



## **FACTUAL HISTORY**

This case has previously been before the Board. On July 12, 2005 appellant, then a 46-year-old modified clerk, filed a traumatic injury claim (Form CA-1) for a June 21, 2005 left hand/wrist injury that she claimed was due to activities during an employer-sponsored functional capacity evaluation (FCE). In a March 1, 2006 decision, OWCP denied the claim because the medical evidence failed to establish that the claimed left wrist/hand condition resulted from the accepted employment event. After a request for hearing, by decision dated October 18, 2006, a representative of the Branch of Hearings and Review affirmed OWCP's March 1, 2016 decision. After many subsequent reconsideration requests, OWCP denied modification of decisions dated February 7, April 12, July 10, 2007, and February 22, 2008.

After appeals to the Board, in a decision dated October 7, 2008, the Board affirmed OWCP's April 12 and July 10, 2007, and February 22, 2008 merit decisions.<sup>3</sup> In a decision dated September 21, 2011, the Board affirmed a November 29, 2010 nonmerit decision of OWCP denying appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>4</sup> In a November 13, 2013 decision, the Board affirmed an April 8, 2013 nonmerit decision of OWCP denying her request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>5</sup> In an April 10, 2015 decision, the Board determined that appellant's July 21, 2014 reconsideration request was untimely filed and failed to demonstrate clear evidence of error.<sup>6</sup> When the case was last on appeal on January 30, 2017, the Board affirmed OWCP's January 27, 2016 nonmerit decision finding that appellant's November 6 and December 31, 2015 requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.<sup>7</sup> The facts and circumstances surrounding the Board's January 30, 2017 decision, as well as the prior appeals are incorporated herein by reference.

On March 8, 2017 OWCP received a February 25, 2017 letter from appellant entitled "Reconsideration on Limited Review of Evidence Previously of Record." She argued that prior

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<sup>3</sup> Docket No. 08-1167 (issued October 7, 2008). The Board subsequently denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 09-1167 (issued June 17, 2009).

<sup>4</sup> Docket No. 11-0685 (issued September 21, 2011). In a July 25, 2012 decision, the Board issued an *Order Dismissing Appeal*, Docket No. 12-70 (issued July 25, 2012). In that decision, the Board found that the record did not contain a final adverse decision under Docket No. 12-0070 and that appellant's October 3, 2011 request would be treated as a timely petition for reconsideration, which would proceed under Docket No. 11-0685. On August 30, 2012 the Board denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 11-0685 (issued August 30, 2012).

<sup>5</sup> Docket No. 13-1478 (issued November 13, 2013).

<sup>6</sup> Docket No. 15-1298 (issued April 10, 2015). On October 14, 2015 the Board denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 15-0298 (issued October 14, 2015).

<sup>7</sup> Docket No. 16-0748 (issued January 30, 2017). While the appeal was pending before the Board, OWCP issued a March 15, 2016 nonmerit decision denying appellant's February 22, 2016 request for reconsideration because it was untimely filed and she failed to demonstrate clear evidence of error. When a case is on appeal to the Board, OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal. 20 C.F.R. § 10.626; *see, e.g., Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004).

submissions had been timely, and accused OWCP of having lost a handwritten letter she sent on July 8, 2009. Appellant also argued that a previously submitted surveillance video had been altered and reiterated that her left hand/wrist was injured during the June 21, 2005 FCE. She provided a copy of a February 15, 2017 letter from the Clerk of the Appellate Boards, as well as January 27 and February 22, 2016 correspondence addressed to the Board. Additionally, appellant submitted a 5-page document that included descriptions of footage contained in the previously referenced surveillance video.

In a decision dated May 3, 2017, OWCP declined to reopen appellant's claim for consideration of the merits. It found that she had not submitted sufficient new evidence or a new relevant argument to require merit review of her claim.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>8</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>9</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>10</sup> OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."<sup>11</sup> The request must establish on its face that such decision was erroneous.<sup>12</sup> Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>13</sup>

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<sup>8</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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). *Id.* at Chapter 2.1602.4b. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be "mailed" to OWCP within one year of OWCP's decision for which review is sought. *Id.* at Chapter 2.1602.4e.

<sup>11</sup> *Id.* at § 10.607(b).

<sup>12</sup> *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>13</sup> 20 C.F.R. § 10.608(b).

When a request is timely filed, a different standard of review applies. A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>14</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>15</sup>

### ANALYSIS

The Board conducted a merit review of appellant's case on October 7, 2008. Appellant had one year from the date of that decision, or until October 7, 2009, to file a reconsideration request with OWCP.<sup>16</sup> Her March 8, 2017 request for reconsideration was received more than one year after the October 7, 2008 merit decision and was, therefore, untimely.<sup>17</sup> Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

In denying appellant's March 8, 2017 reconsideration request, OWCP did not determine whether the request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the wrong standard of review to appellant's untimely request for reconsideration, the Board will set aside the May 3, 2017 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.<sup>18</sup>

### CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>14</sup> *Id.* at § 10.606(b)(3).

<sup>15</sup> *Id.* at § 10.608(a), (b).

<sup>16</sup> *Id.* at § 10.607.

<sup>17</sup> *Id.* OWCP incorrectly identified the issue as whether the evidence presented warranted review of the "decision dated [January 30, 2017]." As noted, the referenced decision was a nonmerit decision issued by the Board.

<sup>18</sup> *See* 20 C.F.R. § 10.607(b); *W.L.*, Docket No. 15-1842 (issued January 14, 2016); *L.D.*, Docket No. 15-0865 (issued October 6, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: October 13, 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