



neck sprain, lumbar sprain and C5-6 herniated nucleus pulposus. It authorized cervical discectomy and interbody fusion with C5-6 external fixation, which occurred on October 10, 2002. Appellant was placed on the periodic rolls for temporary disability on April 14, 2000.

In a June 7, 2006 work capacity evaluation form (Form CA-5c), Dr. Miguel A. Jimenez, a treating orthopedic surgeon, found that appellant was capable of working her usual job for eight hours a day.

On June 20, 2006 OWCP issued a proposed notice of termination for wage-loss compensation based upon Dr. Jimenez's June 7, 2006 report.

By decision dated July 24, 2006, OWCP finalized the termination of appellant's wage-loss compensation effective August 6, 2006.

On August 18, 2006 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on December 9, 2006.

OWCP received a November 8, 2006 functional capacity evaluation which noted that appellant was capable of full-time work with a restriction of occasional lifting carrying less than 52 pounds.

By decision dated March 12, 2007, OWCP's hearing representative affirmed the July 24, 2006 decision terminating appellant's wage-loss compensation.

Following the March 12, 2007 decision, OWCP received medical records of treatment from Dr. Donald R. Taylor, a Board-certified anesthesiologist and pain management physician, dated March 27 through August 17, 2007. Dr. Taylor diagnosed cervical radiculopathy and lumbar disc torn annulus which he attributed to the February 11, 2000 employment injury.

On June 1, 2007 appellant requested OWCP to accept the conditions of cervical radiculopathy and lumbar disc torn annulus based upon Dr. Taylor's reports.

In a letter dated June 1, 2007, appellant requested reconsideration.

By decision dated August 31, 2007, OWCP denied modification of the March 12, 2007 decision.

OWCP subsequently received additional treatment records dated September 24, 2007 through May 27, 2008 from Dr. Taylor, who noted cervical radiculopathy and cervical cord compression, which he attributed to the accepted employment injury.

On August 1, 2008 appellant requested reconsideration of the termination of her wage-loss compensation.

By decision dated September 23, 2008, OWCP denied modification of its prior decisions.

On August 21, 2009 OWCP received an August 4, 2009 progress note and August 14, 2009 report from Dr. Taylor, who reiterated his opinion that appellant's cervical disc herniation and cervical radiculopathy were due to the February 2002 employment injury. He noted that a review of the medical records support this conclusion.

On September 22, 2009 appellant requested reconsideration.

By decision dated November 18, 2009, OWCP denied modification of its prior decisions.

On November 18, 2010 appellant requested reconsideration. In a November 16, 2010 report, Dr. Ronald Clark, Ph.D., concurred with Dr. Taylor's treatment and diagnosis and opined that appellant's work-related problems had not completely resolved.

By decision dated December 22, 2010, OWCP denied modification.

On December 21, 2011 appellant requested reconsideration and submitted medical evidence concerning treatment for cervical radiculopathy from Drs. Taylor and Clark. In a January 17, 2012 work capacity form (Form OWCP-5c), Dr. Taylor noted that appellant was disabled from her date-of-injury position, but was capable of work within specified restrictions.

By decision dated March 12, 2012, OWCP denied modification of its prior decisions.

On March 20, 2013 OWCP received appellant's request for reconsideration dated March 10, 2013. Appellant submitted a report from Dr. Taylor dated January 10, 2013. Dr. Taylor noted that a January 6, 2012 electromyograph test showed that appellant had C5 and C6 radiculopathy which he opined was consistent with her February 11, 2000 employment injury.

By decision dated April 11, 2013, OWCP denied appellant's request for reconsideration finding it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's 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.<sup>2</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>3</sup>

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.<sup>4</sup> OWCP regulations and procedures provide that OWCP will reopen a

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<sup>2</sup> 20 C.F.R. § 10.607(a).

<sup>3</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>6</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</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>10</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>11</sup>

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.<sup>12</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 March 12, 2012. OWCP received appellant's request for reconsideration on March 20, 2013; thus, the request was outside the one-

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<sup>5</sup> *Id.*; 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.

<sup>6</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>7</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

<sup>10</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>12</sup> 20 C.F.R. § 10.607.

year time limit.<sup>13</sup> Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>14</sup>

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's July 24, 2006 decision or shift the weight of the evidence of record in her favor. OWCP terminated her wage-loss benefits effective August 24, 2006 based on the June 7, 2006 report by Dr. Jiminez, a treating physician, which found her capable of returning to her date-of-injury job.

On reconsideration, appellant has not presented sufficient evidence to establish that OWCP improperly terminated her wage-loss compensation. 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> Appellant has not submitted any rationalized medical evidence addressing how she was totally disabled from working due to her accepted employment injuries. In the January 10, 2012 report, Dr. Taylor noted that the objective evidence established C5 and C6 radiculopathy which he opined was consistent with her February 11, 2000 employment injury. However, he has not provided any well-rationalized medical opinion as to the basis for termination of appellant's wage-loss compensation in this report. 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 request was untimely filed and failed to demonstrate clear evidence of error.

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<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. 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 the decision for which review is sought.

<sup>14</sup> 20 C.F.R. § 10.607(a); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>15</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 11, 2013 is affirmed.

Issued: February 21, 2014  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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