

By decision dated February 17, 2016, OWCP denied appellant's December 9, 2015 reconsideration request. It found that because appellant's December 9, 2015 reconsideration request was not received within one year of the most recent August 13, 2014 merit decision, it was untimely filed. OWCP further determined that appellant's reconsideration request failed to demonstrate clear evidence that OWCP's decision was in error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant's application for reconsideration review must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>3</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>4</sup>

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.<sup>5</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>6</sup> The Board makes an independent determination

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.<sup>7</sup>

To demonstrate 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>8</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.

### ANALYSIS

The only decision before the Board on appeal is the February 17, 2016 nonmerit OWCP decision, which declined to reopen appellant's case on the merits because her request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that OWCP properly determined that appellant failed to file a timely application for review. By decision dated August 13, 2014, OWCP denied appellant's traumatic injury claim. It received appellant's appeal request form, which indicated that she was requesting reconsideration, on December 9, 2015, which was outside the one-year time limit.<sup>10</sup> Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>11</sup>

The Board also finds that appellant has not demonstrated clear evidence of error by OWCP. In its August 13, 2014 decision, OWCP denied appellant's traumatic injury claim because she had failed to establish fact of injury. It found that the factual evidence was insufficient to demonstrate that the June 10, 2014 incident occurred as alleged as appellant had not responded to the questionnaire for completion before OWCP issued its denial decision. OWCP also determined that the medical evidence failed to establish a diagnosed condition causally related to the employment incident.

Along with the December 9, 2015 reconsideration request, appellant submitted her answers to the questionnaire for completion and a narrative statement from the employing establishment which indicated that appellant's questionnaire answers had not been properly forwarded. The Board finds, however, that these statements do not demonstrate clear evidence of error on the part of OWCP nor do they raise a substantial question as to the correctness of OWCP's decision. Appellant merely asserted the merits of her claim that the June 10, 2014

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<sup>7</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>9</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>10</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4) (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

<sup>11</sup> 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

incident occurred as she described and explained why OWCP failed to receive her answers to the questionnaire for completion.

To demonstrate clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>12</sup> The evidence of record in this case does not, on its face, establish that OWCP committed an error in denying appellant's claim. The evidence of record also does not raise a substantial question as to whether appellant's diagnosed biliary colic was caused by the employment incident alleged. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

On appeal appellant requests reversal of OWCP's decision because she did not personally receive its correspondence regarding notification of the discrepancies in her claim. She explained that she was a college student participating in Air Force ROTC and that all correspondence from OWCP was sent to the AFROTC Detachment. The evidence of record establishes however that OWCP's correspondence was sent to appellant's last known address, which was provided on the claim form. In the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. This is known as the mailbox rule.<sup>13</sup>

Thus, appellant has failed to meet her burden of proof to establish that her untimely December 9, 2015 reconsideration request demonstrated clear evidence of error in OWCP's August 13, 2014 merit decision.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011).

<sup>13</sup> See *S.M.*, Docket No. 15-1303 (issued August 3, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board