

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

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P.H., Appellant)	
)	
and)	Docket No. 19-1354
)	Issued: March 13, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Oklahoma City, OK, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 28, 2019 appellant filed a timely appeal from a December 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ The most recent merit decision was a Board decision dated March 13, 2018, which became final 30 days after issuance, and is not subject to further review.² As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from December 3, 2018, the date of OWCP's last decision, was June 1, 2019. As this fell on a Saturday, appellant had until the following business day, Monday, June 3, 2019, to file the appeal. Since using June 4, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 28, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 20 C.F.R. § 501.6(d). *See G.G.*, Docket No. 18-1074 (issued January 7, 2019).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On February 11, 2008 appellant, then a 51-year-old administrative assistant, filed an occupational disease claim (Form CA-2) alleging that she developed constant pain in both elbows, hands, arms, and her neck and back as a result of her employment duties. She indicated that she first became aware of her condition and first realized that it resulted from her employment on January 15, 2008. On the reverse side of the claim form, the employing establishment reported that appellant was last exposed to the conditions alleged to have caused her conditions on "February 12, 2008." OWCP accepted her claim for bilateral lateral epicondylitis, bilateral medial epicondylitis, sciatica, and neck sprain. It subsequently expanded acceptance of appellant's claim to include bilateral carpal tunnel syndrome.⁵ OWCP paid wage-loss compensation for total disability on the periodic rolls, effective June 7, 2009.

On December 5, 2014 OWCP mailed appellant an EN1032 form for her completion. The form instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was also directed to report all self-employment activities or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. The kinds of services that she was required to report included such activities as carpentry, mechanical work, painting, contracting, child care, keeping books and records, and managing and overseeing a business of any kind, including a family business. The form also instructed appellant to report any work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to another.

The cover letter for the EN1032 form included the following warning: "A false or evasive answer to any question, or the omission of an answer, may be grounds for forfeiting your compensation benefits and subject you to civil liability." The forms contained certification clauses which informed appellant of the consequences of not accurately reporting her employment

⁴ Docket No. 17-1362 (issued March 13, 2018).

⁵ Under OWCP File No. xxxxxx455, OWCP accepted appellant's September 15, 2008 occupational disease claim for cervical spondylosis without myelopathy or radiculopathy, cervical disc degeneration, lumbar spondylosis without myelopathy or radiculopathy, lumbar spondylolisthesis, bilateral pes planus, neck sprain, bilateral medial and lateral epicondylitis, and bilateral carpal tunnel syndrome as causally related to her employment duties. On September 1, 2010 OWCP combined the current case under OWCP File No. xxxxxxx045 with OWCP File No. xxxxxx455 with the latter file as the master file.

activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation benefits.

On December 27, 2014 appellant completed and signed the EN1032 form. In response to the question of whether she worked for an employer for the past 15 months, she reported "No." Appellant also responded "No" to the question of whether she was self-employed or involved in any business enterprise in the past 15 months.

On June 12, 2015 OWCP received a narrative statement from appellant. Appellant indicated that she needed to correct an answer on the yearly paperwork form. She explained that her husband had purchased a snow cone trailer and had added her name to the permits, trailer, and limited liability company (LLC) just in case anything happened to him. Appellant reported that she answered "No" on the EN1032 form and that she did not think about the snow cone trailer until her husband opened it for business over the summer.

In a July 23, 2015 letter, the employing establishment's Office of Inspector General (OIG) informed OWCP that an investigation into appellant revealed that she had been operating her own business and had failed to report the employment activities to OWCP. It requested that OWCP issue a forfeiture decision due to her failure to disclose her employment.

On July 27, 2015 OWCP received an OIG summary report of investigation, which indicated that during surveillance OIG agents had observed appellant working at a snow cone business, carrying merchandise and buckets, unloading supplies from a trailer, writing on the outside menu of the business, setting up tables and umbrellas, staking signs in the ground, and serving snow cones to customers.

