

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On April 20, 1989 appellant, then a 33-year-old clerk, filed a claim for occupational disease (Form CA-2) alleging that she experienced stress at work due to constant harassment and discrimination. On June 11, 1991 OWCP accepted her claim for generalized anxiety disorder with depressive features.

By letter dated January 10, 1992, the employing establishment offered appellant a position as a support assistant with the U.S. Army Corps of Engineers. On March 5, 1992 OWCP advised appellant that the position of support assistant with the U.S. Army Corps of Engineers was found to be suitable to her work capacity and that she had 30 days to accept the position or provide a reason for refusing the position. It also advised that her compensation benefits could be terminated pursuant to 5 U.S.C. § 8106(c)(2) if she failed to accept the position or failed to demonstrate that her refusal was justified.

OWCP terminated appellant's compensation in an April 17, 1992 decision finding that she had refused an offer of suitable work.

Appellant thereafter requested reconsideration on February 10, 1993. By decision dated March 25, 1993, OWCP denied modification of the prior decision. On April 16, 1993 appellant again requested reconsideration. OWCP denied this request on June 4, 1993 without reviewing the merits of the claim. It received another request for reconsideration on July 1, 1995. By decision dated January 12, 1996, OWCP found that appellant's request was untimely filed and failed to demonstrate clear evidence of error.

Following an appeal to the Board, in a decision dated October 1, 1998, the Board affirmed the January 12, 1996 OWCP decision, finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.⁴ Following this Board decision appellant continued to request reconsideration, and OWCP continued to deny the requests as untimely filed and failing to demonstrate clear evidence of error.⁵

³ Docket No. 92-2518 (issued October 1, 1998); Docket No. 02-1814 (issued January 23, 2003); Docket No. 03-2128 (issued October 30, 2003); Docket No. 04-1429 (issued November 23, 2004); Docket No. 07-1697 (issued December 27, 2007); Docket No. 08-1420 (issued January 6, 2009); Docket No. 09-1497 (issued February 16, 2010); Docket No. 10-1335 (issued February 8, 2011); Docket No. 11-1261 (issued December 6, 2011); Docket No. 12-1065 (issued October 12, 2012); Docket No. 14-0070 (issued March 24, 2014); Docket No. 15-1897 (issued October 20, 2015); Docket No. 16-1059 (issued September 19, 2016).

⁴ Docket No. 92-2518 (issued October 1, 1998).

⁵ By decision dated January 23, 2003, the Board affirmed OWCP decisions dated April 26 and September 7, 2001, and April 11 and July 26, 2002, denying appellant's requests for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Docket No. 02-1814 (issued January 23, 2003).

Appellant subsequently continued to request reconsiderations before OWCP, which it in turn denied as untimely filed and failing to demonstrate clear evidence of error. OWCP's decisions were affirmed by the Board in all subsequent appeals.⁶

OWCP received yet another request for reconsideration on November 12, 2014. By decision dated January 20, 2015, it again found the application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. On September 15, 2015 appellant filed an appeal with the Board from the January 20, 2015 OWCP decision. By order dated October 20, 2015, the Board dismissed the appeal as untimely filed.⁷

On June 15, 2015 OWCP received appellant's June 12, 2015 application for reconsideration. Appellant reiterated arguments that the job offer was incomplete, violated OWCP regulations, and was never offered in writing after a physician's approval.

By decision dated December 14, 2015, OWCP found the application for reconsideration was untimely filed. It denied merit review, finding appellant had failed to demonstrate clear evidence of error.

On April 25, 2016 appellant appealed to the Board. In a decision dated September 19, 2016, the Board affirmed the December 14, 2015 OWCP decision.⁸ The Board noted that appellant continued to argue that the job offer was inadequate, and the subject matter previously reviewed by the Board was *res judicata*, absent further merit review by OWCP.

⁶ In the next appeal, the Board affirmed an August 8, 2003 OWCP decision that found that her June 28, 2003 reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 03-2128 (issued October 30, 2003). By decision dated November 23, 2004, the Board affirmed OWCP decisions dated April 30 and May 17, 2004, finding that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error. Docket No. 04-1429 (issued November 23, 2004). In a decision dated December 27, 2007, the Board affirmed OWCP decisions dated May 10 and 29, 2007, finding that her applications for reconsideration were untimely filed and failed to demonstrate clear evidence of error. Docket No. 07-1697 (issued December 27, 2007). By decision dated January 6, 2009, the Board affirmed an April 4, 2008 OWCP decision again finding the request for reconsideration untimely filed and failing to demonstrate clear evidence of error. Docket No. 08-1420 (issued January 6, 2009). In a decision dated February 16, 2010, again the Board found appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 09-1497 (issued February 16, 2010).

