

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

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<b>E.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0093</b>
	)	<b>Issued: November 9, 2022</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Fenton, MO, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 21, 2020 appellant filed a timely appeal from a June 12, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated March 13, 2013, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</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 requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before Board.<sup>2</sup> The facts and circumstances as set forth in the prior Board decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On January 7, 1994 appellant, then a 28-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she fractured her left ankle when she slipped on snow while dismounting her vehicle to deliver mail while in the performance of duty.

OWCP accepted appellant's claim for trimalleolar fracture of the left ankle and open reduction internal fixation left medial and lateral malleoli. Appellant returned to work with restrictions on January 13, 1994 and was released to full-duty work on July 8, 1994. Her employment was terminated on August 2, 1994 after which time she performed nonfederal employment.

In a December 23, 2008 decision, OWCP denied appellant's claim for wage-loss compensation from December 20, 1995 through August 31, 2004. It found that the medical evidence of record failed to establish causal relationship between the January 7, 1994 employment injury and the claimed period of disability.

On January 9, 2009 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. On April 7, 2009 the hearing representative affirmed the December 23, 2008 decision.

Appellant requested reconsideration on July 31, 2009. By decision dated December 16, 2009, OWCP denied modification of the April 7, 2009 decision. On April 1, 2010 appellant appealed to the Board. By decision dated April 26, 2011, the Board affirmed OWCP's December 16, 2009 decision.<sup>3</sup>

On August 26, 2009 OWCP terminated appellant's wage-loss compensation benefits, effective August 30, 2009. It found that her injury-related disability had ceased.

Appellant thereafter filed a series of requests for reconsideration that were denied. OWCP last reviewed the merits of her claim on March 13, 2013, and denied modification. It subsequently declined appellant's requests for reconsideration of the merits of her claim in decisions dated July 15, September 16, and November 15, 2013, and March 21, 2014.

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<sup>2</sup> *Order Remanding Case, E.D.*, Docket No. 19-1172 (issued February 20, 2020); Docket No. 16-0708 (issued January 17, 2017); Docket No. 14-1102 (issued August 15, 2014); Docket No. 10-1245 (issued April 26, 2011).

<sup>3</sup> Docket No. 10-1245 (issued April 26, 2011).

In a decision dated August 15, 2014, the Board affirmed the November 15, 2013 and March 21, 2014 OWCP decisions, which denied appellant's requests for reconsideration regarding the termination of benefits.<sup>4</sup>

On June 1 and 22, 2015 appellant requested reconsideration of the August 26, 2009 termination decision.

On August 3, 2015 OWCP received a July 29, 2015 letter from appellant requesting that OWCP reconsider its decisions dated August 26 and December 16, 2009. Appellant submitted arguments and forwarded additional evidence which included an October 5, 2006 report by Dr. David Chalk, a Board-certified orthopedic surgeon.

By decision dated September 29, 2015, OWCP denied appellant's requests for reconsideration of the merits of its March 13, 2013 decision. It found that the requests were untimely filed and failed to demonstrate clear evidence of error.

On October 29, 2015 OWCP received appellant's October 26, 2015 request for reconsideration of the March 13, 2013 merit decision. Appellant submitted arguments and evidence to include the October 5, 2006 medical report by Dr. Chalk.

By decision dated January 4, 2016, OWCP denied appellant's October 29, 2015 reconsideration request. It found that the request was untimely filed and failed to demonstrate clear evidence of error.

On February 26, 2016 appellant appealed to the Board from the September 29, 2015 and January 4, 2016 nonmerit decisions of OWCP. In a January 17, 2017 decision, the Board affirmed the September 29, 2015 and January 4, 2016 nonmerit decisions.<sup>5</sup> The Board found that OWCP properly declined to reopen appellant's claim for reconsideration of the merits, as the requests were untimely filed and failed to demonstrate clear evidence of error.

On April 11 and June 25, 2018 OWCP received appellant's requests for reconsideration of "all aspects of my case." Appellant argued that her claimed periods of wage-loss during July 17, 1994 to January 24, 1995, December 20, 1995 to August 31, 2004, and August 20, 2009 to March 13, 2013, were not properly considered and she had established clear evidence of error by establishing continuation of her disability from her January 7, 1994 work injury. She indicated that she was enclosing evidence which included objective medical reports and evidence of misfiled documents in her OWCP file.

