

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

C.B., Appellant	)	
	)	
and	)	<b>Docket No. 18-0372</b>
	)	<b>Issued: October 3, 2018</b>
DEPARTMENT OF THE ARMY, CORPS OF	)	
ENGINEERS, Galveston, TX, Employer	)	
	)	

*Appearances:*  
Stephanie Leet, Esq., for the appellant<sup>1</sup>  
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 December 12, 2017 appellant, through counsel, filed a timely appeal from a June 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated July 18, 2014, to the filing 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 over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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

<sup>3</sup> The record provided the Board includes evidence received after OWCP issued its June 21, 2017 decision. The Board's jurisdiction is limited to the evidence in the case record that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing evidence not before OWCP at the time of the June 21, 2017 for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## ISSUE

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

## FACTUAL HISTORY

On November 4, 2003 appellant, a 45-year-old civil engineer, filed a traumatic injury claim (Form CA-1) alleging that she injured her tailbone while at work on October 31, 2003 as a result of "boating on rough seas" when the boat hit a wave it sent her into the air and slamming her into her seat "landing right on [her] tailbone." OWCP accepted the claim for fractured coccyx and lumbar strain.

On June 27, 2006 appellant filed a claim for a schedule award (Form CA-7).

By decision dated September 21, 2007, OWCP denied appellant's schedule award claim because the medical evidence of record failed to establish a ratable impairment of a scheduled member.

On April 8, 2014 appellant filed a notice of recurrence (Form CA-2a) alleging that she was totally disabled for work as of July 15, 2009 due to her need for additional medical treatment. She further indicated that the date of her first medical treatment following the recurrence was August 15, 2009.

By decision dated July 18, 2014, OWCP denied the claim because the medical evidence of record failed to establish that appellant required additional medical treatment due to a worsening of her accepted work-related conditions, without intervening cause.

On July 24, 2015 appellant requested reconsideration and submitted additional medical evidence, most of which predated the date of the claimed recurrence of disability.

By decision dated August 4, 2015, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

In a January 18, 2016 letter, received by OWCP on March 16, 2016, counsel requested that OWCP expand the acceptance of appellant's claim to include bulging discs at L3-4, L4-5, L5-S1 with radiculopathy, chronic pain syndrome, spondylosis of the lumbar spine, and sacroiliitis.

In an undated letter, received by OWCP on June 9, 2017, counsel reiterated the request for OWCP to expand the acceptance of appellant's claim to include additional medical conditions because appellant's "neck and back condition start[ed] as back sprain and closed fracture sacrum coccyx with spinal cord injury" and "after subsequent testing and examinations were done, there are now diagnos[e]s of bulging discs at L3-4, L4-5, L5-S1 with radiculopathy, chronic pain syndrome, spondylosis of the lumbar spine, and [sacroiliitis]."

Appellant submitted a November 6, 2015 report from Dr. Lenny Jue, a Board-certified anesthesiologist and pain medicine specialist, who indicated that she sustained a work-related injury on October 31, 2003. Dr. Jue opined that the injury caused a diagnosis of closed fracture of the sacrum and coccyx with spinal cord injury and sprain of the back, which were initially stable.

He concluded that over the past few years appellant's conditions included bulging disc radiculopathy, chronic pain syndrome, and sacroiliitis that restarted around July 15, 2009, but was caused by the original injury on October 31, 2003. Dr. Jue opined that her current injuries were part of the normal progression of her accepted diagnoses.

In a January 4, 2016 report, Dr. Jue diagnosed lumbar spondylosis and lumbar radiculopathy.

Appellant also submitted a June 22, 2016 report from an unidentifiable healthcare provider who advised that she was capable of sedentary duty with physical restrictions for walking, standing, bending, and climbing.

Appellant further resubmitted medical reports and diagnostic testing results dated November 17, 2003, January 5 and June 14, 2004, July 11, 2005, January 6 and August 2, 2006, October 20 and November 30, 2011, February 13, 2013, and March 7, 2014. Additionally, she submitted a medical information sheet from Dr. Mikhail Fukshansky, a physiatrist and pain medicine specialist, who recommended that appellant work from home to reduce muscle strain and manage her pain level, and that she should only report to the office when necessary.

By decision dated June 21, 2017, OWCP accepted counsel's letters received on March 16, 2016 and June 9, 2017 as requests for reconsideration and denied them because they were untimely filed and failed to demonstrate clear evidence of error. It noted that appellant's case had been closed prior to her requests for reconsideration on July 18, 2014 and it could not expand conditions on a closed case.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>4</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> One such limitation 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>6</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>7</sup>

Section 10.607(b) provides that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>8</sup>

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<sup>4</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> See *Jesus D. Sanchez*, *supra* note 4; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>8</sup> 20 C.F.R. § 10.607(b).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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 on the part of OWCP.<sup>13</sup>

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value 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>14</sup> The Board makes 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>15</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.<sup>16</sup> The Board has held that, for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System.<sup>17</sup> The most recent merit decision was OWCP's July 18, 2014

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<sup>9</sup> See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

<sup>10</sup> See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>11</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>12</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>13</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>15</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>16</sup> 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); see *Veletta C. Coleman*, *supra* note 14.

decision denying appellant's recurrence claim. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since her requests were not received by OWCP until March 16, 2016 and June 9, 2017, they were filed outside the one-year time period.<sup>18</sup> As appellant's March 16, 2016 and June 9, 2017 requests for reconsideration were received more than one year after the July 18, 2014 merit decision, they were untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.<sup>19</sup>

The record shows that OWCP mailed its July 18, 2014 decision to appellant's last known address. Accordingly, the Board finds that OWCP's July 18, 2014 decision was properly issued on that date and her March 16, 2016 and June 9, 2017 requests for reconsideration were not timely filed as they were not received with one year of the date of issuance of that decision.

By decision dated July 18, 2014, OWCP denied appellant's recurrence claim because the evidence of record failed to establish that there was a material change in the nature and extent of her injury-related condition, causing renewed disability for work or necessary medical treatment as of July 15, 2009. In support of her untimely requests for reconsideration, appellant submitted reports from Dr. Jue who diagnosed lumbar spondylosis and lumbar radiculopathy and opined that these conditions were causally related to her accepted employment injury. She also submitted a June 22, 2016 report from an unidentifiable healthcare provider who advised that she was capable of sedentary duty with physical restrictions for walking, standing, bending, and climbing. Appellant further resubmitted medical reports and diagnostic testing results dated November 17, 2003, January 5 and June 14, 2004, July 11, 2005, January 6 and August 2, 2006, October 20 and November 30, 2011, February 13, 2013, and March 7, 2014. She also submitted June 21, 2011 report from Dr. Fukshansky which discussed his preference that she primarily work from home. The Board finds that this evidence does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's recurrence claim, nor raise a substantial question as to the correctness of OWCP's decision.

To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>20</sup> None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim for a recurrence of total disability. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

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<sup>18</sup> OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. *See* 20 C.F.R. § 10.607 (2011); *see also* C.B., Docket No. 13-1732 (issued January 28, 2014) (where the Board held that, for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in IF ECS). Therefore, OWCP utilized the new regulations and found that, as OWCP received appellant's request for reconsideration on May 12, 2017, or over one year after the May 9, 2016 decision, appellant's request was untimely filed.

<sup>19</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (February 2016); *see Dean D. Beets*, *supra* note 9.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 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