

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

M.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Barbara, CA, Employer**

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**Docket No. 14-444
Issued: June 20, 2014**

Appearances:

Raquell K. Denio, for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2013 appellant, through her representative, filed a timely appeal from the September 17, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. Because more than 180 days elapsed between the last OWCP merit decision dated December 19, 2011 and the filing of the appeal, the Board lacks jurisdiction to review the merits of this case.³

¹ On appeal, appellant submitted new evidence. The Board has no jurisdiction to review new evidence on appeal. See 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193.

³ For OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to file a Board appeal. See 20 C.F.R. § 501.3(d)(2). For OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. See 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On December 21, 2009 appellant, then a 55-year-old modified window clerk, filed an occupational disease claim (Form CA-2) alleging that a change in her limited duty caused a worsening of her bilateral carpal tunnel syndrome, ulnar neuritis and tenosynovitis of the right shoulder. She stopped work on September 14, 2009. At the time of this claim, appellant was performing modified work duties due to another work-related injury.⁴ She also subsequently attributed a cervical condition to her work duties.

By decision dated February 9, 2010, OWCP denied the claim on the basis that fact of injury was not established. It found the evidence insufficient to establish how appellant's work duties changed starting on June 13, 2009. OWCP also found that there was no medical evidence providing a diagnosis which could be connected to the claimed event(s).

Appellant requested a review of the written record by OWCP's Branch of Hearings and Review. By decision dated June 29, 2010, an OWCP hearing representative vacated the February 9, 2010 decision and remanded the case for further development. The hearing representative found that while appellant's specific allegations regarding the duties she performed are not established by the evidence of record, the employing establishment agreed that she was assigned window duties exclusively when no other work was available. The hearing representative also found that there was sufficient evidence to support that appellant may have sustained a worsening in her upper extremity conditions as a result of her window duties. The hearing representative remanded the case for additional medical development and referral to an appropriate specialist for a second opinion evaluation with regard to any medical condition caused or changed by the work duties performed from August 7 through September 11, 2009.

By decision dated May 18, 2011, OWCP denied the claim on the basis that causal relation had not been met. Determinative weight was accorded to the second opinion evaluation of Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, who opined that none of the claimed diagnosed conditions were related to the factually established employment duties as a modified window clerk. He determined that there were documented symptoms of carpal tunnel syndrome.⁵

⁴ Under claim number xxxxxx485, OWCP accepted the condition of bilateral carpal tunnel syndrome with a date of injury of March 1, 1994. It paid appropriate benefits including authorized surgeries for left-sided carpal tunnel release and flexor tenosynovectomy and right-sided carpal tunnel release and flexor tenosynovectomy. Appellant worked a modified permanent light-duty position until April 14, 2009, when the employing establishment offered her another light-duty position. She worked in the new light-duty position from April 14 through September 12, 2009.

⁵ Claim number xxxxxx485, which OWCP accepted for bilateral carpal tunnel syndrome, remains open for medical treatment.

Appellant requested an oral hearing before an OWCP hearing representative, which was held on September 30, 2011. She submitted arguments, as well as additional evidence, including witness statements, photographs and medical reports. By decision dated December 19, 2011, an OWCP hearing representative affirmed the May 18, 2011 decision. The hearing representative found that appellant's specific allegations regarding the duties that she performed were not established by the evidence of record and the medical opinion of appellant's treating physician was not based on an accurate history of the duties appellant actually performed or was sufficiently reasoned to change the weight of medical opinion.

In a December 14, 2012 letter, which OWCP received on December 26, 2012, appellant, through her representative, requested reconsideration. Citing numerous OWCP procedures and case law, the representative argued that appellant met her factual burden of proof relative to performing exclusive window duties; the statement of accepted facts provided by OWCP to the second opinion examiner was deficient and did not give any credit to the evidence or statements provided by appellant regarding her modified duties; the second opinion examiner was asked misleading questions regarding the case; the second opinion examiner's opinion was not rationalized or sufficiently explained; the medical reports from appellant's treating physicians were sufficient to meet her burden of proof or to cause a conflict in medical opinion evidence; and the witness statements from appellant should not be disregarded.

In support of her reconsideration request, appellant submitted a December 12, 2012 declaration under oath; additional witness statements from Coworkers Julio Davila and Michael Post regarding appellant's duties; October 23 and November 21, 2012 and May 8, 2013 progress reports from Dr. Daniel A. Capen, a Board-certified orthopedic surgeon. Duplicative copies of evidence already of record were also submitted.

In a May 6, 2013 letter, the employing establishment pointed out discrepancies in appellant's description of her modified duties supported by the evidence of record and asserted that the modified duties provided during the period June through September 2009 were in accordance with her physician's prescribed restrictions.