In a completed Form EN1032 dated February 7, 2016, appellant answered "yes" that she was self-employed or involved in a business enterprise from the period April 1 to September 1, 2015. She explained that she and her husband bought a snow cone stand and that she bought and delivered cups, checked on the employees, and visited with customers a couple of times. Appellant noted a pay rate of \$8.00/hour.

In a February 7, 2016 narrative statement, appellant explained that her husband had added her name to the title of the snow cone stand that he had bought because he had lung cancer. She indicated that, while grocery shopping with her husband, they occasionally bought cups, straws, or napkins and dropped them off at the snow cone stand. Appellant also related that the snow cone stand was two blocks from her house and that she occasionally stopped by to see how the business was operating and visit with customers. She reported that neither she nor her husband were paid or received any wages while operating the snow cone stand.

By decision dated August 18, 2016, OWCP found that appellant had forfeited her wage-loss compensation for the period September 27, 2013 through December 27, 2014 for failure to report her business and employment activities or earnings on a Form EN1032. The forfeiture period covered the 15 months preceding the December 27, 2014 EN1032 form. OWCP found that appellant had knowingly provided false information about earnings and self-employment on that

EN1032 form. It also determined that all compensation paid during the period would be considered an overpayment subject to recovery in accordance with 5 U.S.C. § 8129.⁶

OWCP received a September 21, 2016 letter by Dr. John Ellis, Board-certified in family medicine, who related that appellant had severe anxiety and depression due to the multiple work-related injuries to her neck, upper extremities, lumbar spine, and feet. Dr. Ellis noted that she was under the influence of narcotic pain medicine when she filled out the Form EN1032 in 2014 and opined that she was not fully aware of what she was signing.

In an October 18, 2016 report, Dr. Gary A. Rouse, a clinical psychologist, related that, since his original evaluation in September 2008, appellant had continued to decline emotionally and physically. He opined that she was not competent or knowledgeable enough to understand what she was signing or attesting to or to understand the complexity or legal implications of partnerships and LLCs.

In a January 31, 2017 statement, appellant explained that she had not received money from her husband's snow cone business nor did she perform any job activities. She reported that her husband had recently dissolved the LLC.

On August 18, 2017 appellant requested reconsideration of the August 18, 2016 forfeiture decision. In a statement dated August 9, 2017, she asserted that she believed that she was not required to report her investment income as work activities since there was no evidence that the three to five hours total spent at the business could be construed as integral to the operation of the business. Appellant cited to FECA Procedure Manual 2.402.5 and *S.G.*,⁷ and contended that the Board has distinguished between the reporting requirements for income received from passive investment and earnings and income received by performing work and earning wages. She also alleged that she was not fully aware when she signed the LLC documents due to her deteriorating mental health, severe anxiety, and depression. Appellant also cited to *B.Y.*,⁸ alleging that the Board had previously found that, in finding that a claimant forfeited compensation, OWCP could not rely solely on video tape and summary submitted by the employing establishment's OIG. She also noted her disagreement with the OIG investigation and her interview with the OIG agents.

⁶ By separate decision dated August 18, 2016, OWCP also issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$43,832.60 for the period September 27, 2013 through December 27, 2014 as a result of the forfeiture. It found that she was at fault in the creation of the overpayment because she failed to report her business and employment activities or earnings from the snow cone business that she owned with her husband. By decision dated December 12, 2016, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$43,832.60 for the period September 27, 2013 to December 27, 2014. It also found that appellant was at fault in the creation of the overpayment, and therefore was not eligible for waiver for recovery of the overpayment. On June 2, 2017 appellant filed an appeal to the Board regarding the December 12, 2016 overpayment decision. By decision dated March 13, 2018, the Board affirmed the December 12, 2016 OWCP decision, which finalized the overpayment of compensation in the amount of \$43,832.60 for the period September 27, 2013 to December 27, 2014 and found that she was at fault in the creation of the overpayment.

