

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

R.S., Appellant

and

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

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**Docket No. 13-610
Issued: June 18, 2013**

Appearances:
Douglas Sughrue, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 28, 2013 appellant, through her attorney, filed a timely appeal from a November 8, 2012 decision of the Office of Workers' Compensation Programs (OWCP), which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days elapsed from the most recent OWCP merit decision of December 9, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's October 29, 2012 request for reconsideration was not timely filed and failed to present clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated February 6, 2012, the Board affirmed OWCP's decisions dated January 6 and February 24, 2011. The Board found that OWCP properly denied appellant's request for reconsideration and her request for a review of the written record.² The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.³

On October 29, 2012 appellant requested reconsideration. Her attorney asserted that OWCP improperly denied her claim when finding that the evidence was not sufficient to establish that the July 16, 2010 incident occurred as alleged. OWCP found a discrepancy between the date of injury reported on the Form CA-1, which listed July 16, 2010 and the date of injury provided in the medical reports of July 17, 2010. Appellant asserted that she adequately explained the discrepancy and maintained that the inaccuracy of the date-of-injury report on the CA-1 form was immaterial. She asserted that the mechanism of injury and diagnosed condition were consistent and explained the inaccuracy in the date of injury on November 10, 2010 and January 26, 2011. Appellant contended that in light of the lack of other inaccuracies regarding the fact of injury, the evidence supported her claim.

In a September 26, 2012 report, Dr. Keith A. Lustig, a Board-certified orthopedic surgeon, noted a history of injury as presented by appellant in which she reported falling on July 17, 2010 while delivering mail. He summarized her treatment from July 26, 2010 to June 15, 2011 noting that on July 17, 2010 she was treated in the emergency room where x-rays revealed a volar subluxation/dislocation at the fifth carpometacarpal joint. On July 27, 2010 Dr. Lustig performed an open reduction and internal fixation of the left fifth carpometacarpal dislocation. He opined that, within a reasonable degree of medical certainty, appellant sustained a left fifth carpometacarpal volar dislocation with resultant traumatic arthritis due to her fall while delivering mail on July 17, 2010.

By decision dated November 8, 2012, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

² On July 16, 2010 appellant, then a 54-year-old carrier, filed a traumatic injury alleging that she injured her right knee and left hand and shoulder on that date when she tripped and fell while delivering mail. She stopped work on July 16, 2010. On December 9, 2010 OWCP denied her claim finding that the evidence was not sufficient to establish that the July 16, 2010 incident occurred as alleged. It also found that the medical evidence was not sufficient to establish her claim.

³ Docket No. 11-1589 (issued February 6, 2012).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.⁵ However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁶

To show clear evidence of error, 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Id.*; *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹² A right to reconsideration within 180 days also accompanies any subsequent merit decision on the issues. As appellant's October 29, 2012 request for reconsideration was submitted more than 180 days after the most recent merit decision of December 9, 2010 it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹³

The Board also finds that appellant has not established clear evidence of error by OWCP. Appellant's October 29, 2012 request asserted that OWCP improperly found that the evidence was not sufficient to establish that the July 16, 2010 incident occurred as alleged. She contended that she adequately explained the discrepancy regarding when the claimed injury occurred and maintained that the date-of-injury inaccuracy on the CA-1 form immaterial. Appellant asserted that her mechanism of injury and diagnosed condition were consistently described and documented and she explained the inaccuracy in the date of injury on November 10, 2010 and January 26, 2011. While she addressed her disagreement with OWCP's decision to deny her claim for traumatic injury, her general allegations do not raise a substantial question as to the correctness of OWCP's most recent merit decision, which found that evidence was not sufficient to establish that the July 16, 2010 incident occurred as alleged. OWCP properly found that appellant's October 29, 2012 statement did not establish clear evidence of error.

The issue for purposes of establishing clear evidence of error is whether appellant has submitted sufficient evidence to establish that the claimed July 16, 2010 injury occurred as alleged. Appellant submitted a September 26, 2012 report from Dr. Lustig, who noted that appellant reported falling on July 17, 2010 while delivering mail. Dr. Lustig opined that within a reasonable degree of medical certainty she sustained a left fifth carpometacarpal volar dislocation with resultant traumatic arthritis due to her fall while delivering mail on July 17, 2010. This report does not address the discrepancy regarding when the claimed injury occurred and appellant did not otherwise explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP erred in its December 9, 2010 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 denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁴ Consequently, the Board finds that Dr. Lustig's report submitted on reconsideration is insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its November 8, 2012 decision.

¹² 20 C.F.R. § 10.607(a).

¹³ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁴ *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

On appeal, appellant asserts that she explained the discrepancy between the date of injury reported on the CA-1 form and the date provided in the medical reports and maintained that the inaccuracy of the date-of-injury report was immaterial. She asserts that clear evidence of error was established by the report of Dr. Lustig on September 26, 2012 who opined that the fall on July 17, 2010 caused the left fifth carpometacarpal volar dislocation. The Board does not have jurisdiction over the merits of this claim, only whether appellant established clear evidence of error by OWCP in its November 8, 2012 decision. As noted above, this report is insufficient to establish clear evidence of error. Appellant also asserted that she submitted statements dated November 10, 2010 and January 26, 2011, which addressed the discrepancy in her date on injury. This evidence was previously considered and she has not otherwise explained how it is sufficient to establish clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration dated October 29, 2012 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board