

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 9, 1992 appellant, then a 52-year-old former contract specialist, filed an occupational disease claim (Form CA-2) alleging that she had an allergic reaction to airborne allergens/allergic asthma, which arose on or about July 21, 1991. OWCP accepted the claim for allergic reaction to airborne allergens/allergic asthma.

Effective September 12, 1993 appellant accepted a position as a management and program analyst with the Department of Defense (DOD), Office of the Inspector General. After an extended period of inactivity, OWCP destroyed the original case file associated with her 1991 employment injury.

In May 2004, Dr. Henry C. Fronc, Jr., a cardiologist, saw appellant for complaints of chest discomfort, which he later diagnosed as costochondritis. In October 2004 Dr. Fronc diagnosed autonomic dysfunction and recommended that appellant avoid her long daily commute and be permitted to telework from home. Beginning in November 2004, the employing establishment accommodated appellant's disability due to autonomic dysfunction by temporarily allowing her to telework from home on a full-time basis, but subsequently modified the accommodation to allow appellant to telework three days a week.

In January 2007, the employing establishment denied any further accommodation for telework. On February 6, 2007 appellant had a near syncope episode while at work. She did not return to work and subsequently filed a claim (Form CA-2a) for recurrence of disability beginning February 6, 2007.

On March 8, 2008 OWCP determined that the evidence was insufficient to establish that appellant's claimed disability beginning February 6, 2007 was causally related to the accepted employment injury, and denied appellant's claim for a recurrence. Appellant requested reconsideration on multiple occasions.³

By decision dated August 26, 2011, OWCP denied modification of its July 17, 2008 merit decision.

On January 4, 2017 appellant requested reconsideration. In support of her request, she submitted a copy of a December 24, 2015 decision by the Social Security Administration finding

² Docket No. 13-1025 (issued August 12, 2013).

³ On July 17, 2008 OWCP reviewed appellant's recurrence claim on the merits and denied modification. On November 15, 2010 it denied reconsideration without considering the merits of the claim. On September 18, 2012 OWCP denied appellant's reconsideration request without conducting a merit review. On March 1, 2013 it denied reconsideration as appellant had not filed a timely request for reconsideration and had not demonstrated clear evidence of error. By decision dated August 12, 2013, the Board affirmed the September 18, 2012 and March 1, 2013 nonmerit decisions. Docket No. 13-1025 (issued August 12, 2013). On April 3, 2014 the Board issued an Order Dismissing Appeal with regard to appellant's appeal from a March 1, 2013 nonmerit decision. *Order Dismissing Appeal*, Docket No. 13-2056 (issued April 3, 2014).

that appellant had been disabled since February 7, 2007. Appellant also submitted internal correspondence with regard to leave buy back from January 21 to February 3, 1997. She alleged that this new evidence was relevant and pertinent and urged OWCP to find that it established that she sustained a recurrence of disability commencing February 3, 1997.

On December 3, 2015 appellant was seen by Dr. Jeffrey D. Gaber, a Board-certified internist. Dr. Gaber indicated that he examined appellant and reviewed medical records that she brought to him. He noted that appellant's situation had declined since he saw her a few years prior, and that she continued to have syncopal episodes, chest pain, costochondritis, and asthma. Dr. Gaber noted that she remained permanently unable to resume work due to the risk of injury to herself or others that might arise from the performance of essential duties in a position similar to the one from which she retired. He expected her to remain fully disabled.

By decision dated January 12, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On February 9, 2017 appellant requested reconsideration. She alleged that new evidence showed that her original work injury of 1992 included the diagnosis, clinical findings, and symptoms of costochondritis, tachypnea, syncope, and chest pain. Appellant also contended that from 1998 through 2007 she was exposed to known allergens and that the employing establishment was aware of her environmental restrictions. She also alleged that she experienced several recurrences or new work injuries from 1998 through 2007. Appellant submitted evidence in support of her reconsideration claim.

