

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

---

L.N., Appellant )

and )

DEPARTMENT OF HEALTH & HUMAN )  
SERVICES, SOCIAL SECURITY )  
ADMINISTRATION, Pine Bluff, AR, Employer )

---

**Docket No. 13-1118  
Issued: September 4, 2013**

*Appearances:*  
*Sheila F. Campbell, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On April 2, 2013 appellant, through her attorney, filed a timely appeal from an October 5, 2012 decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days has elapsed from the last merit decision dated September 1, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely failed and failed to establish clear evidence of error.

---

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

<sup>2</sup> Appellant submitted additional evidence with her appeal. As the evidence was not before OWCP when it rendered its decision, the Board may not review it for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, counsel argued that appellant attempted to request reconsideration on August 31, 2012 through Federal Express but the request was not deliverable and that she utilized Federal Express on September 1, 2012 to deliver a request to the street address of the OWCP in Kansas City, Missouri as well as sending a request for reconsideration through certified mail to the record center at London, Kentucky. She alleged that appellant mailed her requests for reconsideration in a timely fashion and that appellant was entitled to an independent determination of whether there was clear evidence of error on the part of OWCP.

### **FACTUAL HISTORY**

On November 24, 2008 appellant then a 44-year-old service representative, filed a traumatic injury alleging that she sustained a bruised right foot on November 17, 2008 when a coworker rolled her chair over appellant's foot. OWCP accepted her claim for contusion of the foot and ankle on January 6, 2009. On March 19, 2009 it accepted right foot sprain as resulting from the November 17, 2008 employment injury. In a March 24, 2010 decision, OWCP denied appellant's claim for a consequential spine or bulging disc condition as resulting from her November 17, 2008 employment injury. By decision dated May 13, 2010, it denied her claim that she had developed a right knee condition as a result of her November 17, 2008 employment injury.

In a January 21, 2011 decision, OWCP denied appellant's claim for continuation of pay due to employment-related disability for the period November 16, 2008 through January 8, 2009.

Appellant requested an oral hearing. By decision dated September 1, 2011, the hearing representative found that appellant had not met her burden of proof to establish that she was disabled from November 26, 2008 through January 8, 2009 due to her accepted employment injuries. This decision included the statement:

“Your request for reconsideration and the new evidence that you are submitting should be sent to the --

U.S. DEPARTMENT OF LABOR  
OFFICE OF WORKER'S COMP PROGRAMS  
PO BOX 8300 DISTRICT 11 KCM  
LONDON, KY 40742-8300”

In a letter received by OWCP on September 6, 2012, appellant requested reconsideration and stated that she had changed attorneys. She provided her attorney's contact information. Appellant stated that there was new evidence material to her case. She stated that prior to the accident she had arthritis in her right foot and did not know it. Appellant stated that this and other information would be forwarded at a later date and requested additional time to submit this evidence.

By decision dated October 5, 2012, OWCP found that appellant's request for reconsideration dated September 1, 2011 received on September 6, 2012, was untimely from the September 1, 2011 merit decision. It found that she did not submit clear evidence of error as she noted that she had changed attorneys and that new evidence would be forthcoming.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

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

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>3</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>4</sup>

The term clear evidence of error is intended to represent a difficult standard.<sup>5</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>6</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>7</sup>

## ANALYSIS

The Board finds that the October 5, 2012 refusal of OWCP to reopen appellant’s claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) was proper and did not constitute abuse of discretion.

---

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

<sup>6</sup> *Id.* at Chapter 2.1602.5.b.

<sup>7</sup> *C.K.*, Docket No. 13-564 (issued June 21, 2013); *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

Appellant had one year from OWCP's September 1, 2011 decision or until September 4, 2012<sup>8</sup> to deliver a reconsideration request to OWCP. The Board has thoroughly reviewed the record and can find no reconsideration request received prior to the September 4, 2012 deadline.

On appeal, counsel argued that appellant timely mailed her reconsideration request. She stated that appellant sent a request for reconsideration on August 31, 2012 by Federal Express, but that this service could not deliver to a Post Office box. Counsel then argued that appellant sent a Federal Express delivery to the street address of OWCP in Kansas City, Missouri and mailed a certified letter to OWCP at the London, Kentucky Post Office box address on September 1, 2012. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of daily activities, is presumed to have arrived at the mailing address in due course.<sup>9</sup> Counsel's arguments establish that only one request for reconsideration was properly addressed to the mailing address as provided by the hearing representative, London, KY. That request is included in the record before the Board and was received by OWCP on September 6, 2012. As this request was not timely received, within one year of OWCP's September 1, 2011 decision, appellant's reconsideration request was untimely.

Appellant did not submit any evidence of mailing with her untimely request for reconsideration. She alleged that she had preexisting arthritis in her foot<sup>10</sup> and that medical evidence of this would be submitted at a later date. Appellant did not submit any evidence or argument alleging error on the part of OWCP. The Board finds there is no clear evidence of error and that OWCP properly denied her untimely request for reconsideration.

### CONCLUSION

The Board finds that appellant's September 30, 2012 request for reconsideration was untimely and did not establish clear evidence of error on the part of OWCP.

---

<sup>8</sup> The 365<sup>th</sup> day from September 1, 2011 was Saturday, September 1, 2012. The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. *John B. Montoya*, 43 ECAB 1148 (1992). The next business day after September 1, 2012 was Tuesday, September 4, 2012 as Monday, September 3, 2012 was the Labor Day holiday.

<sup>9</sup> *Jeffrey M. Sacrecy*, 55 ECAB 455 (2004).

<sup>10</sup> Appellant is not a physician under FECA and her opinion does not constitute medical evidence. *G.G.*, 58 ECAB 389 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board