



## **FACTUAL HISTORY**

This case has been previously before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

By decision issued December 14, 2015,<sup>3</sup> the Board affirmed an OWCP decision dated June 10, 2015, which denied appellant's April 8, 2015 request for an oral hearing before an OWCP hearing representative.

In a letter dated November 29, 2016, appellant requested reconsideration with OWCP of the Board's December 14, 2015 decision. She contended that OWCP had erred in denying her February 19, 2015 request for reconsideration of a nonmerit February 20, 2014 OWCP decision, as she had submitted new, relevant medical evidence meeting the requirements of 20 C.F.R. § 10.606(b)(3).<sup>4</sup> Appellant also asserted that the Board had erred by affirming OWCP's denial of her request for an oral hearing. She also argued that OWCP did not develop the medical evidence in her claim as she had not been referred for a second opinion examination. Appellant referred generally to sections of OWCP's regulations and procedures, and various Board precedents regarding OWCP's duty to see that justice is done. She did not submit additional evidence in support of her November 29, 2016 request.

By decision dated February 27, 2017, OWCP denied reconsideration, finding that appellant's November 29, 2016 letter was not relevant and pertinent new evidence. It found that her assertions were insufficient to warrant reopening her claim for a merit review. Appellant then appealed to the Board.

By decision dated January 18, 2018,<sup>5</sup> the Board found that OWCP had erred in applying the standards for timely requests for reconsideration as set forth in 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(3) to appellant's November 29, 2016 request for reconsideration. The Board found that it had received appellant's request on November 29, 2016, more than one year after the Board's last merit decision of record of December 15, 2006. The Board set aside OWCP's February 27, 2017 decision and remanded the case to OWCP for issuance of an appropriate decision determined under the clear evidence of error standard.

On remand of the case, by decision dated March 30, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear

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<sup>2</sup> Docket No. 17-1682 (issued January 18, 2018); Docket No. 15-1679 (issued December 14, 2015); Docket No. 09-2374 (issued June 17, 2010); Docket No. 06-1980 (issued December 15, 2006).

<sup>3</sup> Docket No. 15-1679 *id.*

<sup>4</sup> Appellant had provided a January 29, 2015 letter from Dr. Christian Altman, a treating anesthesiologist, pulmonary function test results, and a pulmonary imaging study.

<sup>5</sup> Docket No. 17-1682 *supra* note 2.

evidence of error. It found that appellant's reconsideration request did not constitute relevant evidence as it merely reiterated the factual history of her claim and recited OWCP procedures.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, 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>6</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System.<sup>7</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>8</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>10</sup> is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.<sup>11</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>12</sup>

### **ANALYSIS**

The Board finds that OWCP properly determined that appellant's November 29, 2016 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>8</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>9</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

<sup>10</sup> *See F.N., id.*; *A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See F.N., supra* note 9; *A.F., id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's June 10, 2015 decision because the Board considered that evidence in its December 14, 2015 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>13</sup>

OWCP's regulations<sup>14</sup> and procedures<sup>15</sup> establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>16</sup> The most recent merit decision was the Board's December 15, 2006 decision which affirmed OWCP's May 22, 2006 decision denying appellant's occupational disease claim as causal relationship was not established. As her request for reconsideration was not received by OWCP until November 29, 2016, more than one year after the Board's December 15, 2006 decision, it was untimely filed.<sup>17</sup> Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied her occupational disease claim.<sup>18</sup>

OWCP denied appellant's occupational disease claim as the medical evidence of record failed to establish a causal relationship between occupational exposures and claimed respiratory conditions. In her November 29, 2016 request for reconsideration, appellant asserted that medical evidence received by OWCP on February 19, 2015 was sufficient to establish causal relationship. The Board finds that this argument fails to demonstrate clear evidence of error as it is insufficient to demonstrate that evidence could be construed so as to produce a contrary conclusion.<sup>19</sup> Appellant also protested the denial of her request for an oral hearing and contended that OWCP failed to refer her for a second opinion examination. These arguments are irrelevant to the underlying issue of causal relationship and fail to demonstrate clear evidence of error in OWCP's denial of appellant's occupational disease claim.<sup>20</sup>

The Board finds that appellant's arguments in the untimely request for reconsideration do not raise a substantial question as to the correctness of the final merit decision and are therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim is medical in nature with respect to establishing causal relationship. The Board notes that the term

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<sup>13</sup> See *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

<sup>14</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>15</sup> FECA Procedure Manual, *supra* note 7 at Chapter 2.1604.4 (February 2016); see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>16</sup> *F.N.*, *supra* note 9; *J.W.*, *supra* note 14; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>17</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>18</sup> *F.N.*, *supra* note 9.

<sup>19</sup> *Id.*, *J.S.*, *supra* note 12; *B.W.*, *supra* note 12.

<sup>20</sup> *F.N.*, *supra* note 9; see *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

clear evidence of error is intended to represent a difficult standard.<sup>21</sup> Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.<sup>22</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>23</sup>

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

On appeal, appellant contends that OWCP erred in its March 30, 2018 decision by failing to address all relevant evidence she had submitted in her claim, citing to the Board's order in *J.A.*<sup>24</sup> Additionally, she sets forth multiple grievances with the claims process which are passionate, but irrelevant. As set forth above, OWCP properly found that appellant's November 29, 2016 request for reconsideration failed to demonstrate clear evidence of error.

### CONCLUSION

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

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<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 10.

<sup>22</sup> *F.N.*, *supra* note 9; see *D.G.*, 59 ECAB 455 (2008).

<sup>23</sup> *F.N.*, *supra* note 9; see *M.N.*, *supra* note 20.

<sup>24</sup> Docket No. 12-1902 (issued March 12, 2013) (where the Board set aside OWCP's August 2, 2012 decision and remanded the case for additional development as OWCP had failed to fully consider the medical evidence of record).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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