

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

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<b>B.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-1786</b>
	)	<b>Issued: April 17, 2019</b>
<b>DEPARTMENT OF THE ARMY, TEST &amp; EVALUATION COMMAND, White Sands, NM, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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 September 24, 2018 appellant filed a timely appeal from a June 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 30, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

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

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 28, 2012 appellant, then a 48-year-old information technology (IT) specialist (customer support), filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her back on February 28, 2012 while moving and lifting metal desks while in the performance of duty. OWCP accepted the claim for sprain of back, lumbar region. It placed appellant on the periodic compensation rolls effective May 6, 2012.

Appellant returned to full-time, light-duty work from November 25 to December 16, 2013 and then took sick leave on December 17 and 18, 2013. She stopped work on December 19, 2013 and did not return. Appellant was removed from federal employment effective July 26, 2014 for failure to meet a condition of employment and failure to maintain a regular schedule.

By decision dated January 14, 2014, the Board affirmed OWCP's July 12, 2013 nonmerit decision denying appellant's request for an oral hearing and its March 28, 2013 merit decision suspending her compensation benefits effective April 7, 2013 due to her failure to attend a scheduled medical examination.

OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related condition. In a July 31, 2014 report, Dr. Hood reviewed a statement of accepted facts (SOAF), the history of injury, and the medical evidence of record. He conducted a physical examination and opined that appellant had a single soft tissue lumbar sprain without radiculopathy as a result of the February 28, 2012 incident and that her condition had resolved within a three-month period of time. Dr. Hood concluded that appellant had no disabling residuals related to her accepted February 28, 2012 employment injury and had reached maximum medical improvement as of May 28, 2012. He released her to full duty without restrictions.

On September 12, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period November 1, 2013 to November 1, 2014.

OWCP received work capacity evaluation forms (Form OWCP-5c) dated March 14, 2012 through June 21, 2017 from Dr. Johan Penninck, a Board-certified orthopedic surgeon, who advised that appellant was totally disabled for work.

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<sup>3</sup> Docket No. 13-1869 (issued January 14, 2014) (the Board found that OWCP had properly denied appellant's request for an oral hearing and affirmed OWCP's suspension of compensation benefits, pursuant to 5 U.S.C. § 8123(d), due to her failure to attend a medical examination).

By decision dated November 19, 2014, OWCP noted that appellant had previously been compensated for the period November 1 to 24, 2013, as well as four hours on December 19, 2013, four hours on January 20, 2014, four hours on February 24, 2014, four hours on March 28, 2014, and four hours on May 5, 2014. It found that she was not entitled to compensation for the period November 25 to December 18, 2013 because she was either working full time or on sick leave. Since appellant had been removed from employment effective July 26, 2014,<sup>4</sup> she was not entitled to wage-loss compensation for the period July 26 to November 1, 2014. OWCP further found that appellant had not met her burden of proof to establish the claimed disability for the remaining hours for the period December 19, 2013 to July 26, 2014 because the medical evidence of record did not establish a change in the nature or extent of her injury-related condition, or a change in the nature and extent of her light-duty requirements as the reports of Dr. Penninck were insufficient to establish disability from work.

On December 12, 2014 appellant timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held before an OWCP hearing representative on July 13, 2015.

By decision dated September 30, 2015, OWCP's hearing representative affirmed the denial of appellant's wage-loss compensation claim finding that the medical evidence of record failed to establish that she was totally disabled for the period December 19, 2013 to July 26, 2014, as it did not establish a change in the nature or extent of appellant's employment-related condition, or a change in the nature and extent of her light-duty requirements. She also noted that appellant had been paid total disability compensation for the period April 7 to July 7, 2013 based on her attendance at a second opinion appointment on July 31, 2014.

On August 18, 2017 appellant requested reconsideration. In support of her request she submitted an August 10, 2017 letter setting forth the basis of her request.

By decision dated November 16, 2017, OWCP denied appellant's request for reconsideration finding it was untimely filed and failed to demonstrate clear evidence of error.

Appellant subsequently submitted a January 9, 2018 prescription and medical report from Dr. Penninck who reiterated his diagnosis of sprain of ligaments of lumbar spine and indicated that appellant was not working, noting she was never able to get back to work.

On August 18, 2017 appellant requested reconsideration. She resubmitted her August 10, 2017 letter along with work capacity evaluation forms (Form OWCP-5c) dated January 9 and April 18, 2018 from Dr. Penninck who continued to opine that she was totally disabled from work. On April 27, 2018 appellant submitted another letter requesting reconsideration of her claim.

By decision dated June 28, 2018, OWCP denied appellant's request for reconsideration finding it was untimely filed and failed to demonstrate clear evidence of error. It found that Dr. Penninck's reports were insufficient to demonstrate that the September 30, 2015 decision was erroneous.

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<sup>4</sup> The Board notes that OWCP incorrectly indicated appellant's date of removal as July 22, 2014, instead of July 26, 2014.

## LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>5</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>6</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).<sup>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</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>9</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>10</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>11</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

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<sup>5</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>8</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>10</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

<sup>11</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>12</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

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

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP merit decision.<sup>14</sup> The most recent merit decision was OWCP's September 30, 2015 decision denying appellant's claim for wage-loss compensation. Appellant had one year from the date of that decision to make a timely request for reconsideration. Since appellant's request was not received by OWCP until August 18, 2017, it was filed outside the one-year time period.<sup>15</sup> As appellant's August 18, 2017 request for reconsideration was received more than one year after the September 30, 2015 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.<sup>16</sup>

In its September 30, 2015 decision, OWCP's hearing representative affirmed the denial of appellant's wage-loss compensation claim finding that the medical evidence of record failed to establish that she was totally disabled for the period December 19, 2013 to July 26, 2014, as it did not establish a change in the nature or extent of appellant's employment-related condition, or a change in the nature and extent of her light-duty requirements.

In support of her untimely request for reconsideration, appellant resubmitted an August 10, 2017 letter setting forth the basis of her request. She subsequently submitted an April 27, 2018 letter again noting her request for reconsideration. Appellant submitted work capacity evaluation forms (Form OWCP-5c) dated January 9 and April 18, 2018 from Dr. Penninck who continued to opine that she was totally disabled for work in addition to a previously submitted January 9, 2018 prescription and medical report from Dr. Penninck who reiterated his diagnosis of sprain of ligaments of lumbar spine and indicated that appellant was not working. The underlying issue is medical in nature, namely whether the record of evidence supports the claimed period of disability. The only new medical evidence are the various reports of Dr. Penninck which are substantially similar or repetitive of his prior opinions already reviewed by OWCP. The Board has held that repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the claimant.<sup>17</sup> The Board finds that none of the evidence submitted subsequent to the September 30, 2015 decision establishes that appellant was totally disabled for the claimed period. Therefore,

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<sup>12</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

<sup>13</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>14</sup> *Supra* notes 6 and 7.

<sup>15</sup> *Supra* note 6.

<sup>16</sup> *Id.*; *see also Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *P.B.*, Docket No. 18-0265 (issued September 5, 2018); *D.E.*, 59 ECAB 438 (2008).

this evidence fails to demonstrate clear evidence of error because it does not establish that OWCP committed an error in denying appellant's wage-loss compensation claim, nor does it raise a substantial question as to the correctness of OWCP's decision.

As the evidence and argument submitted 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, appellant has failed to demonstrate clear evidence of error.<sup>18</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2019  
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

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<sup>18</sup> See *W.A.*, Docket No. 18-0297 (issued July 18, 2018).