The additional evidence included a January 7, 1994 pathology report, a January 7, 1994 x-ray of the left ankle, a May 2, 2012 magnetic resonance imaging (MRI) scan of the left ankle, an August 1, 2014 bone scan of the whole body, and an August 7, 2014 MRI scan of the lumbar spine. OWCP also received a copy of the October 5, 2006 previously submitted report from Dr. Chalk, a copy of a previously submitted January 2, 2013 narrative report from Dr. Perry

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<sup>4</sup> Docket No. 14-1102 (issued August 15, 2014).

<sup>5</sup> Docket No. 16-0708 (issued January 17, 2017).

Geistler, a podiatrist, and January 2, 2013 duty status report (Form CA17) from Dr. Geistler which noted appellant's work restrictions regarding standing. It also received a February 6, 2015 letter from OWCP pertaining to another appellant.

In a letter dated July 31, 2018, OWCP informed appellant that her reconsideration request had been reviewed. It explained that there were two issues that could be addressed and would be referred to a senior claims examiner. OWCP indicated that the issues were compensation for the period December 20, 1995 to August 31, 2004, and the termination of compensation effective August 30, 2009.

In a November 21, 2018 decision, OWCP summarily denied appellant's request for reconsideration of the December 16, 2009 decision related to wage loss for the period December 20, 1995 through August 31, 2004. It found that the request was untimely filed and failed to demonstrate clear evidence of error.

In a separate decision also dated November 21, 2018, OWCP summarily denied appellant's request for reconsideration of the March 13, 2013 merit decision, which terminated her wage-loss benefits effective August 29, 2009. It found that the request was untimely filed and failed to demonstrate clear evidence of error.

On April 30, 2019 appellant filed a timely appeal to the Board from the November 21, 2018 OWCP decisions. By decision dated February 20, 2020, the Board found that OWCP properly determined that her April 11 and June 25, 2018 requests for reconsideration were untimely filed. However, it found that the case was not in posture for decision because OWCP did not make any findings regarding the evidence submitted in support of the reconsideration request.<sup>6</sup> The Board set aside OWCP's November 21, 2018 decisions and remanded the case for an appropriate decision on appellant's untimely reconsideration requests.

On March 13, 2020 OWCP received another copy of Dr. Chalk's October 5, 2006 report.

By decision dated June 12, 2020, OWCP denied appellant's April 11 and June 25, 2018 reconsideration requests finding that they were untimely filed and failed to demonstrate clear evidence of error. It explained that for the compensation claim period of December 20, 1995 through August 31, 2004, the last merit decision was issued by the Board on April 26, 2011, which reviewed OWCP's merit decision dated December 16, 2009.<sup>7</sup> OWCP noted that for the compensation claim period of August 30, 2009 through March 13, 2013, the last merit decision on this issue was March 13, 2013. It found that the additional evidence did not show that OWCP erred in its prior merit decisions dated December 16, 2009 and March 13, 2013. OWCP explained that the evidence provided documentation of the medical aspects of her case, but did not reflect any error on the part of OWCP.

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<sup>6</sup> C.R., Docket No. 17-0964 (issued September 9, 2019).

<sup>7</sup> Docket No. 10-1245 (issued April 26, 2011).

## LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>8</sup> This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>9</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>10</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>11</sup>

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.<sup>12</sup> Its 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.<sup>13</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>14</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>15</sup> 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

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<sup>8</sup> 5 U.S.C. § 8128(a); *see L.M.*, Docket No. 20-0203 (issued March 10, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (February 2016).

<sup>11</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>12</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, 501-02 (1990).

<sup>13</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 10 at Chapter 2.1602.5 (February 2016).

<sup>14</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>15</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 10 at Chapter 2.1602.5(a) (February 2016).

the correctness of OWCP's decision. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>16</sup>

### ANALYSIS

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

OWCP's regulations<sup>17</sup> and procedures<sup>18</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>19</sup>

Appellant submitted two requests for reconsideration received on April 11 and June 25, 2018, and she requested reconsideration of "all aspects of her case."

