

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

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**B.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Glenside, PA, Employer**

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**Docket No. 17-0182  
Issued: July 5, 2018**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case submitted on the record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 3, 2016 appellant filed a timely appeal from a June 21, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days elapsed from the last merit decision, dated April 11, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant submitted additional evidence with her appeal to the Board. The Board's jurisdiction, however, is limited to the evidence that was before OWCP at the time of its final decision. Thus, the Board is precluded from considering this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated May 5, 2017, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0182 (issued May 5, 2017).

## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On February 22, 2002 appellant, then a 32-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her back and left leg when she slipped on a frozen puddle while in the performance of duty. OWCP accepted her claim for lumbosacral strain and lumbar intervertebral disc displacement without myelopathy. Appellant returned to work full time in a light-duty capacity on January 7, 2008. Her return to work occurred following an October 9, 2007 second opinion examination with Dr. Steven Valentino, a Board-certified orthopedic surgeon, who found that she could return to work full time with restrictions, which included four hours of sitting, walking, and standing. Dr. Valentino also advised no bending or stooping.

On September 19, 2012 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability on September 1, 2012 causally related to her February 22, 2003 employment injury.

By decision dated December 13, 2012, OWCP denied appellant's recurrence claim. Appellant subsequently appealed to the Board.

By decision dated August 26, 2013, the Board affirmed OWCP's December 13, 2012 decision.<sup>5</sup> It found that none of the medical reports submitted by appellant contained a rationalized opinion to explain why she could no longer perform the duties of her light-duty position and why any such disability or continuing condition would be due to the accepted condition.

On January 13, 2014 appellant requested reconsideration of OWCP's December 13, 2012 decision. She contended that her job requirements changed over the years and she was forced to do more than required and suffered the consequences. Furthermore, appellant contended that she was working beyond her restrictions on a daily basis, until she refused because she was in so much pain. She explained that in September 2012, she went to the emergency room and was taken off work. Appellant noted that Dr. Valentino indicated that her work was the direct cause of her injury. She also argued that she believed her recurrence claim was being denied because it was under the wrong claim and referenced OWCP File No. xxxxxx898.

By decision dated April 11, 2014, OWCP denied modification of its December 13, 2012 decision. It found that appellant had not submitted corroborating evidence to support her

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<sup>4</sup> Docket No. 07-0003 (issued March 16, 2007); Docket No. 13-0793 (issued August 26, 2013).

<sup>5</sup> Docket No. 13-0793, *id.*

contention that she was forced to work outside her medical restrictions. OWCP also found that the medical evidence of record did not address the claimed recurrence.

On March 22, 2016 appellant, through her then-representative, requested reconsideration of the April 11, 2014 decision.<sup>6</sup> He argued that the Board determined that the employing establishment's statement was accepted as factual over that of appellant. The representative argued that this was a critical error and without basis. He also noted that the only evidence provided by the employing establishment regarding work provided to appellant within her restrictions, was the information they provided on the notice of recurrence dated October 18, 2012. The representative noted that appellant submitted her CA-7 forms to the employing establishment and they did not complete their portion of the form until a month later on October 18, 2012. He argued that this was a violation of 10 C.F.R. subsections 1811 C and the violation was not addressed. The representative argued that the only evidence provided by the employing establishment offered no description of the duties she was required to perform. He also noted that the employing establishment was not requested to provide a comment or opinion.

Appellant's representative further argued that the Board ignored its own precedents with regard to appellant's statements, and finding when they stood uncontroverted, they held great probative value. He argued that appellant's statements were uncontroverted. Furthermore, it was a critical error which would determine the outcome of the case and must be considered under the reconsideration guidelines established by FECA and interpretations of the Board. The representative also argued that, with regard to the medical evidence, several key pieces of information were not reviewed or were overlooked by the Board as well as OWCP. He noted that the second opinion physician, Dr. Valentino, began treating appellant. The representative argued that there was no indication that appellant requested a change of treating physicians and OWCP did not question the change. He argued that this violated OWCP procedures and it was unclear as to why a physician who regularly performed second opinion evaluations on behalf of OWCP was permitted to treat, and continue treating appellant. The representative argued that Dr. Valentino's status with OWCP called into question Dr. Valentino's status with OWCP and called into question his ability to provide an impartial opinion on behalf of the claimant. He indicated that upon review of the doctor's reports to OWCP, it was noted that he neglected to provide a clear opinion concerning the causal relationship of appellant's returns to the originally accepted injury. The representative argued that Dr. Valentino had a lengthy relationship with OWCP and had experience producing reports in compliance with the requirements of FECA. He wondered why his report was noncompliant. The representative also argued that Dr. Valentino declared appellant totally disabled as of October 17 2012, due to a worsening of her condition since her return to limited duty. He discussed the medical evidence of record and argued that it was uncontroverted. The representative argued that appellant developed radiculopathy and related her complaints to her treating physician, Dr. Valentino. He argued that the medical evidence was uncontroverted by the facts or the medical evidence of the file and was consistent with a worsening of a condition. The representative argued that OWCP must develop this information further pursuant to FECA and its associated regulations. Furthermore, he argued that a second opinion should be scheduled in order to develop the truth and factual evidence to support the claim. The representative argued that he

