



## 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

On May 21, 1997 appellant, then a 45-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury to her left hip on or prior to July 12, 1994 due to factors of her federal employment, which required continuous standing and physical exertion.<sup>4</sup> By decision dated September 5, 1997, OWCP denied her claim finding that the medical evidence of record failed to establish causal relationship between appellant's diagnosed left hip condition and the accepted factors of her federal employment. Appellant underwent an unauthorized total left hip arthroplasty on September 16, 1997.

Appellant subsequently requested an oral hearing before a hearing representative of OWCP's Branch of Hearings and Review, which was held on October 26, 1998.

By decision dated December 17, 1998, OWCP's hearing representative affirmed the prior decision finding the evidence of record insufficient to establish causal relationship between appellant's diagnosed left hip condition and the accepted factors of her federal employment.

On April 6, 2016 appellant's congressman inquired to OWCP regarding her claim.

In a letter dated May 5, 2016, OWCP informed the office of the congressman that it was unable to reopen appellant's case file because it had been destroyed in accordance with its procedures, since its records indicated that it was inactive, with no time lost from work and no permanent residuals expected. Therefore, in order to process the request, OWCP requested that appellant submit all information she had pertaining to her claim, in particular a copy of her original CA-2 claim form and medical evidence.

In a June 23, 2016 letter to OWCP, appellant indicated that she had learned that her case file had been destroyed. She stated that the employing establishment had a copy of her case file and it was enclosed. Appellant also requested reconsideration of the denial of her claim based on the additional medical information also attached.

In a March 21, 2017 letter to the congressman, OWCP indicated that once it had received the information needed to recreate appellant's claim, it would review the evidence, and then take appropriate action concerning her request for consideration of additional conditions.

The case record included a letter from appellant, dated May 24, 2002, in which she had requested reconsideration of her claim for a left hip condition.

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<sup>4</sup> Appellant had a previously accepted claim for a right hip injury and underwent an authorized right hip arthroplasty in 1996. OWCP assigned File No. xxxxxx995. This file is not before the Board on the present appeal.

Appellant submitted medical evidence, including diagnostic test reports of her hips dated December 12, 21, and 27, 1994 and February 6 and August 5, 1995, as well as progress reports dated November 22, 1994 through June 22, 1995 from an orthopedic surgery practice.

In a May 26, 2017 development letter, OWCP indicated that it had received information to recreate appellant's destroyed case and if she felt that the prior decisions dated September 5, 1997 and December 17, 1998 denying her claim were in error, she could file a written request for reconsideration and provide evidence that the decisions were in error.

In a letter dated October 20, 2017, and received by OWCP on November 10, 2017 as recorded in the integrated Federal Employees' Compensation System (iFECS), appellant requested reconsideration. Her letter contained a narrative statement describing the accepted employment factors and reiterating that she had a prior injury which was accepted for a right hip condition and surgical treatment. Appellant argued that her avascular necrosis had traveled to the other side and started effecting her left hip as well, just as her doctor had suspected. She further reiterated that she had her left hip replaced on September 16, 1997 and she had to use her own sick leave hours during this recovery time.

By decision dated February 2, 2018, OWCP denied appellant's request for reconsideration 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 decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's iFECS).<sup>6</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>7</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>8</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</sup>

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016). OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. *See* 20 C.F.R. § 10.607 (2011); *see also* *C.B.*, Docket No. 13-1732 (issued January 28, 2014) (where the Board held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in iFECS).

<sup>7</sup> 5 U.S.C. § 8128(a); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>8</sup> 20 C.F.R. § 10.607(b); *B.C.*, Docket No. 18-1496 (issued May 22, 2019).

<sup>9</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>10</sup> is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.<sup>11</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>12</sup>

### ANALYSIS

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.

OWCP's regulations<sup>13</sup> and procedures<sup>14</sup> establish a one-year time limitation for requesting reconsideration, which begins on the date of the last OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>15</sup> The most recent merit decision was OWCP's December 17, 1998 decision which denied appellant's occupational disease claim. As appellant's request for reconsideration was not received by OWCP until November 10, 2017, more than one year after the December 17, 1998 decision, the Board finds that it was untimely filed. Because her request was untimely, appellant must demonstrate clear evidence of error on the part of OWCP in having denied her occupational disease claim.<sup>16</sup>

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its last merit decision dated December 17, 1998. In support of her request for reconsideration, appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its December 17, 1998 decision.<sup>17</sup>

OWCP received an October 20, 2017 statement from appellant describing the accepted employment factors and her prior accepted right hip injury. She argued that her avascular necrosis had traveled to the other side and started affecting her left hip. Appellant has not explained how

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<sup>10</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.607(a); *see W.R.*, Docket No. 19-0438 (issued July 5, 2019).

<sup>14</sup> *Supra* note 6 at Chapter 2.1602.4 (February 2016); *see W.R.*, *id.*

<sup>15</sup> 20 C.F.R. § 10.607(b); *see W.R.*, *supra* note 13.

<sup>16</sup> The Board notes that a letter of record dated May 24, 2002 where appellant requested reconsideration was not received by OWCP in iFECS until April 3, 2017, approximately four years after OWCP's December 17, 1998 decision, and would have been untimely filed.

<sup>17</sup> *See R.M.*, Docket No. 18-1393 (issued February 12, 2019).

her statement raises a substantial question regarding the correctness of OWCP's decision denying her claim.<sup>18</sup> This evidence does not offer an opinion that OWCP's decision was incorrect and is not 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>19</sup> Appellant did not provide additional medical evidence and the reports appellant submitted on appeal were not of record at the time of OWCP's final decision.<sup>20</sup> The Board thus finds that appellant's statement does not raise a substantial question as to the correctness of OWCP's last merit decision.

Clear evidence of error is intended to represent a difficult standard. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>21</sup> As appellant has not submitted such evidence, the Board finds that she has not demonstrated clear evidence of error.

### 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>18</sup> See *T.S.*, Docket No. 19-0056 (issued July 1, 2019).

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

<sup>20</sup> *Supra* note 3.

<sup>21</sup> See *T.S.*, *supra* note 18; see also *W.R.*, *supra* note 13.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board