The most recent merit decisions pertaining to her requests include the April 26, 2011 Board decision,<sup>20</sup> which found that appellant had not established entitlement to wage-loss compensation for the period December 20, 1995 to August 31, 2004. As her April 11, 2018 request for reconsideration was not received by OWCP until more than one year after the April 26, 2011 Board decision, the Board finds that the April 11, 2018 reconsideration request was untimely filed. Because her request was untimely filed, appellant must demonstrate clear evidence of error that OWCP erred in finding that she failed to submit sufficient probative medical evidence demonstrating total disability for the above period.<sup>21</sup>

With regard to the June 25, 2018 reconsideration request for the compensation claim period of August 30, 2009 through March 13, 2013, the last merit decision was a March 13, 2013 OWCP decision which denied modification of the August 26, 2009 termination of appellant's wage-loss compensation benefits effective August 30, 2009. As the June 25, 2018 reconsideration request was not received by OWCP until more than one year after the March 13, 2013 decision, the Board finds that it also was untimely filed. Because this request was untimely filed, appellant must

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<sup>16</sup> U.C., Docket No. 19-1753 (issued June 10, 2020).

<sup>17</sup> 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>18</sup> *Supra* note 10 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).

<sup>19</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>20</sup> Docket No. 10-1245 (issued April 26, 2011).

<sup>21</sup> 20 C.F.R. § 10.607(b); *supra* note 10 at Chapter 2.1602.5a (September 2020). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which 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 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. *Id.*

demonstrate clear evidence of error that OWCP improperly terminated her benefits effective August 30, 2009.<sup>22</sup>

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's September 29, 2015 and January 4, 2016 nonmerit decisions. The Board considered that evidence in its January 17, 2017 decision and found that OWCP properly denied her requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>23</sup>

In support of her current untimely requests for reconsideration, appellant argued that the periods July 17, 1994 to January 24, 1995, December 20, 1995 to August 31, 2004, and August 20, 2009 to March 13, 2013, were not considered and she had submitted clear evidence which established disability due to her January 7, 1994 work injury. The Board finds that her arguments do not show that OWCP committed an error in denying her claim, nor has she provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's December 16, 2009 and March 13, 2013 decisions.

The evidence OWCP received in support of appellant's requests for reconsideration included a January 7, 1994 pathology report, a January 7, 1994 x-ray of the left ankle, a May 2, 2012 MRI scan of the left ankle, an August 1, 2014 bone scan of the whole body, and an August 7, 2014 MRI scan of the lumbar spine. It also received a copy of the October 5, 2006 previously submitted report from Dr. Chalk, a copy of a previously submitted January 2, 2013 narrative report from Dr. Geistler, a podiatrist, and January 2, 2013 duty status report (Form CA17) from Dr. Geistler which noted appellant's work restrictions regarding standing. OWCP also received a February 6, 2015 letter from OWCP pertaining to another appellant.

The Board finds that this evidence is of insufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision.<sup>24</sup> The Board notes that clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed well-rationalized 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>25</sup> The evidence noted does not show on its face that OWCP committed an error in its decisions dated December 16, 2009 and March 13, 2013

On reconsideration appellant submitted evidence which was previously of record and considered by OWCP. Duplicative evidence is insufficient to raise a substantial question as to the

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<sup>22</sup> *Id.*

<sup>23</sup> *See I.S.*, Docket No. 19-1461 (issued April 30, 2020); *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

<sup>24</sup> *See J.F.*, Docket No. 18-1802 (issued May 20, 2019); *see G.G.*, *supra* note 11; *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

<sup>25</sup> *Supra* note 10 at Chapter 2.1602.5(a) (February 2016); *see E.G.*, Docket No. 20-0974 (issued February 26, 2021); *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

correctness of OWCP's decision.<sup>26</sup> The reports from Dr. Chalk and Dr. Geistler had been previously submitted to the record and reviewed by OWCP and were therefore insufficient to shift the weight of the evidence to establish appellant's disability claims.<sup>27</sup>

The additional diagnostic tests did not address appellant's period of disability and she failed to establish how these reports on their face established her disability claims.<sup>28</sup> Appellant also did not establish that a misfiled report in her iFECS record established clear evidence of error in the denial of her claims for wage-loss compensation.<sup>29</sup> The Board finds that OWCP therefore properly determined that her untimely requests for reconsideration failed to demonstrate clear evidence of error.<sup>30</sup>

### CONCLUSION

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

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<sup>26</sup> *J.C.*, Docket No. 20-1250 (issued May 24, 2021).

<sup>27</sup> *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

<sup>28</sup> *J.B.*, Docket No. 20-0630 (issued April 21, 2021).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see *S.M.*, Docket No. 18-0075 (issued April 11, 2018); see also *M.B.*, Docket No. 17-1505 (issued January 9, 2018).



**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2022  
Washington, DC

Alec J. Koromilas, 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