

² 5 U.S.C. § 8101 *et seq.*

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 January 19, 2000 appellant, then a 56-year-old supply technician, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment. She noted that she first became aware of her condition and realized its relation to her federal employment on July 7, 1999. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and authorized right and left carpal tunnel releases, which were performed in 2000 and 2004, respectively. It paid appellant wage-loss compensation on the supplemental rolls from April 21 through June 15, 2002 and on the periodic rolls from June 16, 2002 through March 5, 2016.

On October 13, 2015 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Robert Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine if appellant had continuing residuals of her employment injury and if so, if she had work restrictions.

In a November 13, 2015 report, Dr. Smith discussed appellant's factual and medical history and reported the findings of his physical examination. He diagnosed bilateral carpal tunnel syndrome causally related to appellant's work activities. Dr. Smith noted that appellant had satisfactory surgical decompression procedures of the carpal tunnels in 2000 and 2004. He indicated that based on objective resolution of the bilateral carpal tunnel syndrome by surgical releases appellant could return to her previous job without restriction. Dr. Smith opined that appellant's residual complaints were due to nonindustrial diabetic neuropathy and multiple other nonindustrial medical conditions that would prevent her from working. He advised that she did not have residuals of the accepted work injury of January 19, 2000 and did not require any additional medical treatment for the accepted bilateral carpal tunnel syndrome. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Smith noted that appellant reached maximum medical improvement (MMI) and could return to work in her usual job without restrictions related to her bilateral carpal tunnel syndrome. He noted that she was unemployable due to nonindustrial conditions including diabetic neuropathy, heart failure, and kidney disease.

In a notice dated January 20, 2016, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted employment-related conditions. It found that the weight of the medical evidence rested with Dr. Smith, who found that she had no objective findings to support further ongoing disability or residuals caused by her employment-related conditions. OWCP afforded appellant 30 days to submit evidence challenging the proposed termination action. No response was received.

By decision dated February 23, 2016, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective March 6, 2016.

On June 21, 2016 appellant requested reconsideration and submitted additional evidence. An electromyogram (EMG) and nerve conduction velocity (NCV) study dated March 11, 2016 revealed bilateral median neuropathies at the wrist.

By decision dated September 19, 2016, OWCP denied modification of the February 23, 2016 termination decision.³

On October 11, 2016 OWCP received evidence that the September 19, 2016 decision was returned to OWCP as undeliverable as it misaddressed the envelope.

On October 25, 2017 appellant contacted OWCP to inquire of the status of her request for reconsideration. OWCP informed her that it was issued on September 19, 2016, but acknowledged that it had been returned as undeliverable on October 11, 2016. Appellant informed OWCP that she never received the decision. OWCP confirmed her address of record and resent the September 19, 2016 decision that day.

On November 20, 2017 appellant, through her then-counsel, requested reconsideration of the September 19, 2016 decision. Then-counsel⁴ submitted a November 13, 2017 letter advising that appellant had not received notification of the September 19, 2016 decision until appellant contacted OWCP on October 25, 2017. As such, she was unable to file a timely request for reconsideration from the September 19, 2016 decision. Then-counsel requested that appellant be given one year from October 26, 2017 to file additional evidence in support of her reconsideration request.

By decision dated December 11, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On August 22, 2019 appellant, through her then-counsel,⁵ requested reconsideration of OWCP's September 19, 2016 decision.⁶ Counsel noted that the September 19, 2016 decision was mailed to appellant, but returned as undeliverable. She argued that while the decision was resent on or about October 25, 2017, it was not redated to allow appellant appropriate time to request reconsideration. Then-counsel requested that OWCP reissue and redate the September 19, 2016 decision to allow appellant an opportunity to protect her appeal rights.

³ The decision was also mailed to appellant's then-counsel, Amy B. Leasure, Esq.

⁴ At that time, appellant's then-counsel was Scott B. Baron, Esq.

⁵ At that time, appellant's then-counsel was Danielle M. Vida, Esq.

⁶ The request for reconsideration was dated October 5, 2018, but received on August 22, 2019.

