



On appeal appellant asserts that the medical evidence submitted establishes that she was totally disabled beginning July 25, 2006 until she retired on November 1, 2009.

### **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 56-year-old mail processor, sustained an employment-related post-concussion syndrome and panic disorder without agoraphobia on September 25, 2005 when she was struck on the head by a shelf. She returned to four hours of modified duty on March 18, 2006, and to eight hours of modified duty on July 18, 2006. Appellant resumed a four-hour workday on July 25, 2006, and submitted claims for compensation for four hours a day. OWCP paid appellant wage-loss compensation benefits through July 15, 2006. After missing full and partial days from work, appellant resumed full-time, full-duty work on or around July 18, 2016. She returned to a part-time schedule on July 25, 2006 and filed claims for compensation (Forms CA-7) for wage-loss on July 25, 2006 and continuing.

By decision dated December 11, 2006, OWCP denied appellant's claim for compensation from July 25, 2006 and continuing. On December 4, 2007 appellant, through her counsel at the time, requested reconsideration. In a merit decision dated January 3, 2008, OWCP denied modification of its prior decision, finding the medical evidence of record insufficient to establish total disability during the claimed period.

Appellant subsequently appealed to the Board and, by October 6, 2008 decision, the Board affirmed the January 3, 2008 OWCP decision.<sup>3</sup>

Appellant retired, effective November 1, 2009.

On October 31, 2011 appellant again requested reconsideration on the issue of whether she was entitled to back pay beginning July 25, 2006, when she began working four hours a day. In a nonmerit decision dated November 9, 2011, OWCP denied appellant's October 31, 2011 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant filed a timely appeal with the Board and, in a November 14, 2012 decision, the Board affirmed the November 9, 2011 decision.<sup>4</sup>

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<sup>3</sup> Docket No. 08-1217 (issued October 6, 2008).

<sup>4</sup> Docket No. 12-1214 (issued November 14, 2012); *petition for recon. denied* (issued March 25, 2013).

Appellant continued to submit requests for reconsideration and claims to OWCP asserting that she was entitled to back pay from July 25, 2006 to October 31, 2009.<sup>5</sup>

On June 6, 2017 appellant again requested reconsideration, asserting that she was entitled to compensation for the period July 25, 2006 to October 28, 2009. Evidence submitted on reconsideration included an incomplete January 5, 2011 report in which Dr. Andrew Hendrix, a Board-certified physiatrist, described physical examination findings and diagnosed myofascial pain, depression, and anxiety. Caryn S. Feldman, a licensed clinical psychologist, performed psychological and pain assessments on January 5 and 27, 2011. She diagnosed chronic pain and advised that appellant was not a candidate for a chronic pain management program at that time.

In reports dated February 6 and April 16, 2012, Dr. Shana L. Margolis, a Board-certified physiatrist, noted a history of anxiety, panic attacks, headache, neck pain, and right upper extremity pain since 2005 when she was hit by a metal shelf. She reviewed Dr. Hendrix's report and described physical examination findings. She diagnosed myofascial pain, depression, and anxiety.

In a report dated May 23, 2012, Dr. David A. Olmstead, a Board-certified internist, who began treating appellant in 2005, advised that appellant was last seen on October 19, 2011 at which time her symptoms of dizziness and headaches were unchanged since onset after her work injury on September 25, 2005. He advised that these symptoms were fixed and permanent, and attached a list of diagnoses made from December 2005 to November 2006.

In reports dated June 11 and 25, 2012, Dr. Harold McGrath, a psychiatrist, noted the history of injury and his diagnosis of major depression. He advised that appellant had therapy for 12 months and reached maximum medical improvement on November 27, 2006. Dr. McGrath advised that, even though appellant tried to return to work in July 2006, she could not because she could not focus and had disabling headaches, dizziness, fatigue, anxiety, panic attacks, and nausea, all of which were due to the employment injury.

On an emergency room report dated October 18, 2013, Dr. Timothy H. Lamb, Board-certified in internal and emergency medicine, diagnosed gastritis.

In a July 6, 2012 statement, a person named S.S. described appellant's September 25, 2005 injury, treatment, and continuing symptoms.<sup>6</sup>

By decision dated June 9, 2017, OWCP denied appellant's June 6, 2017 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>5</sup> On August 3, 2015 appellant again appealed to the Board. In an order dismissing appeal dated November 16, 2015, the Board found that the record did not contain an appealable OWCP decision. Docket No. 15-1664 (issued November 16, 2015).

<sup>6</sup> S.S. is not further identified with regard to her relationship with appellant.

## LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.<sup>8</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System.<sup>9</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>10</sup>

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>11</sup> 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 shows clear evidence of error on the part of OWCP.<sup>12</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* 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>13</sup>

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued,

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<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

<sup>9</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

<sup>10</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>11</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>12</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

<sup>13</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>14</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>15</sup>

### ANALYSIS

In its June 9, 2017 decision, OWCP properly determined that appellant's request for reconsideration was untimely filed. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.<sup>16</sup> The last merit decision in this case was dated October 6, 2008. Because appellant's request for reconsideration was received on June 6, 2017, more than one year after the October 6, 2008 merit decision, OWCP properly determined that it was untimely filed.<sup>17</sup> Therefore, appellant must demonstrate clear evidence of error on the part of OWCP with regard to its June 9, 2017 decision.

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

The evidence submitted to the record following the November 9, 2011 nonmerit OWCP decision, consists of a number of medical reports. The only reports discussing appellant's work capacity, the underlying merit issue in this case, are those of Dr. McGrath. The Board finds these reports insufficient to raise a substantial question as to the correctness of OWCP's decision. Both OWCP and the Board had previously reviewed reports from Dr. McGrath. While he indicated in his June 2012 reports that appellant stopped work due to disabling symptoms that were caused by the September 25, 2005 employment injury, as noted, evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>18</sup> Appellant did not otherwise submit medical evidence addressing the cause of her disability during the underlying period at issue.<sup>19</sup>

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the January 3, 2008 OWCP decision, appellant has not established that OWCP committed error in refusing to provide a merit review of its June 9, 2017 decision.<sup>20</sup>

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<sup>14</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>15</sup> *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>16</sup> 20 C.F.R. § 10.607(a).

<sup>17</sup> *Id.* at § 10.607(a) (2011).

<sup>18</sup> *E.D.*, Docket No. 16-0708 (issued January 17, 2017).

<sup>19</sup> *See F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

<sup>20</sup> *Supra* note 15.

For these reasons, OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

**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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 27, 2017  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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