

B.H., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

Case Submitted on the Record

JURISDICTION

ISSUE

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal to the Board. For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On October 29, 2000 appellant, then a 39-year-old mail processor, filed an occupational disease claim for symptoms in her wrists, elbows and arms which she attributed to lifting heavy trays while processing mail eight hours a day. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid appropriate benefits. Appellant underwent carpal tunnel release surgery for the left wrist on June 21, 2001 and right wrist on November 28, 2001. By decision dated August 28, 2002, OWCP awarded her a schedule award for 11 percent permanent impairment of the right arm and 8 percent permanent impairment of the left arm. By decision dated October 9, 2002, it determined that appellant's modified clerk employment effective June 7, 2002 fairly and reasonably represented her wage-earning capacity. OWCP found that as her actual wages met or exceeded the job held when injured, no loss of wages occurred.

In 2006, appellant was reassigned to a new duty station at the Atlanta Processing and Distribution Center facility due to reorganization and downsizing at the employing establishment. The employing establishment noted that while the drive to the Atlanta facility was more than her driving limitation of 10 miles, public transportation was available that could transport her to her duty station. Appellant refused the new position alleging the commute to that facility violated her work restrictions. She stopped work February 16, 2006 and filed wage-loss claims for the period beginning June 10, 2006.

In an August 3, 2006 decision, OWCP denied appellant's claim for wage-loss compensation for the period June 10 to 16, 2006. In an August 8, 2006 decision, it denied her claim for wage-loss compensation for the period June 17 to 23, 2006.

On October 10, 2007 appellant's claim was expanded to include bilateral epicondylitis. OWCP authorized surgery, which was performed on October 24, 2007. Compensation benefits for wage loss for the period October 24 through November 8, 2007 was paid.

In May 24, 2007 and February 21, 2008 decisions, OWCP denied appellant's claims for wage-loss benefits for the period September 30 to December 22, 2006.³ However, by decision dated February 2, 2009, it vacated the previous decisions and granted her wage-loss claim for the period September 30 through December 22, 2006.

On December 29, 2009 appellant requested that her claim for wage loss for the period June 10 to September 27, 2006 be paid in light of OWCP's February 2, 2009 decision. In a January 28, 2010 letter, OWCP informed her that compensation for the period June 10 to September 27, 2006 had been processed. The record reflects that appellant received a compensation check on February 13, 2009 for the period September 30 to December 22, 2006.

On March 23, 2010 appellant requested reconsideration of the denial of her wage-loss claims for the period June 10 through 23, 2006. She indicated that her absence from work during the claimed period was due to neglect from her attending physician in reference to diagnosis and treatment. Appellant stated that, while her treating physician was not properly treating her, he

³ By decision dated June 19, 2008, OWCP awarded an additional four percent left arm impairment and six percent right arm impairment.

gave objective medical rationale for her inability to commute. She indicated that the diagnostic evidence of ulnar neuropathy was first documented on the July 19, 2006 nerve conduction study which Dr. Amy Lang, a Board-certified psychiatrist, performed and which Dr. Craig Weil, her attending physician and Board-certified orthopedic surgeon, had documented symptoms in 2005, but did not diagnose her. Appellant noted treatment and evaluations in 2007 and in the years following showed that the ulnar neuropathy was still present and had worsened. She stated the facts explaining those circumstances were already part of the record and alleged her condition had worsened overtime due to the delay of diagnoses and treatment. Appellant alleged that, at the time compensation was requested, she was unable to commute to the workplace due to the worsening of her condition as she had severe tendinitis, swelling and chronic pain in her forearms and elbows. She stated that Dr. Weil had documented her symptoms and clinical findings a year and seven months prior to her wage-loss request. Appellant noted that the basis of her reconsideration request was the same as her absence from June 24 to September 27, 2006, which was granted.⁴ No new evidence was received.

By decision dated April 21, 2010, OWCP denied appellant's March 23, 2010 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to OWCP. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that OWCP will consider an untimely application only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present

⁴ The record reflects appellant received disability compensation for the period June 24 through September 27, 2006.

⁵ 20 C.F.R. § 10.605.

⁶ *Id.* at § 10.607(a).

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *E.R.*, Docket No. 09-599 (issued June 3, 2009).

⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003); *D.O.*, Docket No. 08-1057 (issued June 23, 2009).

evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁰

ANALYSIS

The Board finds that OWCP properly determined appellant's application for review was untimely. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹¹ However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹² The last merit decision in this case regarding the issue raised by appellant were OWCP's August 3 and 8, 2006 decisions, which denied compensation for wage loss for the period June 10 through 23, 2006. As appellant's March 23, 2010 letter requesting reconsideration was submitted more than one year after the last merit decision of record, it was untimely.

As appellant's request were filed more than one year after OWCP's August 3 and 8, 2006 decisions, she must demonstrate clear evidence of error on the issue which was decided by OWCP. The term clear evidence of error is intended to represent a difficult standard.¹³ Appellant's request would have to establish on its face that OWCP's denial of wage-loss compensation for the period June 10 through 23, 2006 was erroneous.¹⁴ It cannot be a matter of opinion; it must be a matter of proof.¹⁵

The Board finds that appellant's request for reconsideration does not establish clear evidence of error. OWCP denied her claim for compensation for wage loss during the period June 10 through 23, 2006 for the accepted conditions of bilateral carpal tunnel syndrome. In her March 23, 2010 letter, appellant claimed her inability to report to work was due to the worsening of her condition and her inability to commute to the workplace. She indicated that the medical

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *James R. Mirra*, 56 ECAB 738 (2005); see *E.R.*, *supra* note 7.

¹⁰ *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005); see *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

¹¹ *D.E.*, 59 ECAB 438 (2008); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 765 (1993).

¹³ *Joseph R. Santos*, 57 ECAB 554 (2006); *D.L.*, Docket No. 08-1057 (issued June 23, 2009).

¹⁴ Although a wage-earning capacity decision was in place when appellant claimed compensation for the underlying period at issue, this did not preclude OWCP from considering a limited period of employment-related disability without a formal modification of the wage-earning capacity determination. See *C.W.*, Docket No. 07-1816 (issued January 16, 2009).

¹⁵ See *D.M.*, Docket No. 10-988 (issued November 26, 2010).

evidence of record supported that Dr. Weil first reported the symptoms of her ulnar neuropathy in 2005 but the condition was documented on July 19, 2006 nerve conduction studies by Dr. Lang, who also referred to medical evidence of record from 2007, which supported that the ulnar neuropathy had worsened. A review of the medical evidence on file reflects Dr. Weil's March 29, 2005 report supports appellant was suffering from "chronic pain and tendinitis" in both arms approximately two years prior to OWCP's acceptance of the bilateral epicondylitis condition. Dr. Lang, in her December 4, 2006 medical note, advised that appellant's tendinitis was present but remained undiagnosed until magnetic resonance imaging scan studies were recently done. She further opined that the tendinitis condition related directly to work activities and appellant's current claim. Earlier reports from Dr. Lang indicated that appellant was disabled due to the tendinitis. In his January 23, 2007 report, Dr. Jeffrey Klugman, a Board-certified orthopedic surgeon, indicated that he believed her carpometacarpal synovitis had been somewhat prolonged. While these reports showed evidence of an ulnar neuropathy, they do not support that appellant was disabled for work during the period claimed due to the accepted condition of bilateral carpal tunnel syndrome. Furthermore, the reports from her various physicians in 2007 or later do not address the period of claimed disability. They are not sufficient to raise a substantial question as to the correctness of OWCP's decision and, thus, do not substantiate clear evidence of error.¹⁶ While appellant stated that she was unable to commute to the workplace due to a worsening of her condition, there is no medical evidence supporting this at the time OWCP's decisions were rendered. Thus, the Board finds that she failed to demonstrate clear evidence of error.

Appellant has not established that OWCP improperly denied her request for further review of the merits of her claim. Although she, on appeal, asserts that there is sufficient evidence to support her claim at the time of her original request, the Board finds that there is insufficient evidence to establish clear evidence of error. As noted, clear evidence of error is intended to represent a difficult standard. The arguments and evidence submitted by appellant in support of her March 23, 2010 request for reconsideration do not shift the weight of the evidence in her favor or raise a substantial question as to the correctness of OWCP's April 21, 2010 decision. The Board therefore finds that they are insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

¹⁶ *Thankamma Mathews*, 44 ECAB 764 (1993).

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board