



## ISSUE

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

## FACTUAL HISTORY

OWCP accepted that on September 30, 2003 appellant, then a 42-year-old management program specialist, was struck by a loaded passenger van backing out of a parking spot, causing contusions and blunt trauma to her left shoulder, left hand, and left foot. Appellant was out of work from October 7 to 28, 2003, and then returned to full duty on October 29, 2003. She was followed through February 2, 2004 by Dr. Eduardo R. Locatelli, an attending Board-certified neurologist, for musculoskeletal pain, status post motor vehicle accident.

On September 30, 2004 under a separate claim,<sup>4</sup> appellant filed a traumatic injury claim (Form CA-1) alleging that on August 4, 2004 a coworker pushed her into a wall. She stopped work on September 11, 2004. The employing establishment separated appellant from employment on September 15, 2004.

On November 16, 2006 appellant filed claims (CA-7 forms) for wage-loss compensation for the periods January 23 to February 28, 2004, and August 17, 2004 to November 18, 2006.

In a November 21, 2006 development letter, OWCP notified appellant of the additional evidence needed to establish her claims for wage loss, including medical evidence establishing disability for work during the claimed periods. It afforded appellant 30 days to submit such evidence.

Appellant provided a November 17, 2006 report from Dr. Joseph J. Czerkowski, an attending Board-certified internist, diagnosing chronic pain syndrome of the left foot and both upper extremities. Dr. Czerkowski released appellant to full duty with no restrictions. Appellant also submitted physical therapy notes dated in September and October 2004, pelvic and sacroiliac x-rays dated October 1, 2004, and 2005 treatment notes for sinusitis and a subconjunctival hemorrhage.

By decision dated January 4, 2007, OWCP denied appellant's claims for wage-loss compensation from January 23 to February 28, 2004 and August 17, 2004 to November 18, 2006, finding that the medical evidence of record did not establish that the accepted left shoulder, hand, and foot contusions totally disabled her from work for the dates claimed.

On January 22, 2007 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She submitted a January 16, 2007 report from Dr. Czerkowski, diagnosing bilateral foot and leg pain. By decision dated May 14, 2007, a hearing representative affirmed OWCP's January 4, 2007 decision, finding that the

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<sup>4</sup> OWCP File No. xxxxxx337. OWCP denied the claim, finding that the evidence of record was insufficient to establish fact of injury.

medical evidence of record failed to establish that appellant was totally disabled from work during the claimed periods due to the accepted employment injuries.

Dr. Czerkowski provided December 6 and 14, 2007 reports diagnosing chronic lumbosacral pain, with resolved bilateral foot and leg pain had resolved. He found appellant able to perform full duty with no restrictions.<sup>5</sup>

OWCP referred appellant for a second opinion examination by Dr. Robert Smith, a Board-certified orthopedic surgeon, scheduled for January 21, 2008. Appellant did not attend the examination. OWCP rescheduled an appointment for February 5, 2008.

By notice dated January 23, 2008, OWCP advised appellant of its proposed suspension of her compensation as she failed to attend the January 21, 2008 second opinion examination. It afforded appellant 14 days to submit evidence or argument showing good cause for not attending the examination. In response, appellant submitted a letter stating that she would not attend the rescheduled February 5, 2008 examination. Appellant did not attend the February 5, 2008 second opinion examination.

By decision dated February 8, 2008, OWCP suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d), finding that she refused to comply with a scheduled second opinion examination without showing good cause.

On March 4, 2008 appellant requested a review of the written record. By decision dated June 25, 2008, an OWCP hearing representative affirmed the February 8, 2008 suspension of appellant's compensation, finding that she did not present a reasonable explanation for her failure to attend the January 21, 2008 or rescheduled February 5, 2008 second opinion examination.

Appellant submitted additional reports from Dr. Czerkowski dated from June 2008 to June 2009, diagnosing chronic lumbar pain with underlying spondylosis and degenerative disc disease.

In letters received by OWCP on November 4, 2016, appellant requested reconsideration of the January 4, 2007 decision denying claimed wage-loss compensation benefits. She contended that the employing establishment removed her without cause, leading to periods of homelessness and health crises.