OWCP received a September 29, 1992 report by Dr. Denise F. Bruner, an allergist, who noted that on July 22, 1991 appellant presented with signs consistent with upper respiratory tract infection. Dr. Bruner opined that appellant's symptoms were the result of being exposed to some unknown allergen at her workplace. In a May 21, 1993 report, Dr. Peter Latkin, Board-certified in allergy and immunology and pediatrics, concluded that appellant's respiratory problems, allergies, and asthmas were most likely related to and caused by her exposure to dust and molds in workplace. OWCP received handwritten progress notes from October 6, 2004 that did not include a legible signature. It also received reports dated April 19 and July 12, 2006 from Dr. Henry C. Fronc, a Board-certified cardiologist, for follow up on appellant's severe sporadic autonomic dysfunction.

Appellant submitted records from her May 2, 2015 treatment at the Virginia Hospital Center and a Patient Care Report from the Arlington County Fire Department. She submitted a note from her February 5, 2017 visit to the emergency department of INOVA.

By decision dated May 9, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

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

⁴ 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.⁵ The one-year period begins on the next day after the date of the contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).⁷

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 nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁸ OWCP regulations and procedures 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 demonstrates clear evidence of error on the part of OWCP.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁵ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift

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

⁶ Federal FECA Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁷ *Id.* at Chapter 2.1602.4b.

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ 20 C.F.R. § 10.607(b); *supra* n. 6 at Chapter 2.1602.3d (January 2004).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *B.L.*, Docket No. 17-1452 (issued October 25, 2017).

the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶

ANALYSIS

OWCP's last merit decision was dated August 26, 2011. OWCP received appellant's requests for reconsideration on January 4 and February 9, 2017. As these requests were filed more than one year after the last merit decision, OWCP properly determined that appellant's requests for reconsideration were untimely filed.

As appellant's requests were untimely filed, she must demonstrate clear evidence of error on the part of OWCP in its denial of her claim for a recurrence of disability beginning February 6, 2007.¹⁷

The Board finds that appellant failed to demonstrate clear evidence of error.

In support of her January 4, 2017 request for reconsideration appellant submitted a decision from the Social Security Administration. However, the Board has held that entitlement to benefits under another statute does not establish entitlement to benefits under FECA.¹⁸ Thus, the Social Security Administration decision was not of sufficient probative value to shift the weight of the evidence or raise a substantial question as to the correctness of OWCP's decision.¹⁹

In support of the request for reconsideration OWCP also received the December 3, 2015 report from Dr. Gaber. Dr. Gaber noted that appellant's physical condition had declined, but his report did not establish that appellant sustained a recurrence of disability commencing February 6, 2007 causally related to her accepted employment injury. The Board has held that even the submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁰

In further support of her request for reconsideration appellant submitted the September 19, 1992 report by Dr. Bruner, the May 21, 1993 report by Dr. Latkin, the progress notes of October 6, 2004, and the April 19 and July 12, 2006 reports by Dr. Fronc, as well as the October 6, 2004 handwritten progress notes with an illegible signature. These reports all predate the alleged recurrence of disability on February 6, 2007 and as such are irrelevant.²¹ As noted,

¹⁶ *Leon D. Faidley, Jr., supra* note 5.

¹⁷ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *Daniel F. O'Donnell, Jr.*, Docket No. 04-1545 (issued January 12, 2015) (determinations and decisions by other administrative agencies are not binding on the Board with respect to whether the individual is disabled under FECA).

¹⁹ *Id.*

²⁰ *Supra* note 6 at Chapter 2.1602.5(a) (February 2016); *James Mirra*, 56 ECAB 738 (2005).

²¹ *See A.C.*, Docket No. 17-0663 (issued October 24, 2017).

clear evidence of error is intended to represent a difficult standard. The evidence must be positive, precise, and explicit that OWCP committed an error in denying the claim.²²

Similarly, the records from the Virginia Hospital Center and Arlington County Fire Department records from May 2, 2015, as well as the INOVA Hospital dated February 5, 2017 did not address whether appellant sustained a recurrence of disability as of February 6, 2007 causally related to her accepted 1991 employment injury, and therefore did not raise a substantial question as to the denial of appellant's recurrence claim.²³

Accordingly, the Board finds that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error with respect to OWCP's August 26, 2011 merit decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 9 and January 12, 2017 are affirmed.

Issued: December 22, 2017
Washington, DC

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

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

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

²² *Supra* note 13.

²³ A.S., Docket No. 16-1082 (issued September 6, 2017).