

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

K.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 11-462
Issued: September 26, 2011**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 21, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decision dated August 11, 2010 which denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's April 10, 2009 decision. Because more than 180 days elapsed between the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 13, 2009 appellant, then a 48-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed left trigger thumb as a result of picking up and holding various types of mail and parcels. She first became aware of her condition in 2008 and of its relationship to her employment in 2009. Appellant sought medical treatment in February 2009, stopped work on February 4, 2009 and notified her supervisor on February 13, 2009.

In a December 2, 2008 report, Dr. Sachin Kapoor, Board-certified in internal medicine, provided a final workers' compensation report for a May 1, 2007 injury in claim No. xxxxxx246.³ He reported that appellant had been a full-time letter carrier for two years and her job entailed sorting, carrying and delivering mail by lifting, bending, stooping, gripping and grasping. Dr. Kapoor reviewed appellant's medical history and stated that she experienced worsening right thumb pain around May 1, 2007. Appellant had been working modified duty after she sustained an unrelated left elbow open fracture on January 1, 2007. As a result, her modified duty entailed repetitive gripping and grasping with her right hand which caused her right thumb pain, swelling and eventually triggering. Appellant underwent right thumb trigger release on March 17, 2008. Dr. Kapoor noted that appellant complained of progressively worse left thumb pain and triggering since September 2008. Physical examination of the left hand revealed no deformity or swelling, no thenar or interosseous atrophy, limited range of thumb motion, tender nodule at the base of the thumb along the flexor tendon with triggering and full grip with discomfort. Dr. Kapoor diagnosed right trigger thumb and left trigger thumb. He opined that appellant's right thumb injury was causally related to her employment during the course of her modified duty for left elbow fracture. Dr. Kapoor stated that the pain and triggering of appellant's left thumb began when she was off work and was not work related.

In a February 12 and March 6, 2009 work status note, Dr. Kapoor restricted appellant's work activities from February 12 to April 13, 2009 with no left handed repetitive gripping and no lifting over five pounds.

By letter dated February 23, 2009, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In a March 6, 2009 progress report, Dr. Kapoor reported that appellant complained of pain at the volar base of her left thumb with intermittent catching. He noted that she was not working because no modified duty was available. Upon physical examination of the left thumb,

³ Appellant's right thumb claim is not before the Board. The record is void of any further information regarding this claim, No. xxxxxx246.

Dr. Kapoor noted mild distress, left thumb with nodule along flexor tendon with tenderness to palpation and limited range of motion. He diagnosed tenosynovitis of the hand. Dr. Kapoor retracted his prior statement from his December 2, 2008 report which stated that appellant's left thumb trigger finger was not work related. After further review of appellant's injuries and treatment course, he opined that she suffered from progressively worse left thumb stenosing tenosynovitis, secondary to overcompensation while recovering from right thumb surgery. Dr. Kapoor noted that appellant's pain was tolerable which allowed her to work, but upon returning to repetitive gripping and lifting as required by her job, she experienced worsening pain and left thumb triggering. He opined that, because her complaints of thumb pain were during the course of her recovery from her work-related right thumb surgery, it should be regarded as a compensable consequence and treated as a work-related injury.

By decision dated April 10, 2009, OWCP denied appellant's claim finding that the evidence failed to establish that the claimed medical condition was related to the accepted work-related events.

On May 13, 2009 appellant requested an oral hearing before OWCP's hearing examiner.

By decision dated June 16, 2009, the Branch of Hearings and Review denied appellant's request for an oral hearing finding that her request was not made within 30 days of the April 10, 2009 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which establishes that her condition was causally related to factors of her federal employment.

On June 21, 2010 appellant requested reconsideration of OWCP's decision. In support of her request, she submitted a May 27, 2010 letter from OWCP which provided her with another copy of OWCP's June 16, 2009 decision after appellant alleged she never received it. OWCP also provided her with information for her emotional condition claim under case No. xxxxxx462.

In a July 29, 2009 medical report, Dr. Michael F. Wright, Board-certified in family medicine, reported that appellant was being stalked outside of her work and home. He diagnosed her with acute anxiety.

By decision dated August 11, 2010, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.⁴

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁵ The

⁴ The Board notes that appellant submitted additional evidence after OWCP issued its August 11, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

⁵ 20 C.F.R. § 10.607(a).

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.⁶

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 manifested on its face that OWCP committed an error.⁷

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁸

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

Appellant claims that she never received the June 16, 2009 decision. She did not assert that her address changed or that the address used by OWCP was otherwise incorrect. The address used by OWCP in its June 16, 2009 decision is the address of record and the same as the one appellant used in her appeal to the Board. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course.¹³ This is known as the mailbox rule.¹⁴ Appellant submitted no evidence

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

⁷ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *M.Y.*, Docket No. 07-2202 (issued February 12, 2008).

¹⁴ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

substantiating why the presumption would not apply. Therefore, the Board finds that appellant received the June 16, 2009 decision.

In its August 11, 2010 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of the OWCP decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As appellant's June 21, 2010 request for reconsideration was submitted more than one year after the date of the last merit decision of record on April 10, 2009, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁷

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In support of her request for reconsideration, appellant submitted a July 29, 2009 medical report from Dr. Wright who diagnosed appellant with acute anxiety and stated that she was being stalked outside of her work and home. However, this evidence is insufficient to establish that OWCP erred in its denial of appellant's claim.¹⁸ Dr. Wright's medical report addressed a wholly different medical issue and failed to address appellant's left thumb injury. His report does not raise a substantial question as to the correctness of OWCP's April 10, 2009 merit decision or demonstrate clear evidence of error.

While appellant addressed her disagreement with OWCP's decision to deny her claim for compensation, her general allegations do not establish clear evidence of error as her arguments do not raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature and the medical evidence submitted was not sufficient to shift the weight of the evidence in her favor and establish that OWCP erred in denying her claim.

CONCLUSION

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

¹⁵ *Supra* note 5.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁷ *See Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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