

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

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**Y.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Austin, TX, Employer**

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**Docket No. 13-1659  
Issued: February 5, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 2, 2013 appellant filed a timely appeal from a January 17, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely and insufficient to establish clear evidence of error. As more than 180 days has elapsed between the last merit decision dated November 10, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

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

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

## **FACTUAL HISTORY**

On March 6, 2004 appellant, then a 49-year-old manual clerk, filed an occupational disease claim alleging that she sustained right shoulder, hand and neck pain casually related to factors of her federal employment. She also attributed her condition to a prior injury to her left hand and shoulder. Appellant stopped work on February 27, 2004. OWCP accepted the claim for bilateral impingement syndrome of the shoulders, bilateral brachial neuritis, neck sprain and a recurrent dislocation of the left shoulder. Appellant underwent surgeries on her shoulders and the cervical spine. On June 2008 she stopped work and did not return. By decision dated February 15, 2005, OWCP found that appellant's actual earnings as a modified mail clerk effective April 9, 2004 fairly and reasonable represented her loss of wage-earning capacity. Appellant subsequently stopped work for left shoulder surgery.

By decision dated August 28, 2009, OWCP terminated appellant's wage-loss compensation effective September 27, 2009 after finding that she refused a June 26, 2009 offer of suitable work under 5 U.S.C. § 8106(c). It found that the opinion of Dr. James Hood, a Board-certified orthopedic surgeon, constituted the weight of the evidence and established that she had the capacity to work in the offered position. In decisions dated November 3, 2009, October 14, 2010 and November 10, 2011, OWCP denied modification of its suitable work termination.<sup>2</sup>

By letter dated November 10, 2012, received by OWCP on January 2, 2013, appellant requested reconsideration of the November 10, 2011 decision. She contended that at the time of the job offer she was on prescription medications which had side effects that rendered the offered position unsuitable. Appellant further maintained that Dr. Hood failed to consider the effect of her medication when finding the job offer suitable. She submitted a list of prescription medications filled in 2009.

Appellant additionally submitted medical evidence, including the results of September 26, 2012 bilateral shoulder arthrograms. In a report dated December 17, 2012, Dr. James Key, an osteopath, discussed appellant's complaints of neck and shoulder pain bilaterally. He diagnosed cervical disc degeneration, neck sprain, a bilateral rotator cuff condition, bilateral shoulder dislocation and bilateral brachial neuritis. Dr. Key recommended diagnostic studies and continued physical therapy.

On October 12, November 9 and December 4, 2012 and January 4, 2013 appellant was evaluated for pain in her neck, shoulders, arms and hands. The provider recommended that she continue with pain patches.<sup>3</sup> In reports dated November 14 and December 10, 2012 and January 3, 2013, a behavioral medical consultant provided pain management and coping skills. On December 8, 2012 appellant underwent a cervical nerve block.

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<sup>2</sup> In its October 14, 2010 and November 10, 2011 decisions, OWCP noted that it had accepted a September 10, 1998 occupational disease claim, assigned file number xxxxxx614, for left shoulder tendinitis, left carpal tunnel syndrome and left de Quervain's tenosynovitis.

<sup>3</sup> The provider is not a physician.

On December 23, 2012 appellant informed OWCP that she had requested reconsideration by letter dated November 10, 2012. She resubmitted the November 10, 2012 reconsideration request.

By decision dated January 17, 2013, OWCP denied appellant's request for reconsideration after finding that it was not timely filed and did not demonstrate clear evidence of error.

On appeal appellant argues that she timely requested reconsideration and cited as support an undated OWCP document number. She contends that a review of the evidence shows that OWCP erred in adjudicating her claim.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>4</sup> As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's 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>5</sup>

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.<sup>6</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.<sup>7</sup>

### **ANALYSIS**

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>8</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>9</sup> As appellant's November 10,

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

<sup>7</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Robert F. Stone*, *supra* note 7.

2012 request for reconsideration was received on January 2, 2013, more than one year after the last merit decision of record dated November 10, 2011, it was untimely.<sup>10</sup> Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>11</sup>

The Board finds that appellant has not submitted evidence or advanced arguments sufficient to raise a substantial question as to the correctness of OWCP's November 10, 2011 decision or *prima facie* shift the weight of the evidence in her favor. OWCP terminated her wage-loss compensation on September 27, 2009 based on its finding that she refused an offer of suitable work. In her request for reconsideration, appellant alleged that the offered position was not suitable because of the prescription medications that she was taking at the time of the job offer. She enclosed a list of prescription medications from 2009. The issue of whether appellant had the physical capacity to accept the offered position is, however, a medical question. As the issue is medical in nature, it can only be resolved through the submission of medical evidence.<sup>12</sup> Appellant's lay opinion regarding the adverse effects of prescribed medication rendering the selected position unsuitable is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.<sup>13</sup> Consequently, her contention is insufficient to establish clear evidence of error by OWCP.

Appellant additionally alleged that Dr. Hood failed to take into consideration that she was taking medication in his finding the offered position suitable. In his February 3 and 17, 2009 reports, however, Dr. Hood discussed her current treatment, including prescribed medications, in finding that she could work with restrictions.

Appellant submitted the results of bilateral shoulder arthrograms obtained September 26, 2012, reports dated November 14 and December 10, 2012 from a behavioral medical consultant, and therapy reports dated October 2012 through January 2013. This evidence does not contain a physician's report addressing the relevant issue of whether she had the physical capacity to accept the offered position and therefore is insufficient to show clear evidence of error.<sup>14</sup>

In a report dated December 17, 2012, Dr. Key diagnosed cervical disc degeneration, neck sprain, a bilateral rotator cuff condition, bilateral shoulder dislocations and bilateral brachial neuritis. He did not, however, address the question of appellant's work capacities at the time of

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<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

<sup>11</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>12</sup> See *George C. Vernon*, 54 ECAB 319 (2003).

<sup>13</sup> See *M.B.*, Docket No. 12-1000 (issued October 4, 2012); *Gloria J. McPherson*, 51 ECAB 441 (2000).

<sup>14</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

the June 26, 2009 job offer. As discussed, in order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>15</sup>

On appeal appellant alleged that she timely requested reconsideration and referred to an undated OWCP document. As noted, the one-year period for requesting reconsideration begins on the date of the original OWCP decision and is determined by the date that the request is received by OWCP.<sup>16</sup> The last merit decision was issued November 10, 2011. OWCP did not receive appellant's reconsideration request until January 2, 2013. Therefore, her request was untimely and OWCP properly considered the request under the clear evidence of error standard.

Appellant also contends that a review of the evidence shows that OWCP erred in adjudicating her claim. To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>17</sup> None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

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<sup>15</sup> *Id.*

<sup>16</sup> *See supra* note 11.

<sup>17</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2014  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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