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<sup>6</sup> Appellant's representative noted that appellant was requesting reconsideration of a purported September 1, 2012 decision. The Board notes that there is no decision of record dated September 1, 2012. The April 11, 2014 decision is the last merit decision of record concerning appellant's recurrence claim.

had demonstrated that the injury occurred in the manner alleged as there was no factual evidence to dispute that statement. He argued that fact of injury has been established and must be accepted and referenced *Charles B. Ward*, 38 ECAB 667 (1987).

By decision dated June 21, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant was being accommodated by the employing establishment with a job within the restrictions on file. OWCP noted that, while appellant claimed that she was working outside of her work restrictions, she did not provide any evidence of this. It explained that the burden of proof was on appellant, but other than her own narrative statement, she had not provided any witness statement(s) or any other corroborative evidence to support her claim that she was required to work outside of her medical restrictions.<sup>7</sup>

### **LEGAL PRECEDENT**

OWCP regulations provide that to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).<sup>9</sup>

OWCP, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.<sup>10</sup> In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>12</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>13</sup> It is not enough merely to show that the evidence

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<sup>7</sup> Regarding the scheduling of a referee examination and physician, OWCP explained that this was the topic of a separate reconsideration request and nonmerit decision dated July 15, 2015. It explained that appeal rights were attached to that decision.

<sup>8</sup> 20 C.F.R. § 10.607; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

<sup>9</sup> *Id.* at Chapter 2.1602.4b.

<sup>10</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>11</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>13</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

could be construed so as to produce a contrary conclusion.<sup>14</sup> The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to 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>15</sup>

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>16</sup>

### ANALYSIS

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

OWCP rendered its last merit decision on April 11, 2014. As appellant requested reconsideration on March 22, 2016, more than one year after the April 11, 2014 merit decision, her reconsideration request was untimely filed.<sup>17</sup> Consequently, she must demonstrate clear evidence of error on the part of OWCP in issuing the December 13, 2012 decision.

The Board finds that appellant has failed to demonstrate clear evidence of error with regard to the April 11, 2014 decision. Appellant did not submit the type of positive, precise, and explicit evidence manifesting on its fact that OWCP committed error in the denial of the claim.<sup>18</sup>

In her March 22, 2016 request for reconsideration, appellant's representative made several arguments. The Board initially notes that his arguments regarding the second opinion physician or referee physician were not addressed by OWCP as appellant was given appeal rights in the July 15, 2015 decision, which is not before the Board.

Appellant's representative also made several arguments with regard to the employing establishment's statement being accepted as factual over that of appellant and alleged that this was a critical error and without basis. However, these arguments were previously addressed by the Board in its August 26, 2013 decision. The Board found that corroboration was needed to support her claim that she was worked beyond her restrictions. The Board notes that she has not provided corroboration to support her arguments and she has not raised a substantial question as to the correctness of OWCP's April 11, 2014 merit decision. These arguments do not establish that OWCP committed clear evidence of error.

Appellant's representative also argued that OWCP committed a procedural error by not completing their portion of the Form CA-7 until a month later on October 18, 2012. He again

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<sup>14</sup> *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>15</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>16</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

<sup>17</sup> *Supra* note 12.

<sup>18</sup> *See S.P.*, Docket No. 17-1708 (issued February 23, 2018).

repeated his argument that the only evidence provided by the employing establishment offered no description of the duties she was required to perform and the employing establishment was not requested to provide a comment or opinion. The Board notes that the burden of proof is on appellant to establish her claim for a recurrence of disability beginning September 1, 2012. This argument does not raise a substantial question as to the correctness of OWCP's April 11, 2014 merit decision. It does not establish that OWCP committed clear evidence of error in the December 13, 2012 decision.

Clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>19</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>20</sup>

For these reasons, appellant has not demonstrated clear evidence of error by OWCP in its April 11, 2014 decision.

On appeal appellant argues that she was forced to work beyond her restrictions. She also argues that she was advised that there was no work within her restrictions. However, as explained above, the Board does not have jurisdiction over the merits of the claim and appellant has not demonstrated clear evidence of error.

### **CONCLUSION**

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

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<sup>19</sup> *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).

<sup>20</sup> *Nancy Marciano*, 50 ECAB 110 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board