

became final after 30 days of issuance, and is not subject to further review.³ As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁵

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁶ 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 October 28, 2011 appellant, then a 56-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging an injury to her low back on October 26, 2011 while in the performance of duty. She alleged that she was the victim of an assault and battery that occurred when an elderly man punched her from behind as she was leaving the employing establishment cafeteria. Appellant stopped work on October 28, 2011. The employing establishment controverted the claim.

By decision dated December 19, 2011, OWCP denied appellant's claim, finding that the assault did not occur as alleged. On December 28, 2011 appellant, through then-counsel, requested a telephone hearing before an OWCP hearing representative.

By decision dated May 17, 2012, an OWCP hearing representative affirmed the denial of appellant's claim.

On June 12, 2012 appellant, through then-counsel, filed an appeal with the Board.

By decision dated May 29, 2013, the Board affirmed OWCP's hearing representative's May 17, 2012 decision. The Board determined that appellant had not established that the incident occurred as alleged. The Board explained that the evidence of record did not substantiate that she

³ 20 C.F.R. § 501.6(d); *see M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ The Board notes that, following the December 21, 2018 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.*

⁶ Docket No. 17-1197 (issued November 1, 2017); Docket No. 12-1353 (issued May 29, 2013).

was assaulted by an elderly male on October 26, 2011 noting inconsistencies in her statements, the video evidence, the lack of eyewitnesses despite numerous individuals in and around the area where the incident allegedly occurred, and her behavior subsequent to the alleged incident.⁷

In a letter dated December 1, 2016, received by OWCP on December 6, 2016 appellant requested reconsideration. She alleged that she had been wrongfully terminated from her place of employment and wrongfully accused of not providing information. Appellant alleged that three employees witnessed the assault, but that they later recanted their stories. She alleged that a witness was willing to take a polygraph test that would clear her name. Appellant continued to submit medical evidence noting treatment for persistent neck and lower back pain.

By decision dated January 17, 2017, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

On May 10, 2017 appellant filed an appeal before the Board docketed as Docket No. 17-1197. On October 17, 2017 while that, appeal was pending with the Board, she again requested reconsideration.

By decision dated November 1, 2017, the Board affirmed OWCP's January 17, 2017 nonmerit decision.⁸ The Board found that OWCP properly denied appellant's request for reconsideration at it was untimely filed and failed to demonstrate clear evidence of error.

Following the Board's decision appellant contacted OWCP to inquire as to the status of her October 17, 2017 reconsideration request.

By decision dated December 21, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim finding that the request 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.⁹ 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.¹⁰ Timeliness is determined by the document receipt date (*i.e.*,

⁷ Docket No. 12-1353 (issued May 29, 2013).

⁸ Docket No. 17-1197 (issued November 1, 2017).

⁹ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁰ 20 C.F.R. § 10.607(a).

the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP’s most recent merit decision was in error.¹³ OWCP’s procedures provide that it 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 demonstrates “clear evidence of error” on the part of OWCP.¹⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁶ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision 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. 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 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.¹⁷

ANALYSIS

The Board finds that OWCP properly denied appellant’s request of reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.¹⁸

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹² *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁴ *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 11 at Chapter 2.1602.5 (February 2016).

¹⁵ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 11 at Chapter 2.1602.5(a) (February 2016).

¹⁷ *Supra* note 15.

¹⁸ *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

The last merit decision of record was the Board's May 29, 2013 decision, which had affirmed OWCP's denial of appellant's traumatic injury claim. OWCP's regulations¹⁹ and procedures²⁰ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²¹ Appellant's October 17, 2017 reconsideration request was received more than one year after the Board's May 29, 2013 merit decision. As her request for reconsideration was not received by OWCP within the one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), the request for reconsideration was untimely filed.²² Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.²³

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly denied her traumatic injury claim because the evidence of record was insufficient to establish that the October 26, 2011 employment incident, occurred as alleged. Appellant argues that the medical evidence submitted in support of her claim establishes that she sustained a lower back injury when she was punched in the back on October 26, 2011 in the employing establishment cafeteria. She repeated her prior assertions that witnesses to the assault had recanted their initial statements.

The term clear evidence of error is intended to represent a difficult standard, and the previous arguments appellant had provided on reconsideration, that she had been wrongfully terminated from employment, and that witnesses to her assault had recanted their initial statements, are not the type of positive, precise, and explicit argument, which manifested on its face that OWCP committed an error.²⁴ Her statements were previously considered and her arguments are insufficient to shift the weight in her favor and raise a substantial question as to the correctness of OWCP's May 17, 2012 merit decision.²⁵ Furthermore, appellant's reference to the medical reports of record in support of her claim also fail to establish clear evidence of error.²⁶ In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which

¹⁹ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

²⁰ *Supra* note 11 at Chapter 2.1602.4 (February 2016); see *L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²¹ *J.W.*, *supra* note 15; *Robert F. Stone*, 57 ECAB 292 (2005).

²² *Supra* note 18.

²³ 20 C.F.R. § 10.607(b); see *R.T.*, Docket No. 19-0604 (issued September 13, 2019); see *Debra McDavid*, 57 ECAB 149 (2005).

²⁴ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

²⁵ *E.B.*, Docket No. 18-1091 (issued December 28, 2018); *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

²⁶ *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

was decided by OWCP.²⁷ However, appellant's claim was not denied for medical reasons. Rather, her claim was denied because she failed to establish that the October 26, 2011 employment incident occurred as alleged. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's May 17, 2012 merit decision.²⁸ Thus, the evidence is insufficient to demonstrate clear evidence of error.²⁹

For these reasons, 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.³⁰

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.

²⁷ *Id.*

²⁸ *D.C.*, Docket No. 19-0570 (issued February 18, 2020).

²⁹ *S.D.*, Docket No. 17-1450 (issued January 8, 2018).

³⁰ *See J.D.*, Docket No. 18-1765 (issued June 11, 2019).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board