In support of her request for reconsideration, appellant submitted a November 16, 2007 physical therapy prescription slip from Dr. Kathleen Burger, an attending Board-certified neurologist. She also provided correspondence dated from April 2000 through May 2016 to and from the Merit Systems Protection Board, Equal Employment Opportunity Commission, Office of Special Counsel, Office of Personnel Management, Federal Bureau of Investigation, Supreme Court of the United States, various circuit courts, state unemployment and rehabilitation commissions, local police departments, departments of motor vehicles, debt collection agencies, a mortgage lender, medical billing offices, and a volunteer agency. Additionally, appellant

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<sup>5</sup> Appellant also submitted January 2008 physical therapy notes.

submitted her statements reiterating various aspects of her compensation claim, and copies of documents previously of record and considered by OWCP.

By decision dated November 17, 2016, OWCP denied appellant's November 4, 2016 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. It explained that because her reconsideration request of OWCP's May 14, 2007 merit decision was received on November 4, 2016, it was not filed within the one-year time limitation. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence that OWCP's May 14, 2007 decision was in error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>6</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>7</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>9</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>10</sup>

In those cases where requests for reconsideration are untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.<sup>11</sup> Its regulation provides that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulation, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.<sup>12</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>14</sup> Evidence which does not raise a

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>8</sup> *Thankamma Mathews, id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>9</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority. See *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>10</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 6 and *Jesus D. Sanchez, supra* note 7.

<sup>11</sup> *Thankamma Mathews, supra* note 7.

<sup>12</sup> 20 C.F.R. § 10.607(b).

<sup>13</sup> *Thankamma Mathews, supra* note 7.

<sup>14</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

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> 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 by OWCP.<sup>17</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>18</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision with regard to the claimed wage-loss benefits on May 14, 2007. Appellant requested reconsideration by letters received by OWCP on November 4, 2016, more than one year from the issuance of the May 14, 2007 decision.<sup>19</sup> OWCP denied the request by November 17, 2016 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. As the November 4, 2016 reconsideration request was untimely filed, it must now be determined whether the request demonstrated clear evidence of error in OWCP's May 14, 2007 decision.

In her November 4, 2016 letters, several additional statements, and correspondence to various courts and agencies, appellant contended that the employing establishment wrongfully dismissed her on September 15, 2004. The Board finds that this argument is irrelevant to the claim. It does not raise a substantial question as to whether the May 14, 2007 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, these documents are insufficient to establish clear evidence of error.<sup>20</sup>

Appellant also submitted reports from 2007 to 2009 from Dr. Czerkawski, an attending Board-certified internist, addressing lumbosacral pain, a condition not accepted by OWCP. Therefore, they are irrelevant to the critical issue in the claim and do not demonstrate clear evidence of error.<sup>21</sup>

Appellant also provided copies of documents previously of record. Repetitive or cumulative evidence is insufficient to *prima facie* shift the weight of the evidence in favor of the

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<sup>15</sup> *Jesus D. Sanchez*, *supra* note 8.

<sup>16</sup> *Leona N. Travis*, *supra* note 14.

<sup>17</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>18</sup> *Gregory Griffin*, *supra* note 9.

<sup>19</sup> The request was also received more than one year after the June 25, 2008 merit decision affirming the suspension of compensation.

<sup>20</sup> *Leona N. Travis*, *supra* note 14.

<sup>21</sup> *Id.*

claimant.<sup>22</sup> Appellant has not sufficiently explained how the resubmission of this evidence demonstrates clear evidence of error.<sup>23</sup>

The Board finds that the additional evidence submitted does not demonstrate clear evidence of error. Appellant has not provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's May 14, 2007 merit decision. Consequently, the Board finds that OWCP properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

On appeal appellant contends that the employing establishment wrongfully removed her from employment because she sustained an occupational injury. This argument does not pertain to the pertinent issue on appeal.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>22</sup> *A.M.*, Docket No. 17-1434 (issued January 2, 2018); *D.B.*, Docket No. 16-0539 (issued May 26, 2016).

<sup>23</sup> *A.M.*, *id.*; *see also A.M.*, Docket No. 10-0526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 17, 2016 is affirmed.

Issued: March 12, 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