

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

C.M., Appellant	)	
	)	
and	)	Docket No. 20-0374
	)	Issued: December 2, 2022
DEPARTMENT OF AGRICULTURE, FOREST	)	
SERVICE, COLVILLE NATIONAL FOREST,	)	
CURLEW JOB CORPS CIVILIAN	)	
CONSERVATION CENTER, Colville, WA,	)	
Employer	)	
	)	

*Appearances:*  
Shane Michael, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On December 6, 2019<sup>2</sup> appellant, through counsel, filed a timely appeal from a June 11, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>3</sup> As more

---

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> On February 4, 2020 appellant, through her counsel, requested oral argument before the Board. As appellant's oral argument request was made more than 60 days after the December 6, 2019 filing of the present appeal, her request is untimely and the Board will proceed to consideration of the case on the record. *See* 20 C.F.R. § 501.5(b).

<sup>3</sup> The Board notes that following the June 11, 2019 decision, OWCP and the Board 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.*

than 180 days has elapsed from the last merit decision on the underlying issue of this case, dated November 12, 2009, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>4</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.

### **FACTUAL HISTORY**

On July 14, 1988 appellant, then a 29-year-old cook instructor, filed an occupational disease claim (Form CA-2) alleging that she developed bulimia, stress, and depression due to factors of her federal employment. OWCP accepted her claim for depression due to factors of her employment on March 23, 1989. On November 3, 1989 it expanded the acceptance of her claim to include bulimia. OWCP paid appellant wage-loss compensation on the periodic rolls.

On October 5, 2009 OWCP referred appellant for a second opinion evaluation with Dr. Gary Hudak, a Board-certified psychiatrist, scheduled for October 22, 2009. Appellant did not appear for the scheduled examination.

On October 26, 2009 OWCP proposed to suspend appellant's wage-loss compensation as she failed to attend a scheduled medical examination with Dr. Hudak in accordance with 5 U.S.C. § 8123(d). It afforded her 14 days to explain the reasons for her failure to attend and provide any supporting evidence. No response was received.

By decision dated November 12, 2009, OWCP finalized the suspension of appellant's wage-loss compensation under 5 U.S.C. § 8123(d) effective that date.

On April 24, 2018 appellant, through counsel, requested reconsideration of the suspension of compensation benefits due to appellant's failure to attend the second opinion examination with Dr. Hudak. Counsel contended that OWCP improperly referred her to Dr. Hudak. Appellant also submitted additional factual evidence regarding the alleged culture of the employing establishment.

By decision dated June 11, 2019, OWCP denied appellant's request for reconsideration of the merits of appellant's claim, 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>5</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

---

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *Id.* at § 8128(a); *see also* A.B., Docket No. 19-1539 (issued January 27, 2020); W.C., 59 ECAB 372 (2008).

decision for which review is sought.<sup>6</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>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>9</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<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 manifest on its face that OWCP committed an error.<sup>12</sup> Evidence that does not raise a 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. 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>14</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>15</sup>

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.<sup>16</sup> The claimant must present evidence, which on its face shows that

---

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>8</sup> *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).

<sup>9</sup> *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>10</sup> *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 7 at Chapter 2.1602.5 (September 2020).

<sup>11</sup> *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leona N. Travis*, 43 ECAB 227 (1999).

<sup>13</sup> *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>14</sup> *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

<sup>15</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

<sup>16</sup> *See supra* note 7 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

OWCP made an error.<sup>17</sup> 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>18</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>19</sup>

### ANALYSIS

The Board finds that by its June 11, 2019 decision, OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The most recent merit decision addressing the suspension of appellant's wage-loss compensation in accordance with 5 U.S.C. § 8123(d) due to her failure to attend a second opinion examination was OWCP's November 12, 2009 decision. Because it received her request for reconsideration more than one year after the November 12, 2009 merit decision, her request was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in its November 12, 2009 decision.

The Board further finds that appellant's request for reconsideration failed to demonstrate clear evidence of error.

In support of appellant's untimely request for reconsideration, counsel contended that OWCP improperly referred her to Dr. Hudak. The Board has held, however, that mere arguments of improper selection of a physician, without supporting evidence, are not sufficient to establish clear evidence of error.<sup>20</sup>

Appellant also submitted additional factual evidence regarding the alleged culture of the employing establishment. However, such evidence is not relevant to the issue at hand, and does not show that OWCP's November 12, 2009 merit decision was incorrect at the time it was issued. This evidence does not raise a substantial question as to whether the November 12, 2009 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, these documents are insufficient to demonstrate clear evidence of error.<sup>21</sup>

Thus, the Board finds that the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its November 12, 2009 decision.<sup>22</sup> Accordingly,

---

<sup>17</sup> *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *R.G.*, Docket No. 21-0540 (issued November 9, 2021); *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

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

<sup>19</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>20</sup> *See V.L.*, Docket No. 17-1108 (issued October 16, 2017).

<sup>21</sup> *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, *supra* note 12.

<sup>22</sup> *J.M.*, *supra* note 15.

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

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2022  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board