

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On August 20, 1998 appellant, then a 39-year-old deportation assistant, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral wrist and elbow pain, numbness in fingers, and left shoulder pain due to factors of her federal employment. OWCP accepted her claim for bilateral wrist, elbow, and shoulder sprains and subsequently expanded acceptance of her claim to include bilateral carpal tunnel syndrome.⁵

On March 12, 2004 OWCP expanded the acceptance of appellant's claim to include cervical radiculopathy, resolved.

In April 2013 appellant filed claims for wage-loss compensation (Form CA-7) for disability from work during the periods January 1 through December 31, 2011, January 1 through July 31, 2012, October 24 through December 31, 2012, and January 1 through March 31, 2013.⁶

OWCP subsequently determined that a conflict in the medical opinion evidence existed regarding whether her work-related cervical condition had resolved. On June 13, 2014 it referred

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 18, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

⁴ *Order Remanding Case*, Docket No. 05-844 (issued September 1, 2005); *Order Remanding Case*, Docket No. 09-2350 (issued February 4, 2010); *Order Remanding Case*, Docket No. 10-1810 (issued May 25, 2011); Docket No. 12-1056 (issued December 18, 2012); Docket No. 13-2097 (issued September 16, 2014); Docket No. 16-895 (issued December 16, 2016); Docket No. 18-1613 (issued April 29, 2020).

⁵ In March 2001 appellant resigned from federal employment. In June 2003 she returned to federal employment with the U.S. Attorney's Office. The record indicates that appellant was removed from employment, effective May 11, 2010.

⁶ Appellant resubmitted these Forms CA-7 with the employing establishment's certification on June 14, 2013.

appellant, along with a statement of accepted facts (SOAF), to Dr. Harry Marinow, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict.

In a memorandum of telephone call (Form CA-110) dated July 2, 2014, Dr. Marinow's office informed OWCP that appellant did not attend the impartial medical examination scheduled for July 1, 2014.

By decision dated July 29, 2014, OWCP suspended appellant's entitlement to wage-loss compensation and medical benefits, effective that date, under 5 U.S.C. § 8123(d) because she failed to report to the examination on July 1, 2014 as directed.

On August 11, 2014 appellant filed a Form CA-7 claiming wage-loss compensation for the period July 1 through 31, 2014.

On July 3, 2015 appellant requested reconsideration of OWCP's denial of wage-loss compensation benefits for the periods January 1 through July 31, 2012 and July 29 through September 22, 2014.

On July 13, 2015 appellant filed a claim for a schedule award (Form CA-7). By decision dated October 20, 2015, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of her accepted employment injuries.

By decision dated September 30, 2015, OWCP denied appellant's July 3, 2015 request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board regarding the September 30 and October 20, 2015 decisions. By decision dated December 16, 2016,⁷ the Board affirmed OWCP's September 30, 2015 nonmerit decision, finding that OWCP properly denied further merit review of appellant's claim regarding her wage-loss compensation for the periods January 1 through July 31, 2012 and July 29 through September 22, 2014, pursuant to 5 U.S.C. § 8128(a). The Board also affirmed the October 20, 2015 OWCP decision, which denied appellant's schedule award claim.

On November 20, 2017 OWCP expanded the acceptance of appellant's claim to include other cervical disc degeneration at a C4-5 level.

On December 15, 2017 appellant requested reconsideration of the December 16, 2016 decision.⁸ She maintained that she had submitted new evidence in support of her wage-loss compensation claims. Appellant asserted that a June 22, 2015 OWCP letter indicated that OWCP

⁷ Docket No. 16-0895 (issued December 16, 2016).

⁸ Although appellant claimed to be filing a request for reconsideration from the Board's December 16, 2016 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Accordingly, the September 30, 2015 OWCP decision is the appropriate subject of possible modification by OWCP. Appellant also requested reconsideration of the September 16, 2014 Board decision, which affirmed the June 10, 2013 OWCP decision, finding that OWCP did not abuse its discretion by denying appellant's request for reimbursement of travel expenses on May 22, 2012.

had erred by not timely accepting her cervical condition. She also contended that OWCP erred in suspending her monetary compensation for the period July 29 through September 22, 2014. Appellant explained that she had not obstructed the impartial medical examination, but had asked for more time so that she could obtain additional medical reports. She alleged that OWCP failed to assist her in obtaining her medical records and denied her access to her medical records relevant to her wage-loss compensation claims.

