



## **FACTUAL HISTORY**

On July 25, 2011 appellant, then a 43-year-old food inspector, injured her lower back in the performance of duty when she pulled on a chair. OWCP accepted her traumatic injury claim for lumbar sprain. Appellant stopped work on July 25, 2011 and received continuation of pay through September 8, 2011. Additionally, OWCP paid wage-loss compensation for the period September 9 through November 30, 2011. In a prior appeal, the Board affirmed OWCP's finding that appellant had not established entitlement to wage-loss compensation on or after December 1, 2011.<sup>3</sup> The Office of Personnel Management (OPM) approved appellant's application for disability retirement, which was effective January 12, 2013.<sup>4</sup>

On September 26, 2013 appellant filed a claim for a schedule award (Form CA-7) due to the accepted July 25, 2011 lumbar injury. She did not submit any medical evidence containing a rating for permanent impairment around the time she filed her schedule award claim.

By decision dated March 6, 2014, OWCP denied appellant's claim for a schedule award due to her accepted July 25, 2011 work injury, sprain of the lumbar region. It found that she did not submit medical evidence establishing permanent impairment of a scheduled member due to her accepted work injury.

Appellant requested reconsideration of the denial of her schedule award claim and, by decision dated May 4, 2015, OWCP denied modification of its March 6, 2014 decision finding that she did not establish permanent impairment of a scheduled member due to her accepted work injury. It discussed a series of medical reports appellant had submitted after March 6, 2014 and found that none of the reports contained a rating for permanent impairment.

In a handwritten letter dated April 28, 2016 and received by OWCP on May 9, 2016, appellant requested reconsideration of OWCP's May 4, 2015 decision denying her schedule award claim. She discussed the pain symptoms in her back and left leg and asserted that she was entitled to schedule award compensation. In connection with her reconsideration request, appellant submitted reports concerning the treatment of her back condition, dated October 9, 2013, April 24 and November 4, 2015, and April 12, 2016, which had not previously been considered by OWCP. She also submitted reports, dated between September 21, 2011 and August 6, 2013, which had previously been considered by OWCP.

In a July 20, 2016 decision, OWCP denied appellant's request for further review of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error. It determined that appellant's reconsideration request was untimely because it was not received by OWCP until May 9, 2016, more than one year after issuance of its May 4, 2015 merit decision. OWCP further found that the evidence and argument appellant submitted in support of her untimely reconsideration request did not demonstrate clear evidence of error in the May 4, 2015 decision.

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<sup>3</sup> Docket No. 13-1227 (issued October 22, 2013).

<sup>4</sup> OPM found that appellant was disabled from her position as a food inspector due to degenerative disc disease.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.<sup>5</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> However, 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 that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>7</sup>

To show 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 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>8</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>9</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>10</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>8</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>9</sup> *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

<sup>10</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's merit decision for which review is sought.<sup>14</sup> As appellant's request for reconsideration was not received by OWCP until May 9, 2016, more than one year after the issuance of its May 4, 2015 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its May 4, 2015 decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its May 4, 2015 decision. In the reconsideration request letter received by OWCP on May 9, 2016, she discussed the pain symptoms in her back and left leg and asserted that she was entitled to schedule award compensation. In connection with her reconsideration request, appellant submitted reports concerning the treatment of her back condition, dated October 9, 2013, April 24 and November 4, 2015 and April 12, 2016, which had not previously been considered by OWCP. She also submitted reports, dated between September 21, 2011 and August 6, 2013, which had previously been considered by OWCP.

Appellant did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error in its May 4, 2015 decision when it denied her schedule award claim.<sup>15</sup> The evidence and argument she submitted did not raise a substantial question concerning the correctness of OWCP's May 4, 2015 decision. None of the medical reports appellant submitted in connection with her reconsideration request contained a rating of permanent impairment. The question of appellant's entitlement to schedule award compensation would generally be resolved through the submission of medical evidence and her mere assertion that she was entitled to schedule award compensation would not tend to show error by OWCP in its May 4, 2015 decision. Appellant did not explain how this evidence and argument raised a substantial question as to the correctness of OWCP's May 4, 2015 decision.

The Board finds that appellant's application for review does not demonstrate on its face that OWCP committed error when it found in its May 4, 2015 decision that she did not establish permanent impairment of a scheduled member due to her accepted work injury.<sup>16</sup> As noted, clear evidence of error is intended to represent a difficult standard.<sup>17</sup> Other than simply reiterating her previous arguments, appellant has not met this standard in this case.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's May 4, 2015 decision and OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

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<sup>14</sup> See *supra* note 6.

<sup>15</sup> See *supra* note 7.

<sup>16</sup> See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

<sup>17</sup> See *supra* note 9.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 20, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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