

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

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<b>S.L., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 19-0858</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	<b>Issued: October 9, 2019</b>
<b>MANN-GRANDSTAFF VETERANS</b>	)	
<b>ADMINISTRATION MEDICAL CENTER,</b>	)	
<b>Spokane, WA, Employer</b>	)	
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*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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On March 9, 2019 appellant filed a timely appeal from a September 13, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days have elapsed since OWCP's last merit decision, dated March 31, 2017, to the filing of this appeal,

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<sup>1</sup> Pursuant to the Board's *Rules of Procedure*, an appeal is considered filed when received by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(f). However, when the date of receipt would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of the U.S. Postal Service postmark or other carriers date markings. *Id.* at § 501.3(f)(1). The 180<sup>th</sup> day following OWCP's September 13, 2018 decision was March 12, 2019. Because using March 14, 2019, 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 March 9, 2019, rendering the appeal timely filed. *Id.*

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 to review the merits of this case.<sup>3</sup>

### **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 February 16, 2017 appellant, then a 49-year-old dental assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained injury due to factors of her federal employment including exposure to chemical fumes from work being performed on the employing establishment roof. She indicated that she first became aware of her condition and its relationship to factors of her federal employment, on February 14, 2017. Appellant did not stop work.

In a development letter dated February 28, 2017, OWCP informed appellant of the deficiencies of her claim, requested additional factual and medical evidence, and provided a questionnaire for her completion. Appellant was afforded 30 days to submit the necessary evidence.

In medical reports dated February 14 and 21, 2017, Dr. Janell Lynn Simpkins, a Board-certified internist, and Dr. Christopher Coons, an osteopathic physician Board-certified in internal medicine, noted an assessment of environmental toxin exposure.

In duty status reports (Form CA-17) dated February 14 and 21, 2017, Dr. Coons did not indicate a diagnosis, but rather noted "respiratory problems" in describing appellant's medical condition.

By decision dated March 31, 2017, OWCP denied appellant's claim finding that she had not submitted medical evidence containing a valid medical diagnosis in connection with the injury.<sup>4</sup>

In a report dated March 20, 2018, John Loranger, a physician assistant, examined appellant and noted an impression of allergic reaction to chemical substance.

In an unsigned report dated March 22, 2018, Dr. Stephanie Walker Stoke, Board-certified in occupational medicine, indicated that appellant had been exposed to chemicals for about four

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

<sup>3</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.*

<sup>4</sup> On March 22, 2018 appellant filed a duplicate notice Form CA-2 alleging that she sustained chemical sensitivity on February 14, 2017 due to work being performed on the employing establishment roof.

years and she could not tolerate being at work anymore. She related that appellant had sensitivity to nitrous oxide, and experienced symptoms including tingling in her sinuses, numbness in her face, plugged-up ears, gravelly voice, tight airway, sharp chest pain, foggy thinking, and weakness in her hands. Dr. Stoke noted an assessment of occupational exposure to chemicals, and referred her to an allergist. She then completed a Form CA-17 relating the same assessment.

On May 24, 2018 appellant requested reconsideration of OWCP's March 31, 2017 decision.

By decision dated September 13, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>5</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>6</sup> One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).<sup>8</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>9</sup>

Section 10.607(b) provides that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must show that OWCP's decision was, on its face, erroneous.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>12</sup> Evidence that does not raise a

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<sup>5</sup> *D.Y.*, Docket No. 19-0565 (issued August 13, 2019); see *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> *D.V.*, Docket No. 19-0588 (issued August 5, 2019); see *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>9</sup> *D.Y.*, *supra* note 5; *F.R.*, Docket No. 09-0575 (issued January 4, 2010); see *Jesus D. Sanchez*, *supra* note 5.

<sup>10</sup> 20 C.F.R. § 10.607(b).

<sup>11</sup> *E.R.*, Docket No. 18-0667 (issued August 1, 2019); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>12</sup> *E.R.*, *id.*; *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley*, *supra* note 5.

substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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 the new evidence demonstrates clear error on the part of OWCP.<sup>15</sup>

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<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.

OWCP's regulations<sup>18</sup> and procedures<sup>19</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>20</sup> The most recent merit decision was OWCP's March 31, 2017 decision which found that the evidence of record was insufficient to establish a medical diagnosis in connection with appellant's claimed injury. As appellant's request for reconsideration was not received by OWCP until May 24, 2018, more than one year after the March 31, 2017 decision, the Board finds that it was untimely filed. Because her request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied her occupational disease claim.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision.

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<sup>13</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010).

<sup>14</sup> *A.C.*, Docket No. 18-1730 (issued July 23, 2019); see *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>15</sup> *A.C.*, *id.*; see *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>16</sup> *D.Y.*, *supra* note 5; see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>17</sup> *E.R.*, *supra* note 11; see *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>18</sup> *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *S.C.*, Docket No. 18-0126 (issued May 14, 2019); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>19</sup> *W.R.*, *id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); see *S.C.*, *id.*; *Veletta C. Coleman*, *supra* note 16.

<sup>20</sup> *W.R.*, *id.*; 20 C.F.R. § 10.607(b); see *S.C.*, *supra* note 18. *Debra McDavid*, 57 ECAB 149 (2005).

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.<sup>21</sup> In her request for reconsideration, appellant submitted additional medical evidence, however, these documents are insufficient to show that OWCP's March 31, 2017 decision was made in error when it was issued.

The report from Mr. Loranger related that appellant had developed an allergic reaction to a chemical substance; however, this report does not demonstrate clear error in the March 31, 2017 merit decision because the reports of nonphysicians, including physician assistants do not constitute probative medical evidence under FECA.<sup>22</sup>

Dr. Stoke evaluated appellant on March 22, 2018, and provided an assessment of occupational exposure to chemicals. This report did not contain the type of positive, precise, and explicit evidence, which manifests on its face, that OWCP committed an error in its March 31, 2017 decision.<sup>23</sup> The Board has previously explained that even 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, does not demonstrate clear evidence of error.<sup>24</sup> The Board finds that the March 22, 2018 report from Dr. Stoke does not rise to the level of clear evidence of error.<sup>25</sup>

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>26</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 as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>21</sup> *S.C.*, *supra* note 18; *J.S.*, *supra* note 18; Federal (FECA) Procedure Manual, *supra* note 19 at Chapter 2.1602.5(a) (February 2016).

<sup>22</sup> *D.Y.*, *supra* note 5.

<sup>23</sup> *R.O.*, Docket No. 18-1687 (issued March 26, 2019); *M.L.*, *supra* note 13; *see Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>24</sup> *T.S.*, Docket No. 19-0056 (issued July 1, 2019).

<sup>25</sup> *Id.*

<sup>26</sup> *Supra* note 16.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2019  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board