The next Board decision was dated February 8, 2011, where the Board found that a March 4, 2010 application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 10-1335 (issued February 8, 2011). By decision dated December 6, 2011, the Board affirmed OWCP decisions dated March 1 and 29, 2011, again finding that the reconsideration requests were untimely filed and failed to demonstrate clear evidence of error. Docket No. 11-1261 (issued December 6, 2011). In a decision dated October 12, 2012, the Board affirmed a March 5, 2012 OWCP decision that held that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 12-1065 (issued October 12, 2012). On March 24, 2014 the Board affirmed an April 3, 2013 OWCP decision, finding again that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 14-0070 (issued March 24, 2014).

⁷ Docket No. 15-1897 (issued October 20, 2015).

⁸ Docket No. 16-1059 (issued September 19, 2016).

Appellant again requested reconsideration by letter dated October 4, 2016, received on October 7, 2016. She argued that the job offer was inadequate as it was not approved by her physician, failed to include dates of availability, and was not in writing after a doctor's approval. Appellant asserted that the claims examiner had given the employing establishment 30 days to provide a proper job offer in a March 3, 1993 letter, and the claims examiner recognized the job offer was incomplete and failed to vacate the April 17, 1992 decision. She argued that OWCP had ignored medical evidence regarding her work limitations.

By decision dated October 25, 2016, OWCP found the reconsideration request was untimely filed. It denied merit review, finding the reconsideration request failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁹ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹⁰

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.¹¹ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹³ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵

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

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.605 (2012).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

¹³ 5 U.S.C. §§ 8101-8193.

¹⁴ 20 C.F.R. § 10.607 (2012). For OWCP decisions from June 1, 1987 to August 28, 2011, the reconsideration request must be mailed within one year of OWCP's decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1402.4(e) (October 2011).

¹⁵ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁹

ANALYSIS

This case has been before the Board on multiple prior appeals with regard to the issue of clear evidence of error. The last decision on the merits of the claim was the March 25, 1993 decision, denying modification of an April 17, 1992 determination that appellant had refused an offer of suitable work. The application for reconsideration dated October 4, 2016 was more than one year after the March 25, 1993 decision and thus is untimely. Therefore, appellant must demonstrate clear evidence of error by OWCP.

In prior appeals, the Board has found that appellant repeatedly argued that the 1992 job offer was inadequate, not properly sent to OWCP, failed to include dates of availability, was not approved by a physician, and was in violation of OWCP regulations. The October 7, 2016 reconsideration request again asserts that the job offer was inadequate as it was not approved by her physician, failed to include dates of availability, and was contrary to medical evidence. Appellant noted a March 3, 1993 letter sent by OWCP to the employing establishment requesting information. All of these arguments have been raised by her and addressed in prior appeals.²⁰ The argument that the job offer was procedurally inadequate and medically unsuitable has been raised and considered by the Board.²¹ The Board has held that the evidence of record does not demonstrate clear evidence of error with respect to the job offer. With the current application for reconsideration appellant submitted no new evidence and again argued the job offer was invalid. The Board's prior decisions are *res judicata*, as OWCP did not further review the merits, and the arguments will not be further reviewed on this appeal.²²

¹⁶ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁸ *Id.*

¹⁹ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

²⁰ In the February 8, 2011 Board decision, for example, the Board noted appellant continued to raise arguments that the employing establishment did not properly respond to a March 5, 1993 OWCP letter. Docket No. 10-1335 (issued February 8, 2011); *supra* note 10.

²¹ *See, e.g.*, Docket No.11-1261 (issued December 6, 2011).

²² *See J.F.*, Docket No. 14-1589 (issued November 24, 2014); *see also J.V.*, Docket No. 14-0788 (issued October 19, 2015).

Appellant's application for reconsideration was untimely filed. A claimant may receive a merit review only if clear evidence of error is demonstrated. On appeal appellant reiterates her argument that the April 17, 1992 OWCP decision was erroneous. The Board finds that she has not demonstrated clear evidence of error, and therefore OWCP properly denied her application for reconsideration in this case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 25, 2016 is affirmed.

Issued: June 7, 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