



## **FACTUAL HISTORY**

On June 9, 2003 appellant, then a 48-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that her asthma and anxiety were aggravated due to excessive dust exposure while in the performance of duty in May 2002. OWCP accepted the claim for unspecified asthma with acute exacerbation, unspecified anxiety state, and specified acute sinusitis. Appellant stopped work intermittently and received medical and wage-loss compensation. She filed for retirement on May 29, 2003.

Appellant sought treatment for her conditions with Dr. Alan R. Varraux, Board-certified in internal medicine, and Dr. Anthony E. Douglas, Board-certified in internal medicine. On January 22, 2013 Dr. Varraux requested OWCP provide authorization for a gym membership from January 1 through December 31, 2013.

By letter dated February 20, 2013, OWCP advised appellant that the evidence was insufficient to approve the request for a health club membership. It requested that she provide a statement from her physician addressing why the membership was necessary and appropriate for effective treatment of her accepted work-related condition of aggravation of asthma, aggravation of anxiety, and acute sinusitis. OWCP also provided a series of questions pertaining to health club memberships. Appellant was afforded 30 days to submit this additional evidence.

In a December 19, 2013 report, Dr. Douglas provided an exercise assessment recommending stationary recumbent bike no more than 15 minutes for three days a week. He restricted appellant from outdoor exercise due to asthma and also restricted deep impact exercise which would cause shortness of breath and anxiety. Dr. Douglas noted that the restrictions were valid for one year. In a December 19, 2013 authorization request form, he requested OWCP authorize appellant's gym membership from January 1 through December 31, 2013.

By decision dated January 23, 2014, OWCP denied appellant's request for authorization for a health club membership.

In an August 11, 2014 letter addressed to OWCP, received on August 20, 2014, appellant stated that she was submitting a medical opinion by pulmonary specialist Dr. Varraux in accordance with section 8103 explaining why a health club membership was necessary. Appellant noted her claim number and requested that OWCP review and approve authorization for her health club membership.

Accompanying appellant's letter was a June 3, 2014 letter from Dr. Varraux addressed to OWCP. Dr. Varraux informed OWCP that he was responding to its letters dated February 20, 2013 and January 23, 2014 regarding questions pertaining to membership at a health club and requested OWCP review and approve the health club membership. He provided an explanation pertaining to the need for aquatic/aerobic classes with proper equipment resources and further detailed why it was necessary with respect to appellant's work-related conditions.

By letter dated January 26, 2015, appellant requested OWCP to review the denial of her gym membership. She noted that she had previously submitted a letter on August 11, 2014, accompanied with Dr. Varraux's June 3, 2014 report, which provided detailed explanation

regarding her supervised physical training as it pertained to her injuries. Appellant further stated that she had also submitted an October 7, 2014 reconsideration request pertaining to the denial of her request for a health club membership. She submitted a copy of the October 7, 2014 reconsideration request with her January 26, 2015 letter. OWCP received these documents on February 2, 2015.

By decision dated March 13, 2015, OWCP denied appellant's reconsideration request as untimely filed and failing to demonstrate clear evidence of error. It found that there was no record of the October 7, 2014 reconsideration request until February 2, 2015 which rendered it untimely for reconsideration of the January 23, 2014 decision.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>3</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>4</sup>

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. 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>5</sup>

To demonstrate 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>6</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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence

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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, 111 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>6</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>8</sup> *Id.*

demonstrates clear error on the part of OWCP.<sup>9</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>10</sup>

### ANALYSIS

In its March 13, 2015 decision, OWCP denied appellant's request for reconsideration of the January 23, 2014 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. The Board finds, however, that OWCP improperly determined that her request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.<sup>11</sup>

On January 23, 2014 OWCP issued a decision denying authorization for a health club membership finding that the medical evidence of record failed to establish how it was necessary in relation to her accepted work-related conditions. Accordingly, appellant had until January 23, 2015 to make a timely request for reconsideration.<sup>12</sup> OWCP determined her request for reconsideration was received on February 2, 2015. The Board finds, however, that appellant had submitted a request for reconsideration of the January 23, 2014 decision on August 20, 2014 and submitted evidence and argument in support of her request, within the required one-year time period.<sup>13</sup>

The record contains a letter from appellant addressed to OWCP and received on August 20, 2014 regarding authorization for health club membership. She informed OWCP that she was submitting a medical opinion by pulmonary specialist Dr. Varraux in accordance with section 8103 which explained why a health club membership was necessary. Appellant noted her claim number and requested that OWCP review and approve authorization for her health club membership. Although this letter received by OWCP on August 20, 2014 does not mention the word reconsideration, the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration.<sup>14</sup> No special form is required as long as the request is made in writing, identifies the decision and specific issue to be considered, and is accompanied by relevant and pertinent new evidence not previously considered.<sup>15</sup> The word reconsideration does not need to be stated in the request for it to be

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

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>11</sup> *J.L.*, Docket No. 12-1181 (issued November 1, 2012).

<sup>12</sup> OWCP's procedures were changed effective August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. 20 C.F.R. § 10.607 (2011).

<sup>13</sup> *Id.*

<sup>14</sup> *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

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

considered valid, but sufficient detail should be provided to discern the decision being contested.<sup>16</sup>

Appellant also submitted a June 3, 2014 letter from Dr. Varraux who provided a detailed explanation pertaining to the need for a health club membership as it related to appellant's work-related conditions. Moreover, Dr. Varraux's letter to OWCP identified the February 20, 2013 development letter and January 23, 2014 decision as he noted that he was responding to questions posed in these documents. Thus, the Board finds that appellant's August 11, 2014 letter, submitted with Dr. Varraux's June 3, 2014 letter, constituted a timely request for reconsideration.<sup>17</sup>

Thus, appellant filed a request for reconsideration within one year of the January 23, 2014 OWCP decision. The Board finds that OWCP improperly denied her reconsideration request under the legal standard for untimely requests for reconsideration. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).<sup>18</sup> Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

### **CONCLUSION**

The Board finds that OWCP improperly found that appellant's request for reconsideration of OWCP's January 23, 2014 decision was untimely filed.

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<sup>16</sup> See *M.H.*, Docket No. 14-1389 (issued October 22, 2014).

<sup>17</sup> *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

<sup>18</sup> 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 13, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this decision.

Issued: June 8, 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