

**United States Department of Labor  
Employees' Compensation Appeals Board**

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C.D., Appellant )

and )

**DEPARTMENT OF THE NAVY, NORFOLK )  
NAVAL SHIPYARD, Portsmouth, VA, Employer )**

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**Docket No. 17-1915  
Issued: February 21, 2018**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 8, 2017 appellant filed a timely appeal from March 24 and April 3, 2017 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision on the underlying issue was a Board decision dated August 25, 1999, which became final after 30 days of issuance and is not subject to further review.<sup>1</sup> OWCP has not issued a merit decision since the Board's August 25, 1999 decision. As the March 24 and April 3, 2017 nonmerit decisions are the only decisions issued within 180 days of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c), and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

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

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<sup>1</sup> 20 C.F.R. § 501.6(d); *see D.A.*, Docket No. 08-1217 (issued October 6, 2008).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal appellant asserts that, in denying her claim, her rights have been violated and she has been denied due process of law.

### **FACTUAL HISTORY**

This case has previously been before the Board. In an August 25, 1999 decision, the Board found that appellant did not meet her burden of proof to establish that claimed fibromyalgia and myofascial pain in her neck, shoulder, and right arm were causally related to factors of her federal employment. The Board affirmed July 14 and March 28, 1997 and November 12, 1996 OWCP decisions.<sup>3</sup> In a June 22, 2007 decision, the Board found that, as appellant's August 28, 2005 reconsideration request was untimely filed and because she failed to demonstrate clear evidence of error, OWCP properly denied a merit review of her claim in an April 7, 2006 decision.<sup>4</sup> The facts as presented in the prior Board decision are incorporated herein by reference.

Subsequent to the Board's June 22, 2007 decision, in a letter dated January 16, 2017, received by OWCP on January 31, 2017, appellant referenced both OWCP claims.<sup>5</sup> She submitted correspondence and medical reports previously of record. In a letter dated and received by OWCP on March 14, 2017, appellant requested reconsideration of File No. xxxxxx122, the instant claim.

New medical evidence received subsequent to OWCP's April 7, 2006 decision consisted of a procedure note for an epidural injection dated September 7, 2005 from a provider with an illegible signature. In a November 28, 2007 report, Dr. Hossan Hassan, a Board-certified family physician, indicated that appellant had widespread myofascial pain, which he felt to be consistent with fibromyalgia syndrome and headaches. He advised that she was permanently disabled. In a July 24, 2008 report, Dr. Robert B. Hansen, a Board-certified neurologist, noted that appellant had been his patient for many years, but that he had no knowledge of her condition since he last saw her on November 19, 2004. He referenced a report he previously authored on November 19, 2004. Dr. Hassan provided an attending physician's report (Form CA-20) dated February 18, 2009 in which he diagnosed myofascial pain and fibromyalgia. He checked a box marked "yes," indicating that the condition was employment related, stating, "per previous [physician,] pain stems directly from [appellant's] work." Dr. Hassan advised that appellant could never return to work.

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<sup>3</sup> Docket No. 97-2798 (issued August 25, 1999), *denying petition for recon.*, Docket No. 97-2798 (issued May 25, 2000). On May 19, 1996 appellant, then a 54-year-old supply clerk, filed an occupational disease claim (Form CA-2) alleging that severe pain in her shoulders, neck, and right upper extremity were due to the constant use of computers and typewriters at work. She had retired from her federal employment on October 1, 1993. The notification of personnel action (SF-50) indicated that appellant retired to take advantage of the employing establishment's separation incentive. The instant case was adjudicated by OWCP under File No. xxxxxx122. The record indicates that appellant has a second case, adjudicated by OWCP under File No. xxxxxx656. Only File No. xxxxxx122 is presently before the Board.

<sup>4</sup> Docket No. 06-1849 (issued June 22, 2007).

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

In a nonmerit decision dated March 24, 2017, OWCP denied appellant's reconsideration request as it was untimely filed and she failed to demonstrate clear evidence of error on the part of OWCP. Appellant again requested reconsideration on March 28, 2017. She submitted nothing further.

By decision dated April 3, 2017, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

### **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>6</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>7</sup> Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System.<sup>8</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 of FECA.<sup>9</sup>

OWCP may not deny an application for review solely because 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 demonstrates clear evidence of error.<sup>10</sup> OWCP's 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 demonstrates clear evidence of error on the part of OWCP.<sup>11</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

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<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</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>8</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>9</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>10</sup> *See* 20 C.F.R. § 607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>11</sup> *Id.* at § 607(b); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

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>12</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, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>13</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>14</sup>

### ANALYSIS

The Board finds that, in its March 24 and April 3, 2017 decisions, OWCP properly determined that appellant's multiple requests for reconsideration were 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>15</sup> The last merit decision in this case was dated August 25, 1999. Because appellant's requests for reconsideration were received on March 14 and 28, 2017, more than one year after the August 25, 1999 merit decision, OWCP properly determined that these requests were untimely filed.<sup>16</sup> Therefore, she must demonstrate clear evidence of error on the part of OWCP with regard to the March 24 and April 3, 2017 decisions.

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

The evidence submitted to the record following the April 7, 2006 nonmerit OWCP decision consisted of several medical reports. The only report discussing causal relationship, the underlying merit issue in this case, is the February 18, 2009 attending physician's report from Dr. Hassan. While he checked a box marked "yes," and indicated that "per previous [physician.] pain stems directly from [appellant's] work," the Board has long held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without sufficient rationale, as here, that opinion is of diminished probative value and is insufficient to establish a claim.<sup>17</sup> Moreover, 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

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<sup>12</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>13</sup> *Supra* note 7 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>14</sup> *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>15</sup> 20 C.F.R. § 10.607(a).

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

<sup>17</sup> *Sedi L. Graham*, 57 ECAB 494 (2006).

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.<sup>19</sup>

Regarding appellant's due process claim, the United States Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures. As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim. The Federal courts retain jurisdiction over decisions under FECA where there is a charge of a violation of a clear statutory mandate or where there is a constitutional claim.<sup>20</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 OWCP's last merit decision dated July 14, 1997, appellant has not established that OWCP committed error in refusing to provide merit review by its March 24 and April 3, 2017 decisions.<sup>21</sup>

### CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration as the requests were untimely filed and failed to demonstrate clear evidence of error.

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<sup>18</sup> *Supra* note 13.

<sup>19</sup> The Board notes that the November 19, 2004 report referenced by Dr. Hansen had previously been reviewed by both OWCP and the Board in its June 22, 2007 decision.

<sup>20</sup> See *Woodruff v. U.S. Department of Labor*, 954 F.2d 634 (11<sup>th</sup> Cir. 1992); *Andrew Fullman*, 57 ECAB 574 (2006).

<sup>21</sup> *D.A.*, Docket No. 17-1503 (issued November 27, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 3 and March 24, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 21, 2018  
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