

# Decisions, decisions, decisions, Part 10: Staying alive on the merits

**I**n a perfect world, injured workers would file clear and well-supported claims, attending physicians would write conclusive medical rationales, and OWCP would fairly process and quickly accept claims. In reality, however, it sometimes takes years for claims to be accepted, or for accepted claims that have foundered to be rescued or revived. In such cases, it is important for claimants and their representatives to understand how to keep a claim alive on the merits.

Last month's column discussed the distinction between merit review and non-merit review decisions. OWCP will grant full reconsideration to any application for reconsideration that falls within one year of the last merit review decision.

However, if a claimant applies for reconsideration beyond one year of the last merit review decision, OWCP will consider the application "untimely" and it will not grant full reconsideration. Instead, it will conduct only a limited review of the case to determine whether or not there is clear evidence of error on its part in the most recent merit decision (20 CFR 10.607(c)). According to the *FECA Procedure Manual* 2 1602.5(a):

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 a mistake.... [even] 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.

Because of the "clear evidence of error" standard, it is a daunting task to repair a claim through untimely reconsideration.<sup>1</sup> Claimants applying for reconsideration of disallowances or denials should always strive to be within one year of the most recent merit decision. They accomplish this by making sure that their applications for reconsideration create new merit review decisions, since the right to full reconsideration within one year renews itself with each new merit decision.

**This column in March and April discussed in detail how claimants must meet one of three criteria in order for OWCP to grant reconsideration. They must either show that OWCP 1) erroneously applied a specific point of law, 2) advance a relevant legal argument not considered by OWCP, or 3) provide relevant new evidence not previously considered by OWCP. When the claimant meets one of these three criteria, OWCP will issue a new merit review decision.**

Most applications for reconsideration hinge on the third criterion—questions of evidence. And that evidence is usually medical evidence. Claimants often will try to correct the deficiencies OWCP has found in the medical evidence of

their case by having their attending physician rewrite his or her medical reports. This would be appropriate in cases where OWCP has disallowed the claim due to a lack of a properly rationalized medical report and the attending physician can produce such a report.<sup>2</sup> There is a danger, however, that OWCP will consider a new medical report from the attending physician as cumulative or repetitious and refuse to grant reconsideration.<sup>3</sup>

To stay alive on the merits, claimants should carefully consider obtaining a rationalized supporting medical report from a physician not previously connected with the case. According to the *FECA Procedure Manual* 2 1602.6.b(2):

A rationalized supporting statement from a physician not previously of record requires a merit review when the denial rested on medical issues.

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The rationalized supporting medical report from the new physician will trigger a new merit review and even if OWCP does not modify its denial, the claim will stay alive on the merits for another year.

Claimants should be aware, as a recent ECAB order makes clear, that there is one circumstance where OWCP is required to issue a merit decision even if none of the three criteria is met: when a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to a review of the merits of the case by ECAB.<sup>4</sup>

OWCP, however, has no obligation to conduct a merit review if none of the three criteria are met when the 180-day time limit for requesting review by ECAB expires within 90 days of OWCP receiving the application for reconsideration.<sup>5</sup>

1. Next month's column will discuss untimely applications for reconsideration.

2. See the November 2009 column for a discussion of the importance of a rationalized medical report.

3. See the April 2013 column for a discussion of cumulative and repetitious evidence.

4. See C.L., Docket No. 10-1483 (May 12, 2011).

5. *FECA Procedure Manual* 2 1602.7(a).