

second opinion examination and that her injury was erroneously processed as a consequential injury and not a traumatic injury.²

FACTUAL HISTORY

This case was previously before the Board. The history of the case provided by the Board in its prior decision is hereby incorporated by reference.³ The relevant facts follow.

On October 5, 2009 appellant, then a 49-year-old postmaster, filed a traumatic injury claim alleging that she sustained an L5-S1 herniated disc in the performance of duty on November 18, 1998. By decision dated April 20, 2010, OWCP denied appellant's claim as it was not timely filed and this decision was later affirmed by the hearing representative on August 5, 2010. By decision dated November 20, 2010, it denied appellant's request for reconsideration without reviewing the merits of the case. In the December 2, 2011 decision, the Board found that OWCP properly denied appellant's request for reconsideration.⁴ On July 5, 2012 appellant filed a new claim for the same alleged employment incident of November 18, 1998. By letter dated September 10, 2012, OWCP informed appellant that this case had previously been adjudicated and that, if she had any questions or concerns about that claim, she should read the decisions and appeal rights that were issued with regard to the claim.

Appellant resubmitted numerous medical documents including nursing evaluation reports concerning appellant's treatment in 1999; physician progress notes of 1998; reports with regard to her operations of June 25, 1998 and February 16, 1999; and a January 13, 2009 medical report. She also submitted copies of CA-8 forms listing an injury of December 2, 1997; these forms were signed by a human resource specialist on November 20, 1998.

On August 13, 2012 appellant requested reconsideration and asked for a full merit review as she alleged that she established clear evidence of error. She argued that her immediate supervisor had actual knowledge within 30 days of her November 18, 1998 injury and that she reported the injury in a timely manner. In a statement dated June 20, 2012, appellant reiterated that she notified Mike Hoover, her supervisor, on November 18, 1998 and discussed issues she had with various persons at OWCP. On September 10, 2012 she made further allegations including that the employing establishment did not forward all information and that she was ordered to file the wrong form. Appellant also made further arguments with regard to the medical evidence.

² On July 18, 2013 the Board issued an *Order Denying Request for Oral Argument* in this case. Docket No. 13-1242 (issued July 18, 2013).

³ Docket No. 11-983 (issued December 2, 2011). The Board denied appellant's petition for reconsideration of this decision on May 11, 2012. *Order Denying Petition for Recon*, Docket No. 11-983 (issued May 11, 2012). The Board further notes that, while the case was before the Board on this prior appeal, OWCP issued an April 18, 2011 decision and appellant subsequently appealed this decision to the Board. On April 23, 2012 the Board issued an *Order Dismissing Appeal and Dismissing Request for Oral Argument* in Docket No. 11-1474. The Board determined that, as OWCP and the Board may not have simultaneous jurisdiction over a case, OWCP's decision of April 18, 2011 was null and void. *See* Docket No. 11-1474 (issued April 23, 2012).

⁴ *Id.*

By decision dated November 9, 2012, OWCP denied appellant's request for reconsideration of its August 5, 2010 decision as it was untimely filed and failed to establish clear evidence of error.

On December 4, 2012 appellant filed another request for reconsideration. She contended that her claim should have been processed as a new injury, made various arguments with regard to the medical evidence and again contended that she provided her supervisor with notice within 30 days of the November 18, 1998 injury. Appellant also made various arguments concerning the handling of a 1997 injury by OWCP. She wrote another letter on January 8, 2013 to the Secretary of the Department of Labor, reiterating her previous arguments.

By decision dated February 20, 2013, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and 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(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). 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.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴

ANALYSIS

As the Board previously noted in its December 2, 2011 decision, appellant alleged that she suffered an injury at the employing establishment on November 18, 1998, but did not file her claim until over 10 years later on October 5, 2009. Accordingly, OWCP denied appellant's claim as untimely filed. The Board reviewed a prior request for reconsideration on December 2, 2011, and determined that OWCP had properly denied reconsideration as it was not timely filed and did not establish clear evidence of error.¹⁵ Appellant continued to request reconsideration, wherein she reiterated arguments that had been previously considered and rejected by both OWCP and the Board.

The only issue before the Board is whether OWCP properly denied reconsideration, in its decisions of November 9, 2012 and February 20, 2013, of the August 5, 2010 determination that appellant's claim was not timely filed.

Appellant's arguments with regard to whether she was injured or whether the medical evidence established that she suffered an employment injury are irrelevant in the current posture of the case. Similarly, her arguments that her case was mishandled are repetitive of arguments previously made and are not relevant to the issue of whether appellant submitted her claim in a timely manner. The Board notes that appellant contends that the evidence supports that she filed her claim in a timely manner, but the Board finds no such evidence in support of appellant's assertion. Appellant contends that CA-8 forms signed on November 20, 1998 by a human resource specialist support her assertion that her supervisor knew within 30 days about her November 18, 1998 injury; however, this document references a prior injury of December 2, 1997;¹⁶ it does not reference an alleged incident of November 18, 1998.

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona D. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ Docket No. 11-983 (issued December 2, 2011).

¹⁶ The Board notes that OWCP had accepted this claim for a sprain of the lumbar region.

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of the last merit decision, appellant has not established clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her requests were untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 20, 2013 and November 9, 2012 are affirmed.

Issued: September 5, 2013
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