

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 13, 1993 appellant, then a 34-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on August 31, 1993 she experienced sharp pains down both legs, and in her back, hip, and groin after assisting a patient from bed to a shower chair, aiding with the shower, and then pushing the patient back to bed. OWCP accepted appellant's claim for low back strain. Appellant returned to light duty on January 21, 1994 and stopped work on January 22, 1994.

To further develop appellant's claim, OWCP referred appellant to Dr. Gerald Steiman, a Board-certified orthopedist, to determine whether appellant was totally disabled from work. In a report dated December 9, 1994, Dr. Steiman opined that appellant continued to have injury-related residuals which precluded her from returning to her date-of-injury position. In a work capacity evaluation dated May 11, 1995, he provided permanent work restrictions noting appellant should limit bending, stooping, and crouching, lifting up to 75 to 100 pounds with assistance, and lifting under 70 pounds without help. Dr. Steiman noted that appellant could return to work full time.

Appellant was also referred to Dr. Roslyn Pariser, a Board-certified psychiatrist, on May 30, 1995, who diagnosed major depression and borderline personality disorder. She opined that appellant could perform various functions associated with work including returning to her former workplace, communicating and cooperating with coworkers and supervisors, interacting with the public, organizing and completing work assignments, and maintaining acceptable levels of concentration and pace while at work.

On June 12, 1995 appellant was referred for vocational rehabilitation services based on Dr. Steiman's and Dr. Pariser's recommendations and restrictions.

On July 21, 1995 the employing establishment offered appellant a full-time limited-duty position as a licensed practical nurse. The position was within the physical limitations established by Dr. Steiman. The position was effective July 31, 1995 with a tour of duty from 10:00 a.m. to 6:30 p.m. and an annual salary of \$25,022.00 a year. Appellant was asked to indicate her acceptance/declination of the job offer by completing an enclosed form and returning it to the employing establishment by July 28, 1995.

In a July 24, 1995 letter, OWCP informed appellant that the July 21, 1995 job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or to present to OWCP reasons for refusing it. OWCP noted that at the end of the 30-day period, a final decision on the matter would be made. If appellant did not accept the employing establishment's offer, the explanation or evidence provided would be considered in determining whether her refusal to accept the position was justified.

On July 25, 1995 appellant responded to the employing establishment, but did not indicate specifically whether she was accepting or declining the job offer. In handwritten notations on the provided form, she noted that since she had been off work for more than one year, she was informed that she should have any updated information on her medical restrictions noted. Appellant indicated that she had scheduled an appointment with her treating physician for an evaluation, and that she would have them review the job offer.

On August 17, 1995 appellant contacted OWCP by telephone expressing concern about the job offer, upset that she was being “forced back to work.” She indicated that she was not capable of performing the outlined job duties. OWCP advised that a determination had been made that the offered position was within her established work restrictions. Appellant was advised that, if she was refusing the job offer, she must submit her reasons for refusal and provide any additional medical evidence. She was informed of examples of valid reasons for refusing a job offer. On August 22, 1995 appellant contacted OWCP by telephone and indicated that the employing establishment offered her a job that her physician found that she could not perform. Similarly, on August 24, 1995 she contacted OWCP and reiterated her concerns about the job offer. Appellant indicated that the employing establishment would perform a fitness-for-duty examination and find the job unsuitable. She believed that the medical evidence submitted showed that she could not perform the duties of the position. OWCP directed appellant to put her specific objections and concerns in writing so that they could be considered. It provided her with a fax number that she could use to submit her objections.

In a decision dated August 28, 1995, OWCP terminated appellant’s claim for compensation, finding that the evidence of record established that she refused suitable work under 5 U.S.C. § 8106(c)(2). It noted that she neither accepted the offered position, nor did she provide any specific written objections to the offered position in response to OWCP’s July 24, 1995 letter. However, OWCP found that her lack of response to the job offer could only be construed as a refusal of suitable work.

By letter dated July 24, 1996, received by OWCP on August 2, 1996, appellant requested reconsideration. She indicated that she reported for duty as ordered and spoke to J.W., but was informed that the offered position was no longer available. On August 16, 1996 appellant was removed from employment because she was physically unable to perform the duties of a licensed practical nurse.