In an August 14, 2013 letter, appellant's representative responded to the employing establishment's rebuttal.

By decision dated September 17, 2013, OWCP found that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁶ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁷ In implementing the one-year time limitation, OWCP's procedures provide that the one-year time

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607; *see also D.K.*, 59 ECAB 141 (2007).

limitation period for requesting reconsideration begins on the date of the original OWCP decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁸

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁹ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

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. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. 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.¹²

ANALYSIS

By decision dated December 19, 2011, an OWCP hearing representative affirmed the denial of appellant's claim for an occupational disease on the grounds that causal relationship had not been established. Appellant requested reconsideration of this decision in a letter dated December 14, 2012, which OWCP received on December 26, 2012. In a September 17, 2013 decision, OWCP denied her request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

⁹ *A.F.*, 59 ECAB 714 (2008).

¹⁰ *E.R.*, Docket No. 09-599 (issued June 3, 2009). See *supra* note 8 at Chapter 2.1602.3 (January 2004).

¹¹ *D.G.*, 59 ECAB 455 (2008).

¹² *Id.* See *James R. Mirra*, 56 ECAB 738 (2005).

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ The Board notes that, for merit decisions issued prior to August 29, 2011, OWCP's procedures provided that the timeliness for a reconsideration request was determined not by the date OWCP received the request, but by the postmark on the envelope.¹⁵ OWCP's new procedures as of August 29, 2011 require that, for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP.¹⁶ As appellant's December 14, 2012 request for reconsideration was received by OWCP on December 26, 2012, more than one year after the last merit decision of December 19, 2011, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁷

Appellant's claim was denied on the grounds that she had not established causal relationship. On reconsideration, she alleged that the statement of accepted facts was deficient and the second opinion was asked misleading questions regarding the case as it did not include all the employment factors identified and performed by her. Appellant also argued that the second opinion examiner's opinion was not rationalized or sufficiently explained and that the medical reports from her treating physicians were sufficient to meet her burden of proof or to cause a conflict in medical opinion evidence. These arguments, however, do not raise a substantial question concerning the correctness of OWCP's December 19, 2011 decision or establish clear evidence of error. The hearing representative specifically found that appellant's allegations regarding the duties she performed were not established by the evidence of record; thus, her allegations alone would not be part of the statement of accepted facts. The Board notes that there is no evidence to suggest that the medical findings provided by the second opinion physician were erroneous or that he was misled with regard to the facts of the case. Also there is no evidence to suggest that the statement of accepted facts was incomplete or erroneous.

Appellant also submitted a December 12, 2012 declaration under oath; additional witness statements from coworkers regarding her duties and progress reports from Dr. Capen. The progress reports from Dr. Capen do not address the relevant issue involved, causal relationship. While the statements from appellant and her coworkers provide varying accounts from those reflected in the hearing representative's decision, this does not amount to clear and convincing evidence of error. 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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized 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

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁵ *See supra* note 8 at Chapter 2.1602.3(b)(1) (January 2004).

¹⁶ *Id.* at Chapter 2.1602.4(e) (August 29, 2011).

¹⁷ *See supra* note 13; *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

require a review of a case.¹⁸ While the submitted evidence could possibly be construed to produce a contrary conclusion, it does not present clear evidence of error in the hearing representative's decision.

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying her claim. Therefore, the Board finds that she has not presented clear evidence of error.

On appeal, appellant's representative contends that OWCP erred in considering her request to be untimely as it was postmarked and mailed within one year from the December 19, 2012 decision. She contends that OWCP failed to give proper notice in its appeal rights instructions with the December 19, 2012 decision regarding the change in OWCP's regulations regarding how timeliness of reconsideration requests was determined. Effective August 29, 2011, OWCP amended its regulations, after months of a comment period, to reflect that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought¹⁹ as opposed to the use of the postmark to determine timeliness.²⁰ Contrary to the argument advanced by appellant's representative, she had sufficient notice that any request for reconsideration had to be submitted to OWCP within one year of the date of the decision.²¹ Any change in OWCP's regulations regarding the timeliness of the submission of reconsideration requests is the responsibility of appellant.²² Appellant's request was untimely as it was not received by OWCP until December 26, 2012, more than one year after the last merit decision of December 19, 2011. Her other arguments on appeal pertain to the merits of the case, over which the Board does not have jurisdiction.

CONCLUSION

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

¹⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁹ *See supra* note 13.

²⁰ Prior to August 29, 2011, OWCP's regulations provided in pertinent part: An application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. 20 C.F.R. § 10.607(a) (April 1, 2011).

²¹ *See G.T.*, Docket No. 13-1818 (issued January 7, 2014).

²² *See B.J.*, 59 ECAB 660 (2008). The Board has held that an employee's unawareness of possible entitlement, lack of access to information or ignorance of the law of one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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