

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

C.D., Appellant	)	
	)	
and	)	Docket No. 19-0154
	)	Issued: May 7, 2019
DEPARTMENT OF THE NAVY, NORFOLK	)	
NAVAL SHIPYARD, Portsmouth, VA, Employer	)	
	)	

*Appearances:*  
Loretta Dennison, 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 October 26, 2018 appellant, through counsel, filed a timely appeal from a May 17, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The most recent merit decision was a Board decision dated August 25, 1999, which became final 30 days after issuance, and is not subject to further review.<sup>3</sup> As there was no merit decision by OWCP within

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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> Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 13, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0154 (issued March 13, 2019).

<sup>3</sup> 20 C.F.R. § 501.6(d); see *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>4</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 19, 1996 appellant, then a 54-year-old supply clerk, filed an occupational disease claim (Form CA-2) alleging that she developed severe pain in her shoulders, neck, and right upper extremity due to the constant use of computers and typewriters at work. She had retired from her federal employment on October 1, 1993.

OWCP denied appellant's claim by decisions dated November 12, 1996, and March 28 and July 14, 1997. Appellant appealed to the Board on September 15, 1997. In the last merit decision issued in this case, on August 25, 1999 the Board found that appellant had not met her burden of proof to establish that her alleged fibromyalgia and myofascial pain in her neck, shoulder, and right arm were causally related to factors of her federal employment.<sup>6</sup>

By decision dated June 22, 2007, the Board found that, as appellant's August 28, 2005 reconsideration request was untimely filed and failed to demonstrate clear evidence of error, OWCP's April 7, 2006 decision was proper.<sup>7</sup> By decision dated February 21, 2018, the Board found that OWCP properly denied appellant's March 14 and 28, 2017 requests for reconsideration because they were untimely filed and failed to demonstrate clear evidence of error. The Board, therefore, affirmed OWCP's decisions dated March 24 and April 3, 2017.<sup>8</sup>

On March 27, 2018 appellant again requested reconsideration. She submitted two medical reports previously of record including one page of December 9, 1996 correspondence from Dr. Bruce L. Tetalman, a Board-certified psychiatrist, in which he discussed myofascial pain. In an October 17, 2002 report, Dr. Robert B. Hansen, Board-certified in neurology and pain

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> Docket No. 17-1915 (issued February 21, 2018); Docket No. 06-1849 (issued June 22 2007); Docket No. 97-2798 (issued August 25, 1999).

<sup>6</sup> Docket No. 97-2798, *id.*

<sup>7</sup> Docket No. 06-1849, *supra* note 5.

<sup>8</sup> Docket No. 17-1915, *supra* note 5.

medicine, summarized appellant's care since 1993. He advised that appellant suffered from widespread myofascial pain felt to be consistent with fibromyalgia syndrome which rendered her disabled.

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

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA,<sup>9</sup> OWCP has the discretion to reopen a case for further merit review.<sup>10</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>11</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>12</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>13</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>14</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>15</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>16</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>17</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>18</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>19</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

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<sup>9</sup> *Supra* note 4.

<sup>10</sup> 5 U.S.C. § 8128(a); *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>13</sup> *J.W.*, *supra* note 10.

<sup>14</sup> 20 C.F.R. § 10.607(b); *M.E.*, Docket No. 18-1497 (issued March 1, 2019).

<sup>15</sup> *G.G.*, *supra* note 3; *see also* 20 C.F.R. § 10.607(b); *supra* note 12 at Chapter 2.1602.5 (February 2016).

<sup>16</sup> *M.E.*, *supra* note 14.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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

the new evidence demonstrates clear error on the part of OWCP.<sup>20</sup> 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>21</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>22</sup> 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.<sup>23</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>24</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 provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.<sup>25</sup> The last merit decision in this case was dated August 25, 1999. Because appellant's request for reconsideration was received on March 27, 2018, more than one year after the August 25, 1999 merit decision, OWCP properly determined that the request was untimely filed.<sup>26</sup> Therefore, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant failed to demonstrate clear evidence of error.

On reconsideration appellant submitted two medical reports to OWCP. These reports, however, were previously of record. Dr. Tetelman's December 9, 1996 report had been reviewed by the Board in its August 25, 1999 decision.<sup>27</sup> Dr. Hanson's October 17, 2002 report was reviewed by the Board in its June 22, 2007 decision. The Board's review of the previously submitted medical evidence of record is *res judicata* absent any further review by OWCP under

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<sup>20</sup> *Id.*

<sup>21</sup> *J.W.*, *supra* note 10.

<sup>22</sup> *Supra* note 12.

<sup>23</sup> *M.E.*, *supra* note 14.

<sup>24</sup> *Id.*

<sup>25</sup> 20 C.F.R. § 10.607(a).

<sup>26</sup> *Id.* at § 10.607(a).

<sup>27</sup> *Supra* note 6.

section 8128(a) of FECA and, therefore, the prior evidence need not be addressed again in this decision.<sup>28</sup> There is no newly submitted evidence.

Counsel asserts on appeal that, under the Federal Rules of Appellate Procedure the case should be reviewed on the merits of appellant's claim. The Federal Rules of Appellate Procedure govern procedures in the United States Courts of Appeal. Federal workers' compensation claims are governed by FECA.<sup>29</sup> The Board is a quasi-judicial body which has been delegated exclusive jurisdiction by Congress to hear and make final decisions on appeals from determinations of OWCP in claims of federal employees arising under FECA.<sup>30</sup> The *Rules of Procedure* which are applicable to the Employees' Compensation Appeals Board are found at 20 C.F.R. § 501 *et seq.* Thus, counsel's arguments are without merit.

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's August 25, 1999 decision, appellant has not met her burden of proof to demonstrate clear evidence of error.<sup>31</sup>

### **CONCLUSION**

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

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<sup>28</sup> See *N.M.*, Docket No. 18-1244 (issued March 4, 2019).

<sup>29</sup> *Supra* note 4.

<sup>30</sup> *Id.*; see *Clinton K. Yingling, Jr.*, 4 ECAB 529 (1952).

<sup>31</sup> *M.E.*, *supra* note 14.

**ORDER**

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

Issued: May 7, 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