In a decision dated October 18, 1996, OWCP denied appellant’s request for reconsideration of the merits of her claim, finding that the evidence submitted was immaterial and repetitive.

On January 15, 2016 appellant, through counsel, again requested reconsideration of the August 28, 1995 termination decision. Counsel asserted that the July 24, 1995 letter from OWCP afforded appellant 30 days to either accept the position or present reasons for refusing the position, but that the letter provided no direction that the objection had to be in writing. Additionally, he noted that she made several telephone calls to discuss her concerns about the job offer. Counsel noted that, although appellant put her objections to the job offer in writing on August 24, 1995 as verbally advised by OWCP, they were not considered because OWCP states that they were not received prior to the August 28, 1995 termination decision. He asserted that there were two procedural errors in this matter: appellant was not instructed in the July 24, 1995

letter to submit her reasons of refusal of the job offer in writing and OWCP did not provide appellant 15 days to report to work without penalty after considering and rejecting appellant's reasons for refusing suitable work.

By decision dated April 11, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

Clear evidence of error is intended to represent a difficult standard.⁷ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁸ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.¹⁰

³ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011).

⁷ *D.G.*, 59 ECAB 455 (2008).

⁸ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

ANALYSIS

The Board finds that OWCP properly found that appellant's January 15, 2016 reconsideration request was untimely filed. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹¹ As appellant's request for reconsideration was not received by OWCP until January 15, 2016, more than one year after the August 28, 1995 termination decision, it was untimely filed.

Consequently, appellant must demonstrate clear evidence of error by OWCP in its decision to terminate compensation benefits due to refusal of suitable work. The Board finds that appellant failed to demonstrate clear evidence of error on the part of OWCP. In the January 15, 2016 reconsideration request, counsel disagreed with OWCP's termination decision, contending that OWCP committed two procedural errors in appellant's case: first, OWCP did not instruct appellant to submit her objections in writing when, in its July 24, 1995 letter, it afforded her 30 days to either accept the job offer or present reasons for refusing the position; and second, OWCP failed to provide appellant 15 days to report to work without penalty after considering and rejecting appellant's reasons for refusing suitable work.¹²

The Board finds that counsel's allegations are insufficient to demonstrate that OWCP erred in its August 28, 1995 termination decision, as the evidence of record fails to establish that appellant expressly rejected the July 21, 1995 job offer. The Board notes that OWCP's July 24, 1995 letter directed appellant to either accept the position or present reasons for refusing the job. Appellant verbally asserted concerns with her ability to perform the job in an August 17, 1995 telephone call. In additional calls on August 22 and 24, 1995 she expressed fear that she was being asked to perform a job her physician did not feel she could perform and that the medical evidence showed was not suitable. However, appellant never specifically stated that she was refusing the offered position, nor did she provide reasons explaining her refusal. Although OWCP verbally directed appellant during the August 24, 1995 telephone call to put her objections in writing, and provided a fax number for her use, appellant did not respond by the time the termination decision was issued on August 28, 1995. Thus, there was no error in OWCP's issuing the termination decision without affording appellant an additional 15 days to accept the offered position.¹³

The Board, therefore, finds that appellant's January 15, 2016 reconsideration request does not raise a substantial question as to the correctness of OWCP's termination decision. Appellant has failed to demonstrate clear evidence of error.

On appeal appellant, through counsel, reiterates the same assertions made before OWCP in the January 15, 2016 reconsideration request. As explained above, appellant has not demonstrated clear evidence of error in OWCP's August 28, 1995 termination decision.

¹¹ 20 C.F.R. § 10.607(a).

¹² Board precedent contemplates that OWCP will advise the employee that the work offered is suitable and provides 30 days for the employee to accept the job or present reasons to counter OWCP's suitability finding. If the employee presents such reasons and OWCP finds them unreasonable, OWCP will offer the employee an additional 15 days to accept the job without penalty. *Sandra K. Cummings*, 54 ECAB 493 (2003).

¹³ *Id.*

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 April 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2017
Washington, DC

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

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

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