

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

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|--|---|--------------------------|
| C.D., Appellant                          | ) |                          |
|  | ) |                          |
| and                                      | ) | Docket No. 20-0035       |
|  | ) | Issued: October 14, 2020 |
| DEPARTMENT OF THE NAVY, NORFOLK          | ) |                          |
| NAVAL SHIPYARD, Portsmouth, VA, Employer | ) |                          |
|  | ) |                          |

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 3, 2019 appellant filed a timely appeal from an October 1, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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>1</sup> As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, 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 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.

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<sup>1</sup> 20 C.F.R. § 501.6(d); *see R.T.*, Docket No. 20-0298 (issued August 6, 2020); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

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

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</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 sustained severe pain in her shoulders, neck, and right arm due to factors of her federal employment, including the constant use of computers and typewriters at work. Appellant's supervisor noted on the claim form that appellant had retired from federal employment on October 1, 1993.

OWCP denied appellant's claim by merit decisions dated November 12, 1996 and March 28, 1997 and denied reconsideration on 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 she 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>4</sup>

Appellant continued to request reconsideration. By decisions dated October 7, 2004 and April 7, 2006, OWCP denied her August 9, 2004 and August 28, 2005 reconsideration requests, finding that they were untimely filed and failed to demonstrate clear evidence of error. Appellant appealed the April 7, 2006 decision to the Board. By decision dated June 22, 2007, the Board affirmed OWCP's April 7, 2006 decision.<sup>5</sup>

Appellant again requested reconsideration. By decision dated February 21, 2018, the Board affirmed OWCP's March 24 and April 3, 2017 decisions, finding that her March 14 and 28, 2017 requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.<sup>6</sup>

On March 27, 2018 appellant again requested reconsideration. OWCP denied her request for reconsideration on May 17, 2018, finding that it was untimely filed and failed to demonstrate clear evidence of error. On October 26, 2018 appellant, through counsel, appealed to the Board. By decision dated May 7, 2019, the Board affirmed OWCP's May 17, 2018 decision.<sup>7</sup>

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<sup>3</sup> Docket No. 19-0154 (issued May 7, 2019); Docket No. 17-1915 (issued February 21, 2018); Docket No. 06-1849 (issued June 22, 2007); Docket No. 97-2798 (issued May 25, 2000); Docket No. 97-2798 (issued August 25, 1999), *denying petition for recon.*

<sup>4</sup> Docket No. 97-2798 (issued August 25, 1999), *denying petition for recon.*, Docket No. 97-2798 (issued May 25, 2000).

<sup>5</sup> Docket No. 06-1849 (issued June 22, 2007).

<sup>6</sup> Docket No. 17-1915 (issued February 21, 2018).

<sup>7</sup> Docket No. 19-0154 (issued May 7, 2019).

On June 19, 2019 appellant again requested reconsideration. She resubmitted three medical reports previously of record. The first was from the employing establishment's clinic with notes dated August 25, 1992 and July 7, 1993. It was initially submitted on June 3, 1997 and contained illegible signatures. Appellant also resubmitted one page of December 9, 1996 correspondence from Dr. Bruce L. Tetelman, a Board-certified psychiatrist, and an October 17, 2002 report by Dr. Robert B. Hansen, Board-certified in neurology and pain medicine, who summarized her medical history since 1993.

By decision dated October 1, 2019, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.<sup>8</sup>

### **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, OWCP 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, it 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

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<sup>8</sup> The decision was initially issued by OWCP on July 1, 2019, was returned to OWCP as undeliverable, and was reissued on October 1, 2019.

<sup>9</sup> *Supra* note 2.

<sup>10</sup> 5 U.S.C. § 8128(a); *P.J.*, Docket No. 19-1479 (issued May 8, 2020); *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> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>14</sup> 20 C.F.R. § 10.607(b); *C.M.*, *id.*

<sup>15</sup> *See also id.* at § 10.607(b); *supra* note 12 at Chapter 2.1602.5 (February 2016).

<sup>16</sup> *J.S.*, Docket No. 20-0337 (issued July 15, 2020).

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

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 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 denied appellant's request for reconsideration as it 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 was dated August 25, 1999. Because appellant's request for reconsideration was received on June 9, 2019, more than one year after the August 25, 1999 merit decision, the Board finds that the request was untimely filed.<sup>26</sup> Therefore, appellant must demonstrate clear evidence of error on the part of OWCP.<sup>27</sup>

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

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

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

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

<sup>21</sup> *Supra* note 13.

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

<sup>23</sup> *Supra* note 13.

<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> *See R.T., supra* note 1.

On reconsideration appellant submitted three medical reports to OWCP. These reports, however, were previously of record. Dr. Tetalman's December 9, 1996 report was reviewed by the Board in its August 25, 1999 decision.<sup>28</sup> The employing establishment clinic notes dated August 25, 1992 and July 7, 1993, were initially submitted on June 3, 1997 and were also reviewed in the Board in its August 25, 1999 decision. Dr. Hansen's October 17, 2002 report was reviewed by the Board in its June 22, 2007 decision.<sup>29</sup> The Board therefore finds that this previously submitted evidence does not raise a substantial question concerning the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error.<sup>30</sup>

### **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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2020  
Washington, DC

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

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

Judge

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

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<sup>28</sup> *Supra* note 4.

<sup>29</sup> *Supra* note 5

<sup>30</sup> *C.M.*, *supra* note 13.