By decision dated September 17, 2019, OWCP denied appellant's August 22, 2019 request for reconsideration.⁷

On June 30, 2021 appellant, through counsel, requested reconsideration of the September 19, 2016 and December 11, 2017 decisions, contending that OWCP failed to extend the time limit for appellant to request reconsideration due to their address error. He further noted that the report of the second opinion physician, Dr. Smith, was "weak" and not well rationalized and there was a conflict of opinion between Dr. Smith and her treating physician.

By decision dated July 15, 2021, OWCP denied appellant's June 30, 2021 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On October 14, 2021 appellant, through counsel, again requested reconsideration. Counsel reiterated that appellant did not receive the September 19, 2016 decision and that OWCP failed to extend the time for her to file an appeal. Counsel argued that Dr. Smith's report was "silly" and asserted that there was a conflict of medical opinion between Dr. Smith and appellant's treating physician.

By decision dated January 11, 2022, OWCP denied appellant's reconsideration request, 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.⁸ 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.⁹ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

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

⁷ On May 20, 2021 appellant, through counsel, appealed the December 11, 2017 decision to the Board. By order dated June 25, 2021, the Board dismissed appellant's appeal, finding that it lacked jurisdiction to review the appeal as appellant did not file an appeal with the Board until May 20, 2021 more than 180 days after the December 11, 2017 decision. *Order Dismissing Appeal*, Docket No. 21-0888 (issued June 25, 2021).

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

⁹ 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹¹ *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).

decision was in error.¹² 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.¹³ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

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.

OWCP's regulations¹⁷ and procedures¹⁸ 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.¹⁹ The most recent merit decision was OWCP's September 19, 2016 decision, which denied

¹² 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).

¹³ *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 (September 2020).

¹⁴ *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).

¹⁵ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 10 at Chapter 2.1602.5a (September 2020).

¹⁶ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

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

¹⁸ *Supra* note 10 at Chapter 2.1602.4 (September 2020); see *L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

modification of the decision terminating her medical and wage-loss compensation. As that decision was returned as undeliverable, OWCP resent it on October 25, 2017. As OWCP received appellant's request for reconsideration on October 14, 2021, more than one year after September 19, 2016, the date of the merit decision, and October 25, 2017, the date that OWCP resent it, the Board finds that her request for reconsideration was untimely filed. Consequently, she must demonstrate clear evidence of error on the part of OWCP.

In support of appellant's request for reconsideration, counsel reiterated that appellant did not receive the September 19, 2016 decision and OWCP failed to extend the time for her to file an appeal. Counsel argued that the report of the second opinion, Dr. Smith, was "silly" and asserted that there was a conflict of medical opinion between Dr. Smith and appellant's treating physician. However, OWCP corrected the mailing error with regard to the September 19, 2016 decision when it resent it on October 25, 2017 and treated appellant's November 20, 2017 request for reconsideration as timely.²⁰ Furthermore, these arguments do not show that OWCP's termination of her wage-loss compensation and medical benefits was erroneous, nor do they raise a substantial question as to the correctness of OWCP's determination that she no longer had residuals or disability causally related to her accepted employment-related conditions.²¹ The Board has held that the term clear evidence of error is intended to represent a difficult standard.²² As such, the Board finds that this evidence is insufficient to show clear evidence of error in OWCP's September 19, 2016 decision.

Appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in terminating her wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted employment-related conditions.²³ Thus, the Board finds that her untimely request for reconsideration failed to demonstrate clear evidence of error.²⁴

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.

²⁰ See *Lan Thi Do*, 46 ECAB 366 (1994) (appellant's opportunity for a hearing constituted a meaningful post-deprivation process whereby the government was able to address the procedural error after it occurred).

²¹ See *P.O.*, Docket No. 13-0092 (issued April 4, 2013).

²² *M.P.*, Docket No. 19-0200 (issued June 14, 2019).

²³ *S.C.*, Docket No. 19-1424 (issued September 15, 2020); *U.C.*, *supra* note 16.

²⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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