⁷ Docket No. 11-0942 (issued April 4, 2012).

⁸ Docket No. 11-1798 (issued July 24, 2012).

By decision dated November 17, 2017, OWCP denied modification of the August 18, 2016 forfeiture decision.

On November 20, 2018 OWCP received appellant's appeal request form, which requested reconsideration of the November 17, 2017 decision. In a narrative statement, appellant alleged that OWCP ignored many issues, including her arguments concerning why any of the OIG interviews or photographs were applicable. She also contended that OWCP erred by ignoring evidence and arguments concerning whether her comprehension was impaired. Appellant cited to the Board's holding in *C.G.*,⁹ and alleged that she had provided probative supporting evidence that she would have difficulty understanding the obligations required on a Form EN1032.

Appellant also resubmitted Dr. Ellis' September 21, 2016 report and Dr. Rouse's October 28, 2016 report.

OWCP received a statement from appellant dated June 1, 2017. Appellant alleged that OWCP had not supported its forfeiture determination because there was no evidence establishing that she knowingly failed to report self-employment or earnings on the Form EN1032 signed on December 27, 2014. She explained that the three to five hours spent at the business were not considered valuable on the open labor market and that her activities could not be construed as integral to the operation of the business. Appellant also asserted that, although the business was licensed in May 2014, it had not opened for business in April 2015. She further indicated that the file contained statements from her psychologist who noted that she was not fully aware of what she was signing when she signed the LLC.

By decision dated December 3, 2018, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹⁰ This discretionary authority, however, is subject to certain restrictions.¹¹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹² Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).¹³

⁹ Docket No. 11-0454 (issued May 22, 2012).

¹⁰ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹¹ 20 C.F.R. § 10.607; *S.C.*, Docket No. 18-0126 (issued May 14, 2019).

¹² *Id.* at § 10.607(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹³ *Id.* at Chapter 2.1602.4(b).

Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁴ OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁵ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁶

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.¹⁷ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁸ The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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.¹⁹ OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.²⁰

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.²¹

ANALYSIS

The Board finds that this case is not in posture for decision.

The most recent merit decision of OWCP was the November 17, 2017 decision. One year from November 17, 2017 elapsed on November 17, 2018. As November 17, 2018 fell on a Saturday, appellant had until the next business day on Monday, November 19, 2018 to file her reconsideration request.²² OWCP received her reconsideration request on November 20, 2018 which was more than one year after the November 17, 2017 decision. Appellant's request

¹⁴ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁶ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 12 at Chapter 2.1602.5 (February 2016).

¹⁷ 20 C.F.R. § 10.607(b); *P.L.*, Docket No. 18-0813 (issued November 20, 2018); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁸ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁹ *V.L.*, Docket No. 17-1493 (issued September 12, 2018); *Annie L. Billingsley*, 50 ECAB 210 (1998).

²⁰ *Supra* note 12 at Chapter 2.1602.5a (October 2011).

²¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

²² *Supra* note 12 at Chapter 2.1602.4 (February 2016).

therefore was untimely filed.²³ The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.²⁴ In denying her request, OWCP applied the standard of review for timely requests for reconsideration.²⁵ As it applied the incorrect standard of review to the untimely request for reconsideration, the Board will set aside OWCP's December 3, 2018 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.²⁶

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this decision of the Board.

Issued: March 13, 2020
Washington, DC

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

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

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

²³ See *E.H.*, Docket No. 19-0859 (issued December 10, 2019).

²⁴ *Supra* note 15.

²⁵ See *L.W.*, Docket No. 16-1202 (issued January 25, 2018); *H.L.*, Docket No. 13-2077 (issued March 20, 2014).

²⁶ See 20 C.F.R. § 10.607(b); see also *M.C.*, *Order Remanding Case*, Docket No. 18-0866 (issued March 26, 2019).