



## ISSUE

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

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are summarized below.

OWCP accepted that appellant, then a 39-year-old mail handler, sustained bilateral tendinitis of the hands and wrists, right shoulder tendinitis with C7 radiculopathy, and a herniated disc at C6-7 resulting from her repetitive federal employment duties as of February 27, 1998. In a September 1, 1998 letter, appellant reported that her employment had been terminated July 1, 1998, as her temporary employment had expired. She filed claims for compensation (Forms CA-7) and was referred for vocational rehabilitation services.

In a note dated October 16, 1998, Dr. Michael Treister, a Board-certified orthopedic surgeon, indicated that appellant could return to limited duty with no frequent repetitive movements of the right upper extremity. By report dated January 28, 1999, he wrote that appellant indicated that she was feeling better. Dr. Treister indicated that no further orthopedic treatment was recommended. He noted that appellant had complaints of swelling in the hands when used, but he could not relate it to the neck problem, nor were her symptoms typical of carpal tunnel syndrome.

By letter dated February 9, 1999, OWCP advised appellant it proposed to terminate her wage-loss compensation and medical benefits based on the medical evidence from Dr. Treister. Appellant was afforded 30 days to respond if she disagreed with the proposed termination.

Dr. Treister submitted a February 15, 1999 report indicating that he had treated appellant on January 28, 1999. He opined that appellant could return to work as a mail handler.

In a letter dated February 16, 1999, appellant advised OWCP that she had retained counsel. She submitted a letter dated March 5, 1999, relating that counsel would like to speak with the claims examiner before a final decision was issued. Appellant requested that OWCP call counsel before issuing a final decision.

The record contains a March 12, 1999 note from OWCP indicating the case was discussed with counsel. The note indicated that counsel reported that appellant was in a six-week training program and inquired as to whether compensation could continue during the training program. OWCP advised counsel that compensation ceased when the medical evidence of record showed the work injury had resolved. According to the note, counsel was advised that a final decision would probably be issued within the next week. The appeals process was also discussed.

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<sup>4</sup> Docket No. 00-0158 (issued November 21, 2000).

By decision dated March 15, 1999, OWCP terminated appellant's wage-loss compensation and medical benefits. It found the weight of the evidence was represented by Dr. Treister.

In a letter dated June 15, 1999, appellant, through counsel, requested a hearing before an OWCP hearing representative. By decision dated August 12, 1999, OWCP found that the hearing request was untimely. It exercised its discretion and considered the hearing request, but determined that the issue could equally well be addressed by requesting reconsideration and submitting new evidence. Appellant appealed to the Board.

By decision dated November 21, 2000, the Board affirmed the March 15, 1999 and August 12, 1999 OWCP decisions.<sup>5</sup> The Board found that OWCP had met its burden of proof to terminate compensation, effective March 15, 1999. In addition, the Board found that OWCP had properly denied the hearing request.

On January 27, 2016 appellant filed a request for reconsideration dated January 23, 2016. She reviewed the prior decisions in the case. Appellant argued that OWCP did abuse its discretion, as counsel tried to meet with OWCP on March 5 and 12, 1999, prior to the March 15, 1999 decision. She accused the claims examiner of "stalling tactics" and asserted that counsel was unable to become familiar with the case. Appellant also contended that there were due process violations when OWCP failed to allow counsel 30 days to review the evidence and failed to provide a hearing. She further asserted that she continued to have residuals of the employment injury and OWCP did not meet its burden of proof.

By decision dated April 12, 2016, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.<sup>6</sup>

### **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.<sup>7</sup> 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."<sup>8</sup>

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.<sup>9</sup> This section vests OWCP with discretionary authority to

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<sup>5</sup> *Supra* note 3.

<sup>6</sup> The decision was initially issued on March 24, 2016 using a different address. The April 12, 2016 decision was reissued with appellant's current address.

<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.605 (2012).

<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

determine whether it will review an award for or against compensation.<sup>10</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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 claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>14</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>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> 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.<sup>17</sup>

### ANALYSIS

In the present case, the last decision on the merits of the claim was the Board's November 21, 2000 decision. Appellant's request for reconsideration was dated and mailed January 23, 2016.<sup>18</sup> For OWCP decisions prior to August 29, 2011, appellant had one year to mail a reconsideration request.<sup>19</sup> Since the reconsideration request was received more than one year after the last merit decision, it was untimely filed.

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<sup>10</sup> 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."

<sup>11</sup> 5 U.S.C. §§ 8101-8193.

<sup>12</sup> 20 C.F.R. § 10.607.

<sup>13</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>14</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>15</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>16</sup> *Id.*

<sup>17</sup> *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

<sup>18</sup> The certified mail receipt number shows a mailing date of January 23, 2016.

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (October 2011).

Consequently, appellant must demonstrate clear evidence of error by OWCP. She argues that OWCP erred in that counsel attempted to meet with OWCP prior to the final decision terminating her compensation benefits. OWCP provided appellant a pretermination notice dated February 9, 1999 in accordance with established procedures.<sup>20</sup> Appellant therefore had an opportunity to provide relevant evidence on the issue. OWCP explained that the issue was a medical issue and the termination was based on evidence from the treating physician, Dr. Treister. Furthermore, the record indicates that counsel did discuss the case with OWCP on March 12, 1999. No relevant medical evidence was submitted prior to the March 15, 1999 termination decision.

Appellant had an opportunity to timely exercise appeal rights from the March 15, 1999 decision. Her hearing request was dated June 15, 1999, more than 30 days after the March 15, 1999 decision. Appellant was not entitled to a hearing as a matter of right, and OWCP properly exercised its discretion in denying the hearing request.<sup>21</sup>

There is no evidence of a due process violation<sup>22</sup> or other evidence that would demonstrate clear evidence of error in this case. OWCP followed its procedures in terminating appellant's wage-loss compensation and medical benefits on March 15, 1999, and in denying her request for a hearing. Appellant was given a pretermination notice and provided appeal rights, including a right to a hearing. The Board finds that appellant failed to demonstrate clear evidence of error in this case. OWCP properly declined to review the merits of the claim.

On appeal appellant asserts that OWCP issued a March 24, 2016 merit decision denying her claim for loss of wage-earning capacity. She discusses issues that include earnings, retirement, disability, and permanent impairment, indicating that she believes the issues before the Board includes whether she has established compensable work factors, and whether she has supported her claim with probative and reliable evidence. As to March 24, 2016, this represented the date of the original clear evidence of error decision, which was sent to an old address. The decision on appeal is the reissued April 12, 2016 decision, finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. OWCP had issued a March 15, 1999 decision terminating compensation based on the medical evidence of record, and an August 12, 1999 decision denying her request for a hearing. The only issue on appeal is whether appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error by OWCP in its March 15 or August 12, 1999 decisions. Based on the evidence of record, and for the reasons discussed above, the Board finds that OWCP properly found appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>20</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (March 1997); current regulations regarding pretermination notices are found at Chapter 2.1400.4 (February 2013). The Board notes that appellant did not designate a representative until after the February 9, 1999 pretermination notice.

<sup>21</sup> See *Mary E. Hite*, 42 ECAB 641, 647 (1991).

<sup>22</sup> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

**CONCLUSION**

The Board finds 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 April 12, 2016 is affirmed.

Issued: September 5, 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