

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

Y.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bedford Park, IL, Employer**

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**Docket No. 10-2404
Issued: July 13, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 28, 2010 appellant, through her attorney, filed a timely appeal from a July 29, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. The last merit decision in this case was OWCP's March 9, 2009 decision denying her occupational disease claim, more than 180 days prior to the date the appeal was filed.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the case.³

¹ An appeal from final adverse decisions of OWCP issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following issuance of the July 29, 2010 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the request was untimely filed and failed to establish clear evidence of error.

On appeal, appellant's attorney contends that OWCP's decision was contrary to fact and law.

FACTUAL HISTORY

On December 12, 2009 appellant, then a 44-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she was working in a light-duty capacity when she sustained bilateral carpal tunnel syndrome due to factors of her federal employment.

By decision dated March 9, 2009, OWCP denied appellant's claim on the grounds that the evidence submitted was not sufficient to establish an injury under FECA.

On November 13, 2009 appellant filed an appeal with this Board.

By order issued January 29, 2010, the Board dismissed appellant's appeal on the grounds that it was not timely filed.⁴

In a letter dated May 27, 2010, received by OWCP on June 6, 2010, appellant's attorney requested reconsideration of the March 9, 2009 decision before the Office.

In support of her request for reconsideration, appellant submitted a March 9, 2010 medical report by Dr. Shawn Love, an orthopedic surgeon, who diagnosed bilateral carpal tunnel syndrome and opined that it was likely work related and exacerbated by her duties as a mail handler. Upon physical examination, Dr. Love found positive median nerve compression, positive Tinel's sign and positive Phalen's sign bilaterally. He indicated that appellant underwent an electromyogram and nerve conduction testing which proved that she had severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Dr. Love advised her to continue her current splinting regimen and work without restrictions.

By decision dated July 29, 2010, OWCP denied appellant's reconsideration request as untimely and failing to establish clear evidence of error.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of OWCP's decision denying or terminating a benefit,

⁴ Docket No. 10-299 (issued January 29, 2010).

⁵ 5 U.S.C. § 8128(a).

a claimant must file 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

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁸ OWCP's regulations and procedures provide 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to establish clear evidence of error.

⁶ 20 C.F.R. § 10.607(a).

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (January 2004).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *See Pete F. Dorso*, 52 ECAB 424 (2001).

The Board finds that appellant failed to file a timely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ As appellant's May 27, 2010 request for reconsideration was submitted more than one year after the date of the last merit decision of record on March 9, 2009, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁸

In support of her request for reconsideration, appellant submitted a March 9, 2010 medical report by Dr. Love, who diagnosed bilateral carpal tunnel syndrome, which he attributed to appellant's employment duties. However, this evidence is insufficient to establish that OWCP erred in its denial of appellant's claim.¹⁹ Dr. Lee did not provide any medical rationale explaining his conclusion that appellant's conditions were employment related. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.²⁰ Dr. Love's report does not raise a substantial question as to the correctness of OWCP's March 9, 2009 merit decision or demonstrate clear evidence of error. Thus, OWCP properly found that appellant's reconsideration does not establish clear evidence of error.

The Board finds that the evidence submitted by appellant in support of her untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet her burden of proof to show clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the request was untimely filed and failed to establish clear evidence of error.

¹⁶ *Supra* note 6.

¹⁷ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²⁰ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2011
Washington, DC

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

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

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