By decision dated March 15, 2018, OWCP denied appellant's December 15, 2017 request for reconsideration of the merits of her claim for wage-loss compensation for the periods in 2012 and 2014 and her schedule award claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed the March 15, 2018 decision to the Board.

By decision dated April 29, 2020, the Board set aside the March 15, 2018 decision in part and remanded the case for OWCP to apply the proper standard of review for an untimely request for reconsideration regarding appellant's entitlement to wage-loss compensation for periods in 2012 and 2014.⁹ The Board noted that as more than one year had elapsed from OWCP's last merit decision on July 29, 2014 regarding appellant's wage-loss compensation claim to the filing of appellant's reconsideration request on December 5, 2017, OWCP should have applied the more stringent clear evidence of error standard. The Board also affirmed the March 15, 2018 decision, in part, finding that OWCP properly denied further merit review of appellant's claim regarding her claim for a schedule award pursuant to 5 U.S.C. § 8128(a).

Following the Board's decision, OWCP issued a June 18, 2020 decision denying appellant's December 15, 2017 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. The June 18, 2020 decision simply noted: "You did not present clear evidence of error.... The basis for this decision is."

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).¹¹ 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.¹²

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited

⁹ Docket No. 18-1613 (issued April 29, 2020).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2020).

¹² *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

review to determine whether the request demonstrates clear evidence of error.¹³ OWCP's regulations and procedures provide 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(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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 evidence of error on the part of OWCP.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁸

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁹ The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁰

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²¹ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.²² The Board has held that the reasoning behind OWCP's evaluation should be clear

¹³ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

¹⁴ *Id.*; *supra* note 11 at Chapter 2.1602.5(a).

¹⁵ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁶ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁷ *B.W.*, *supra* note 17.

¹⁸ *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁹ *Supra* note 11 at Chapter 2.1602.5(b).

²⁰ *G.B.*, *supra* note 1; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

²¹ 5 U.S.C. § 8124(a).

²² 20 C.F.R. § 10.126.

enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²³

ANALYSIS

The Board finds that this case is not in posture for decision.

Preliminarily, the Board notes that by decision dated April 29, 2020, the Board set aside the March 15, 2018 decision in part and remanded the case for OWCP to apply the proper standard of review for an untimely request for reconsideration regarding appellant's entitlement to wage-loss compensation for periods in 2012 and 2014. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.²⁴

On remand, OWCP failed to make findings regarding the arguments and evidence submitted in support of appellant's untimely reconsideration request.²⁵ In its June 18, 2020 decision, it summarily denied appellant's request for reconsideration without analyzing whether it was sufficient to demonstrate clear evidence of error.²⁶ The June 18, 2020 decision simply noted: "You did not present clear evidence of error.... The basis for this decision is." OWCP, however, did not provide any discussion regarding the basis for its decision and did not address the arguments made by appellant in her December 15, 2017 reconsideration request letter.²⁷ Thus, the Board finds that OWCP did not comply with the review requirements of FECA and its implementing regulations.²⁸ Accordingly, appellant could not understand the precise defect of the claim, *i.e.* whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect, and the kind of evidence which would overcome it.²⁹ The Board will therefore set aside OWCP's June 18, 2020 decision and remand the case for an appropriate decision, with findings of fact and a statement of reasons, regarding appellant's untimely reconsideration request.

CONCLUSION

The Board finds that this case is not in posture for decision.

²³ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *supra* note 13 at Chapter 2.1400.5 (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

²⁴ *See M.B.*, Docket No. 21-0012 (issued May 12, 2021); *M.M.*, 18-1366 (issued February 27, 2019); *E.L.*, 16-0635 (issue November 7, 2016); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²⁵ *See K.D.*, Docket No. 20-1186 (issued February 3, 2021).

²⁶ *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020).

²⁷ *See Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

²⁸ *Supra* notes 23 and 24.

²⁹ *Supra* note 11 at Chapter 2.1400.5.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 9, 2021
Washington, D.C.

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