



forearm when he was bitten by a transient person while in the performance of duty. He stopped work on April 3, 2017 and returned to full-duty work on April 8, 2017.

In a development letter dated April 6, 2017, OWCP informed appellant of the type of factual and medical evidence needed to establish his claim. It afforded him 30 days to submit the requested evidence.

In response to OWCP's request, it received a report dated April 1, 2017, which noted that emergency room triage was performed by Victoria Crowers, a registered nurse. Ms. Crowers reported that appellant had been bitten by a homeless person that evening. Details regarding how the injury occurred were detailed on an emergency department form. In April 1, 2017 notes, Charis Hasdorff, certified physician assistant, reported that appellant had been evaluated for a left forearm human bite.

By decision dated May 17, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the April 1, 2017 employment incident occurred as alleged.

On June 22, 2018 appellant requested reconsideration and submitted additional evidence.

In support of his request for reconsideration, appellant submitted an ambulance report, dated April 1, 2017, which documented that he had sustained a human bite on the left forearm at the time alleged. Also submitted was a copy of the April 1, 2017 emergency room report indicating a human bite which was already of record. Appellant also submitted two statements dated April 2, 2017 by D.G., a coworker, who described the incident on April 1, 2017 involving appellant. D.G. related that she heard screams while G.C. was securing the doors in the vestibule. A female, who refused to leave, verbally and physically attacked both, appellant and G.C., and bit appellant's arm. Police were contacted. The police arrested the woman who bit appellant. Both appellant and G.C. were taken by ambulance to the hospital.

G.C., in an April 2, 2017 witness statement, related that, while closing the employing establishment, a young female was found lying down in the vestibule. When G.C. asked the female to leave, she proceeded to lunge at G.C. and push her towards the lobby. At this point, appellant heard G.C. scream and grabbed the female's arm to remove her from G.C. They both fell to the ground and, after separating, the female ran out the door. It was at this point that a bite mark was observed on appellant.

Appellant also submitted his own April 3, 2017 narrative statement, which reiterated the details provided by G.C.

By decision dated July 16, 2018, OWCP denied appellant's reconsideration request, 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>2</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>3</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System).<sup>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</sup>

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>6</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>7</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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 decision.<sup>12</sup>

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<sup>2</sup> See 5 U.S.C. § 8128(a); *M.E.*, Docket No. 18-1497 (issued March 1, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>5</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>7</sup> *W.R.*, Docket No. 18-1042 (issued February 12, 2019); see *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>8</sup> *F.N.*, *supra* note 5; see *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *M.E.*, *supra* note 2; see *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Leon J. Modrowski*, *supra* note 6; *Jesus D. Sanchez* *supra* note 6.

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> *W.K.*, Docket No. 18-1260 (issued February 5, 2019); *Leon D. Faidley, Jr.*, *supra* note 5.

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>13</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision of record was OWCP's May 17, 2017 decision. As appellant's request for reconsideration was received by OWCP on June 22, 2018, more than one year after the May 17, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim.<sup>14</sup>

The Board further finds, however, that the evidence submitted in support of appellant's untimely request for reconsideration is sufficient to demonstrate clear evidence of error.

To determine whether appellant has demonstrated clear evidence of error, OWCP will review the evidence submitted and arguments raised in support of the request and determine whether such evidence or argument is sufficient to show error in its prior decision.<sup>15</sup> In support of his request, appellant submitted an ambulance report dated April 1, 2017, which documented that he had sustained a human bite on the left forearm at the time alleged as well as a copy of the April 1, 2017 emergency room report indicating a human bite which was already of record. He also submitted two statements dated April 2, 2017 by D.G., a coworker, who described the incident on April 1, 2017 involving appellant and supported that the incident occurred as alleged.

The Board has held that the evidence submitted with an untimely reconsideration request must relate to the issue presented and the evidence that was before OWCP at the time of the prior decision.<sup>16</sup> As discussed above, OWCP denied appellant's claim based on the factual component of fact of injury. With his untimely request for reconsideration, appellant resubmitted the emergency room reports, which were before OWCP at the time of its initial denial that supported the incident occurred at the time, place, and in the manner alleged. He also submitted an ambulance report which further supports a human bite occurring at the time, place, and in the manner alleged. The witness statements and his statement, submitted on reconsideration, provide further details relative to the occurrence of the alleged April 1, 2017 employment injury. The Board finds, therefore, that appellant has raised a substantial question as to the correctness of the

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<sup>13</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>14</sup> 20 C.F.R. § 10.60(b). *Debra McDavid*, 57 ECAB 149 (2005).

<sup>15</sup> See *V.L.*, Docket No. 17-1493 (issued September 12, 2018); *George C. Vernon*, 54 ECAB 313 (2003).

<sup>16</sup> See *V.L.*, *id.*; *K.N.*, Docket No. 13-0911 (issued August 21, 2013); *J.S.*, Docket 10-0385 (issued September 15, 2010).

May 17, 2017 merit decision. Thus, OWCP abused its discretion in failing to reopen his claim for further merit review.<sup>17</sup>

The Board will reverse OWCP's July 16, 2018 decision and remand the case for an appropriate decision on the merits of appellant's claim.

**CONCLUSION**

The Board finds that appellant has demonstrated clear evidence of error in its July 16, 2018 merit decision and, thus, OWCP improperly denied his request for reconsideration of the merits of his claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 16, 2018 is reversed and this case is remanded for further proceedings consistent with this decision.

Issued: February 5, 2020  
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

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<sup>17</sup> See, e.g., *A.B.*, Docket No. 10-1070 (issued March 8, 2011), wherein claimant submitted new evidence with an untimely reconsideration request, including an Equal Employment Opportunity decision relating to her allegations of error by the employing establishment. The Board found that appellant had established clear evidence of error.