

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

Y.J., Appellant	)	
	)	
and	)	Docket No. 18-0495
	)	Issued: December 10, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Oakland, CA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 9, 2018 appellant filed a timely appeal from a November 13, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was an October 7, 2008 decision of the Board, which became final 30 days after issuance, and is not subject to further review.<sup>1</sup> As there was no merit decision issued by OWCP within 180 days from 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> 20 C.F.R. § 501.6(d).

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

<sup>3</sup> The Board notes that, following the November 13, 2017 decision, OWCP received additional evidence. 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 denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On July 12, 2005 appellant, then a 46-year-old modified clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left hand/wrist injury while in the performance of duty on June 21, 2005 when undergoing an employer-sponsored functional capacity evaluation (FCE). In a March 1, 2006 decision, OWCP denied the claim. It found that the medical evidence failed to establish that appellant's left wrist/hand condition resulted from the accepted employment incident.

Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. On October 18, 2006 an OWCP hearing representative affirmed the denial. OWCP subsequently requested reconsideration. By decisions dated February 7, April 12, and July 10, 2007, and February 22, 2008, OWCP reviewed the merits of appellant's claim but denied modification.

On March 11, 2008 appellant appealed to the Board. By decision dated October 7, 2008, the Board reviewed the merits of appellant's claim and found that she had not met her burden of proof to establish that she injured her left wrist during the employment-related June 21, 2005 FCE incident.

Appellant subsequently requested reconsideration. By decisions dated May 27 and June 1, 2010, OWCP denied appellant's requests for reconsideration, finding that they were insufficient to warrant a merit review of her claim. Appellant continued to request reconsideration. By decision dated November 29, 2010, OWCP denied appellant's requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error. Appellant continued to file appeals with the Board. By decisions dated September 21, 2011 and November 13, 2013, the Board affirmed OWCP's nonmerit decisions, finding that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.<sup>5</sup> Appellant continued to request reconsideration. On January 27, 2016 OWCP again denied appellant's November 6 and December 31, 2015 requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error. On March 7, 2016 appellant

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<sup>4</sup> Docket No. 17-1394 (issued October 13, 2017); Docket No. 16-0748 (issued January 30, 2017); Docket No. 15-0298 (issued April 10, 2015); Docket No. 13-1478 (issued November 13, 2013); Docket No. 12-0070 (issued July 25, 2012); Docket No. 11-0685 (issued September 21, 2011), *denying petition for recon.*, Docket No. 11-0685 (issued June 17, 2009); and Docket No. 08-1167 (issued October 7, 2008), *denying petition for recon.*, Docket No. 08-1167 (issued June 17, 2009).

<sup>5</sup> *Id.*

appealed to the Board. By decision dated January 30, 2017, the Board affirmed OWCP's January 27, 2016 nonmerit decision.

On March 8, 2017 appellant again requested reconsideration. She argued that OWCP had lost some of her evidence and she disagreed with OWCP that her prior reconsideration requests were untimely. Appellant provided a copy of a July 8, 2009 letter in which she indicated she was requesting reconsideration because reports from the FCE were inaccurate and 100 images of a previously submitted surveillance video had been altered. She also submitted documents previously of record regarding prior correspondence to and from the Board.

By decision dated May 3, 2017, OWCP declined to reopen the case on the merits. It found that appellant had not submitted sufficient new evidence or a new relevant argument to require merit review of her claim. Appellant appealed to the Board. By decision dated October 13, 2017,<sup>6</sup> the Board found that the case was not in posture for decision as OWCP had improperly applied the standard of review for a timely request for reconsideration. The Board explained that because the reconsideration request was untimely filed, appellant must demonstrate clear evidence of error on the part of OWCP. The Board remanded the case for an appropriate decision applying the clear evidence standard.<sup>7</sup>

Upon return of the case record, by decision dated November 13, 2017, OWCP again denied appellant's March 8, 2017 request for reconsideration, finding that it was untimely filed and failed 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>8</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>9</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>10</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>11</sup>

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<sup>6</sup> *Supra* note 4.

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *W.L.*, Docket No. 15-1842 (issued January 14, 2016); *L.D.*, Docket No. 15-0865 (issued October 6, 2015).

<sup>8</sup> 5 U.S.C. § 8128(a); *see R.T.*, Docket No. 19-0604 (issued September 12, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>11</sup> *See R.T.*, Docket No. 19-0604 (issued September 13, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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>12</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>13</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit, and must manifest on its face that OWCP committed an error.<sup>14</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>15</sup> 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>16</sup> OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>17</sup>

### 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.

The Board last conducted a merit review of appellant's case on October 7, 2008. Appellant had one year from the date of that decision, until October 7, 2009, to file a reconsideration request with OWCP.<sup>18</sup> As appellant's reconsideration request was received on March 8, 2017, more than one year after the October 7, 2008 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying her claim.<sup>19</sup>

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<sup>12</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 (1990).

<sup>13</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 10 at Chapter 2.1602.5 (February 2016).

<sup>14</sup> *R.C.*, Docket No. 18-1441 (issued October 21, 2019); *S.T.*, Docket No. 18-0925 (issued June 11, 2019).

<sup>15</sup> *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>16</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>17</sup> *C.M.*, Docket No. 19-0666 (issued October 23, 2019); *M.P.*, Docket No. 19-0200 (issued June 14, 2019).

<sup>18</sup> 20 C.F.R. § 10.607.

<sup>19</sup> *Id.* at § 10.607(b); *L.W.*, Docket No. 19-1186 (issued October 28, 2019); see *Debra McDavid*, 57 ECAB 149 (2005).

In her March 8, 2017 request for reconsideration, appellant repeated arguments made in her prior reconsideration requests, that her prior correspondence was timely and that OWCP lost some of her correspondence, including a handwritten letter that she timely sent on July 8, 2009. She also argued that 100 images of a previously submitted surveillance video had been altered. However, the underlying issue on reconsideration is whether appellant injured her left wrist during an employment-related FCE incident on June 21, 2005. This issue is medical in nature. As the underlying issue is medical in nature, this nonmedical evidence consisting of arguments, taking issue with surveillance images, and correspondence does not show that OWCP's denial of the claim was erroneous or raise a substantial question as to the correctness of the decision.<sup>20</sup>

Clear evidence of error is intended to represent a difficult standard. The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>21</sup> As appellant did not submit medical evidence which establishes on its face that OWCP improperly denied appellant's traumatic injury claim, she has not demonstrated clear evidence of error.<sup>22</sup>

### **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.

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<sup>20</sup> *S.D.*, Docket No. 17-1450 (issued January 8, 2018); *see, e.g., D.B.*, Docket No. 17-1197 (issued November 1, 2017).

<sup>21</sup> *K.S.*, Docket No. 18-1115 (issued October 28, 2019); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>22</sup> *Supra* note 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy 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