

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

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**B.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
San Francisco, CA, Employer**

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**Docket No. 11-1857  
Issued: May 22, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 9, 2011 appellant filed a timely appeal from an Office of Workers' Compensation Programs (OWCP) decision dated June 23, 2011 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated April 7, 2004 and the filing of this appeal on August 9, 2011, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**FACTUAL HISTORY**

In this case, OWCP accepted a claim for bilateral overuse syndrome. It commenced appropriate payment for total disability compensation. Appellant has not worked since 1997.

By decision dated April 25, 2002, OWCP terminated appellant's compensation due to her refusal to accept a suitable job offer as a video-coding technician. By decision dated October 7, 2002, OWCP's hearing representative affirmed the April 25, 2002 decision. By decisions dated November 25, 2002, October 1, 2003 and April 7, 2004, OWCP denied modification of the April 25, 2002 decision.

By letter dated June 4, 2011, appellant requested reconsideration. She essentially contended that OWCP erred in finding that she refused to accept suitable employment. Appellant stated that she accepted the employing establishment's offer of a video coding position on August 8, 2002; she submitted a copy of the job description, which indicated that she signed her acceptance of the job offer on August 8, 2002. She asserted in her letter that she had several conditions in addition to overuse of the wrists, including carpal tunnel syndrome, post-traumatic stress disorder and severe depression condition, which rendered her totally disabled from work at the time the position was offered.

In support of her request, appellant submitted a January 10, 2002 report from Dr. George D. Karalis, a specialist in psychiatry and her treating psychiatrist, who stated that she was not ready to return to any job with the employing establishment because of her ongoing psychiatric total disability. Dr. Karalis therefore opined that she was not able to accept the video-coding technician job. Appellant also submitted several position description forms.

By decision dated June 23, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that she had not established clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>1</sup> does not entitle an employee to a review of an OWCP decision as a matter of right.<sup>2</sup> This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> As one such limitation, OWCP has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).<sup>5</sup>

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>6</sup> OWCP procedures state that it will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.<sup>7</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup> To show 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 *prima facie* 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>13</sup> The Board makes an

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<sup>3</sup> Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law, or (2) advancing a relevant legal argument not previously considered by OWCP or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *See* cases cited *supra* note 2.

<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 2.

<sup>11</sup> *See Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley*, *supra* note 2.

independent determination of whether an appellant has submitted 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.<sup>14</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on April 7, 2004. Appellant requested reconsideration on June 4, 2011; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's June 4, 2011 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence which not only would be of sufficient probative value to 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 relevant to the issue which was decided by OWCP. She alleged that she had in fact accepted the offered position, and submitted a copy of her acceptance dated August 8, 2002. However, appellant only accepted the job in August 2002; four months after OWCP issued its April 2, 2005 termination decision.<sup>15</sup> In addition, she did not submit any new medical evidence with her request. Dr. Karalis' January 10, 2002 psychiatric report, which did not provide a diagnosis or any detail regarding why appellant was disabled, was submitted previously and rejected by OWCP in its April 25, 2002 termination decision.<sup>16</sup> Appellant did not submit any new factual evidence with her request for reconsideration. Therefore, she has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

### CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in his reconsideration request dated June 4, 2011. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on June 23, 2011.

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<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>15</sup> The Board notes that OWCP, in its April 25, 2002 decision, stated that appellant admitted that she had refused to accept the job offer on the grounds that she was unable to perform it, which contradicts her argument in her reconsideration request that she had actually accepted this position.

<sup>16</sup> In its April 25, 2002 termination decision, OWCP stated that it had received and considered Dr. Karalis' January 10, 2002 report.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board