

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

M.Y., Appellant	)	
	)	
and	)	<b>Docket No. 18-1772</b>
	)	<b>Issued: April 9, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Sunnyvale, CA, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 13, 2018 appellant filed a timely appeal from a March 22, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated November 7, 2016, 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.

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 22, 2018, the date of OWCP's last decision was September 18, 2018. Since using September 19, 2018, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is September 13, 2018, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

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

## ISSUE

The issue is whether OWCP properly denied appellant's March 20, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

On June 28, 2014 appellant, then a 59-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on June 4, 2014, she sustained sciatica after lifting magazines from the bottom of a mail hamper while in the performance of duty. She stopped work on June 12, 2014. On the reverse side of the claim form, the employing establishment controverted the claim noting that the date of injury specified on the Form CA-1 conflicted with that provided on the medical reports.

By decision dated August 13, 2014, OWCP denied appellant's traumatic injury claim. It found that she had not factually established the occurrence of the alleged June 4, 2014 employment incident, noting that the medical evidence indicated differing dates of injury.

Appellant, on August 21, 2014, requested an oral hearing before an OWCP hearing representative.

Following a December 3, 2014 hearing, by decision dated February 6, 2015, OWCP's hearing representative affirmed the August 13, 2014 decision as modified to find that appellant had established the occurrence of the June 4, 2014 employment incident. He found, however, that appellant failed to establish a medical diagnosis in connection with the accepted June 4, 2014 employment incident.

Appellant, on February 2, 2016, authorized John Casey to represent her before OWCP. On February 3, 2016 appellant, through her then-representative, requested reconsideration.

By decision dated May 9, 2016, OWCP modified its February 6, 2015 decision to find that appellant established both the factual and medical components of fact of injury. However, it denied her traumatic injury claim, finding that she failed to establish causal relationship.

On August 11, 2016 appellant, through her then-representative, again requested reconsideration.

Appellant, on August 17, 2016, provided written notice to OWCP that John Casey was no longer her representative. She specified Alan Apfelbaum as her then-representative. On August 22, 2016 appellant withdrew all other representative designations and advised that Mr. Apfelbaum was her sole representative in matters regarding her OWCP claim.

By decision November 7, 2016, OWCP denied modification of its May 9, 2016 decision. It found that appellant had not submitted reasoned medical evidence establishing causal relationship between a diagnosed condition and the accepted June 4, 2014 employment incident.

Mr. Casey, on November 28, 2017, indicated that he had submitted a request for reconsideration on behalf of appellant on November 6, 2017.<sup>3</sup> On December 20, 2017 he inquired about the status of that reconsideration request.

OWCP, in a January 4, 2018 response, informed Mr. Casey that it was unable to communicate with him as appellant had not designated him as her authorized representative. It enclosed instructions regarding how to designate a representative before OWCP.

On February 22, 2018 appellant again authorized Mr. Casey as her representative before OWCP.

By letter dated March 8, 2018, OWCP advised Mr. Casey that it had not received a request for reconsideration subsequent to its November 7, 2016 decision.

Mr. Casey, on March 20, 2018, provided a copy of the November 6, 2017 letter requesting reconsideration. The November 6, 2017 request for reconsideration was signed by Mr. Casey. He further enclosed a certified mail receipt indicating that an envelope had been mailed to OWCP on November 6, 2017.

In support of appellant's request for reconsideration, Mr. Casey submitted an October 20, 2017 report from Dr. Peter Wu, who specializes in family medicine. Dr. Wu found that she had continued limitations from a June 4, 2014 employment injury. He indicated that appellant's work activities on June 4, 2014 had aggravated her underlying lumbar condition. Dr. Wu noted that a magnetic resonance imaging (MRI) scan study showed a bulging disc. He opined that appellant had continued limitations and disability resulting from her June 4, 2014 employment injury.

By decision dated March 22, 2018, OWCP denied appellant's March 20, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that Mr. Casey was not her authorized representative at the time that he may have requested reconsideration by letter dated November 6, 2017. OWCP further found that the medical evidence from Dr. Wu was insufficient to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal

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<sup>3</sup> The Board notes that the record does not show that a November 6, 2017 request for reconsideration was received prior to March 20, 2018.

<sup>4</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>8</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</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 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.<sup>10</sup>

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

<sup>7</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>9</sup> *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

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

## ANALYSIS

The Board finds that OWCP properly denied appellant's March 20, 2018 request for reconsideration<sup>13</sup> as it was untimely filed and failed to demonstrate clear evidence of error.

An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>14</sup> As appellant's request for reconsideration was not received by OWCP until March 20, 2018, more than one year after the issuance of its November 7, 2016 decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its November 7, 2016 decision.<sup>15</sup>

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its November 7, 2016 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its November 7, 2016 decision.<sup>16</sup> OWCP denied her claim as she failed to submit medical evidence sufficient to establish that she had sustained a diagnosed condition causally related to the accepted June 4, 2014 employment incident. In a report dated October 20, 2017, Dr. Wu opined that appellant had aggravated an underlying lumbar condition at work on June 4, 2014. He indicated that she continued to experience limitations resulting from her claimed June 4, 2014 employment injury. While Dr. Wu diagnosed an aggravation of a lumbar condition due to a June 4, 2014 employment injury, as previously noted, clear evidence of error is intended to represent a difficult standard.<sup>17</sup> Even the submission of a detailed, well-rationalized report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, does not constitute clear evidence of error.<sup>18</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion.<sup>19</sup> Instead, the evidence must shift the weight in appellant's

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<sup>13</sup> With the March 20, 2018 reconsideration request, J.C. enclosed a request for reconsideration he had signed and dated November 6, 2017. He provided a certified mail receipt showing that an envelope was mailed to OWCP on that date. Mr. Casey, however, was not appellant's authorized representative as of November 6, 2017. OWCP's implementing regulations clearly provide that for a representative to be recognized by OWCP, the claimant must submit a signed written notice to OWCP appointing the representative. Appellant advised OWCP in writing on August 17, 2016 that Mr. Casey was no longer her authorized representative. She instead had designated Mr. Apfelbaum as her representative. Appellant signed an authorization form on February 22, 2018 again designating Mr. Casey as her authorized representative before OWCP. There is no evidence that Mr. Casey was appellant's authorized representative at the time the November 6, 2017 letter was submitted. Consequently, the November 6, 2017 correspondence is not a request for reconsideration of OWCP's November 7, 2016 decision as it was not signed by appellant or her authorized representative. *See* 20 C.F.R. § 10.700(a).

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>16</sup> *See R.M.*, Docket No. 18-1393 (issued February 12, 2019).

<sup>17</sup> *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

<sup>18</sup> *E.K.*, Docket No. 18-0422 (issued August 22, 2018).

<sup>19</sup> *Id.*

favor.<sup>20</sup> The Board finds that the October 20, 2017 report from Dr. Wu does not rise to the level of clear evidence of error.<sup>21</sup>

Appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying her claim. She has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.<sup>22</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's March 20, 2018 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> *R.S.*, Docket No. 18-0505 (issued July 24, 2018).

<sup>21</sup> *See E.B.*, Docket No. 18-1091 (issued December 28, 2018).

<sup>22</sup> *See M.B.*, Docket No. 17-1505 (issued January 9, 2018).