

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

M.M., Appellant)	
)	
and)	Docket No. 18-0622
)	Issued: October 2, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Atlanta, GA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 30, 2018 appellant filed a timely appeal from a January 17, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated October 13, 2011, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 8, 1989 appellant, then a 41-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her back on October 26, 1988 while attempting to remove a mailbag from a hamper. OWCP accepted the claim for a herniated disc at L4-5 and subluxation from C5 to T3. Appellant stopped work on the date of injury and did not return.

By decision dated June 8, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that same date based upon the opinion of Dr. Walter C. Edwards, a Board-certified orthopedic surgeon, serving as OWCP's impartial medical examiner.

On July 26, 2010 appellant requested reconsideration. By decision dated September 2, 2010, OWCP denied modification of its June 8, 2010 termination decision.

On January 25, 2011 appellant appealed to the Board. By decision dated October 13, 2011, the Board affirmed the termination of her wage-loss compensation and medical benefits. The Board further found that appellant had not established continuing residuals or disability following the termination of compensation.³

Appellant requested reconsideration on January 5, 2018. In support of her request she submitted a February 18, 2016 report in which Dr. Plas T. James, a Board-certified orthopedic surgeon, related that he initially saw her on December 3, 2015. Dr. James noted appellant's complaints of severe back and neck, right arm, and right leg pain. He noted that she advised that she was in her usual state of health until 1987 when she developed lower back pain while working, which resolved. In December 1989, however, appellant injured her back and neck when lifting mail at work. Dr. James indicated that she had been disabled from work since 1999. Following physical examination and review of magnetic resonance imaging scan reports, he diagnosed L5-S1 foraminal stenosis, L4-S1 facet arthropathy, and C3-4 and C4-5 spinal stenosis. Dr. James concluded, "We feel [appellant] is totally and permanently disabled due to the injuries she has sustained."

By decision dated January 17, 2018, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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

² Docket No. 11-0690 (issued October 13, 2011); Docket No. 98-1505 (issued November 3, 1998).

³ Docket No. 11-0690 (issued October 13, 2011).

decision for which review is sought.⁴ Timeliness is determined by the document receipt date, as indicated by the “received date” in OWCP’s Integrated Federal Workers’ Compensation System.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 of FECA.⁶

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrated clear evidence of error.⁷ 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.⁸

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 be 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 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.⁹

OWCP’s 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. 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.¹⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹¹

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).

⁹ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *Supra* note 5 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹¹ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ANALYSIS

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

Appellant had one year from the last merit decision to request reconsideration. The last merit decision was the Board's October 13, 2011 decision. The Board finds that, as appellant's request for reconsideration was not received until January 5, 2018, more than one year after the Board's October 13, 2011 decision, her request for reconsideration was untimely filed.¹² Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board further finds that appellant failed to demonstrate clear evidence of error. In her reconsideration request, appellant maintained that Dr. James' report was sufficient to outweigh that of Dr. Edwards. The issue in OWCP's last merit decision was whether she had met her burden of proof to establish that she continued to be disabled from work after the June 8, 2010 termination of her wage-loss compensation and medical benefits. In his February 18, 2016 report, Dr. James merely reiterated a history appellant had provided and concluded that she had been disabled from work since 1999 due to injuries she sustained.

The term "clear evidence of error" is intended to represent a difficult standard, and the argument appellant provides is not the type of positive, precise, and explicit evidence which is manifest on its face that OWCP committed an error.¹³ 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.¹⁴

As the evidence and argument submitted on reconsideration are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's last merit decision, dated September 2, 2010, she failed to demonstrate clear evidence of error.¹⁵ The Board, therefore, finds that OWCP properly denied her untimely request for reconsideration.¹⁶

On appeal, appellant generally contends that the medical evidence of record is sufficient to establish that she continues to be disabled from work. As explained above, the Board lacks jurisdiction to review the merits of this case.¹⁷

¹² *Supra* note 5.

¹³ *Supra* note 11.

¹⁴ *E.D.*, Docket No. 16-0708 (issued January 17, 2017).

¹⁵ *P.S.*, Docket No. 17-1707 (issued February 9, 2018).

¹⁶ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).

¹⁷ *Id.* at §§ 501.2(c), 501.3.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 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