

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On January 7, 2010 appellant, then a 24-year-old temporary recruiting assistant, filed a traumatic injury claim alleging that she pulled back muscles when lifting a case of papers from the rolling cart. OWCP accepted the claim for cervical and lumbar strains and paid compensation for lost wages for the period March 11 through June 25, 2010.

By decision dated October 14, 2010, OWCP denied appellant's claim for disability compensation for the period June 26 through September 19, 2010. The medical evidence failed to establish that she was totally disabled from her date-of-injury position during that period. Determinative weight was accorded to second opinion examiner Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, whose findings corroborated those of appellant's treating physician, Dr. Tae Shin, an orthopedic surgeon, that she was not totally disabled but was medically able to return to work effective June 25, 2010. By decision dated January 11, 2012, OWCP denied modification of the October 14, 2010 decision.

In a January 10, 2012 letter,³ received by OWCP on January 15, 2013, appellant requested reconsideration. She set forth various reasons why she disagreed with OWCP's denial of her claim. Appellant argued that she was unable to obtain medical care while pregnant with her child who was born on March 31, 2012. She has had difficulty finding a job and the demands of being a mother were physically taxing. The evidence received included letters related to benefits from insurance agencies, a January 3, 2013 emergency room discharge report and a physical therapy prescription.

By decision dated January 25, 2013, OWCP denied appellant's request for reconsideration. It found that the request was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁴ 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.⁵ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁶

³ Appellant appears to have a typographical error in the date of her letter requesting reconsideration.

⁴ See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

⁵ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

⁶ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁷ if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.¹¹

OWCP's procedures note 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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

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.¹⁴ A right to reconsideration within one year

⁷ 20 C.F.R. § 10.607.

⁸ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹¹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 7.

¹² *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(c) (October 2011).

¹³ See *M.L.*, *supra* note 8; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

¹⁴ 20 C.F.R. § 10.607(a).

also accompanies any subsequent merit decision on the issues.¹⁵ The Board notes that, for merit decisions issued prior to August 29, 2011, OWCP's procedures provided that the timeliness for a reconsideration request was determined not by the date OWCP received the request, but by the postmark on the envelope.¹⁶ OWCP's new procedures as of August 29, 2011 require that for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP.¹⁷ As appellant's January 10, 2012¹⁸ request for reconsideration was received by OWCP on January 15, 2013, more than one year after the last merit decision of January 11, 2012, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁹

The underlying claim for wage-loss compensation for the period June 26 through September 19, 2010 was denied on the grounds that appellant had not established that she was totally disabled or medically incompetent to return to her date-of-injury job. On reconsideration, appellant did not allege error or abuse in OWCP's decisions denying her claim for wage-loss compensation. While she presented arguments regarding the fact that she was pregnant during the period in question and has had difficulty finding a job as her date-of-injury position was temporary and no longer available, these arguments fail to present clear evidence to overcome the fact that she was determined by OWCP's second opinion physician and her treating physician to be medically competent to return to her date-of-injury position. Additionally the evidence submitted on reconsideration is irrelevant as it fails to address the period in question or the relevant issue involved.

On appeal, appellant contends in part that her reconsideration request was timely filed as she had sent it by overnight express and had included a receipt on the reconsideration request. As noted above, the operative date is when the reconsideration request was received by OWCP, not the date of mailing. Appellant also addresses the merits of her case. The Board only has jurisdiction over OWCP's January 25, 2013 nonmerit decision and therefore is precluded from addressing the merits of this case.

¹⁵ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.3(b)(1) (January 2004).

¹⁷ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.4(e) (August 29, 2011).

¹⁸ The Board notes that appellant may have made a typographical error in the year of her request for reconsideration.

¹⁹ *Id.* at § 10.607(a); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and insufficient to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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