



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> In the most recent appeal, by decision issued December 14, 2015,<sup>4</sup> the Board affirmed a nonmerit decision of OWCP dated June 10, 2015, which denied appellant's April 8, 2015 request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In support of her April 8, 2015 request for an oral hearing, appellant submitted a January 29, 2015 letter from Dr. Christian Altman, an anesthesiologist. She also submitted January 26, 2015 pulmonary function test results without interpretation and a computerized tomography (CT) scan of the chest which demonstrated minimal interstitial scarring and three micronodules. The Board found that appellant was not entitled to a hearing as a matter of right as she had previously requested reconsideration under 5 U.S.C. § 8128(a) with regard to OWCP's May 22, 2006 denial of her occupational disease claim for a respiratory condition. OWCP's May 22, 2006 decision was the only merit decision issued by OWCP in this claim.<sup>5</sup> The Board further found that OWCP properly exercised its discretion in denying appellant's request for a hearing as the issue in the case could also be pursued through a request for reconsideration and the submission of additional evidence. The facts and circumstances of the claim as set forth in the Board's prior decision are hereby incorporated by reference.

On November 29, 2016 appellant requested reconsideration with OWCP of the Board's December 14, 2015 decision. She contended that OWCP erred in denying her February 14, 2015 request for reconsideration as Dr. Altman's report and the two imaging studies were new, relevant, and pertinent evidence meeting the requirements of 20 C.F.R. § 10.606(b)(3). Appellant also asserted that the Board had erred by affirming OWCP's denial of her request for reconsideration. She also argued that OWCP did not develop the medical evidence in her claim as she had not been referred for a second opinion examination. Appellant referred generally to sections of OWCP's regulations at 20 C.F.R. § 10.126, OWCP's procedures, and various Board precedents regarding OWCP's duty to see that justice is done. Appellant did not submit additional evidence in support of her November 29, 2016 request.

By decision dated February 27, 2017, OWCP denied reconsideration of the Board's December 14, 2015 decision, finding that appellant's November 29, 2016 letter was not relevant and pertinent new evidence. It found that appellant's assertions were insufficient to warrant reopening her claim for a merit review.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an

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<sup>3</sup> Docket No. 06-1980 (issued December 15, 2006); Docket No. 09-2374 (issued June 17, 2010); Docket No. 15-1679 (issued December 14, 2015).

<sup>4</sup> Docket No. 15-1679 (issued December 14, 2015).

<sup>5</sup> The Board's December 15, 2006 merit decision affirmed OWCP's May 22, 2006 decision.

award for or against payment of compensation at any time on his or her own motion or on application.<sup>6</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that 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>

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original merit decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include preresoupment hearing decisions.<sup>8</sup> Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees' Compensation System). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>9</sup>

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>10</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>11</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>12</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<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(b) (February 2016).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.607.

<sup>11</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>12</sup> *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

## ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded to OWCP for the application of the appropriate standard of review.<sup>13</sup>

Following requests for reconsideration and OWCP nonmerit decisions denying those requests, on April 8, 2015, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. OWCP denied appellant's April 8, 2015 request for an oral hearing by nonmerit decision dated June 10, 2015. Appellant subsequently appealed to the Board. By decision dated December 14, 2015, the Board affirmed OWCP's June 10, 2015 nonmerit decision. Appellant requested reconsideration of the Board's December 14, 2015 decision by letter received by OWCP on November 29, 2016.<sup>14</sup> In a February 27, 2017 decision, OWCP denied appellant's reconsideration request.

The Board finds that in its February 27, 2017 decision, OWCP erroneously applied the standard of review for timely requests for reconsideration as set forth in 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(3). OWCP's procedures provide that a request for reconsideration must be received within one year of the date of the most recent merit decision.<sup>15</sup> The last merit decision of record in this case was the Board's December 15, 2006 decision. As appellant's November 29, 2016 request for reconsideration was received more than one year after the December 15, 2006 merit decision, the request was untimely filed.<sup>16</sup> The appropriate standard of review for untimely reconsideration requests is the clear evidence of error standard.<sup>17</sup> As such, the Board will remand the case to OWCP for application of the clear evidence of error standard as set forth in 20 C.F.R. § 10.607(b).<sup>18</sup>

Following any necessary further development, OWCP shall issue an appropriate decision.

## CONCLUSION

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

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<sup>13</sup> See *P.L.*, Docket No. 17-0146 (issued October 24, 2017); *K.K.*, Docket No. 16-1187 (issued February 7, 2017); *E.B.*, Docket No. 16-0746 (issued June 1, 2016).

<sup>14</sup> The Board notes that OWCP is not authorized to review Board decisions. Board decisions are not subject to review except by the Board and they become final after 30 days. Although the December 15, 2006 Board decision was the last merit decision of record, OWCP's June 22, 2005 initial denial is the appropriate subject of possible modification by OWCP. See 20 C.F.R. § 501.6(d).

<sup>15</sup> *Supra* note 8.

<sup>16</sup> *T.E.*, Docket No. 16-0574 (issued August 18, 2016); see also *John W. O'Connor*, 42 ECAB 797 (1991).

<sup>17</sup> See *Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>18</sup> *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 27, 2017 is set aside, and the case is remanded for further action consistent with this decision.

Issued: January 18, 2018  
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