

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

J.R., Appellant)	
)	
and)	Docket No. 12-279
)	Issued: August 7, 2012
DEPARTMENT OF AGRICULTURE,)	
Minneapolis, MN, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 14, 2011 appellant filed a timely appeal from May 18, 2011 decisions of the Office of Workers' Compensation Programs (OWCP) which denied her request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated August 20, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

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

¹ For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. See 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On December 19, 2006 appellant, a 46-year-old poultry inspector, filed a traumatic injury claim alleging that, on December 18, 2006, she was on a poultry stand, which popped off without warning and caused her to fall in the performance of duty. She indicated that she sustained injuries to her lower back. Appellant did not initially stop work. On February 23, 2007 OWCP adjudicated this injury under claim number xxxxxx632 and accepted the claim for sprain of back and lumbar region.²

On September 5, 2007 appellant filed a claim for a schedule award. By decision dated September 25, 2007, OWCP denied appellant's claim for a schedule award. It found that she was not eligible for a schedule award as she had not reached maximum medical improvement.

On January 3, 2008 appellant requested reconsideration and submitted additional medical evidence. By decision dated August 20, 2008, OWCP denied modification of its September 25, 2007 decision denying her claim for a schedule award.

On November 6, 2008 appellant requested reconsideration and submitted additional evidence. In a November 19, 2008 decision, OWCP denied her request for reconsideration of the August 20, 2008 decision without a review of the merits on the grounds that the evidence was duplicative and did not address permanent impairment due to the accepted lumbar conditions and was insufficient to warrant review of its prior decision.

On February 16, 2011 appellant requested reconsideration in claim number xxxxxx632. She advised OWCP that she was submitting updated medical evidence in support of her claim but no evidence accompanied the request.³ Appellant also asserted that she had additional back conditions that caused pain and radiculopathy.

In a decision dated May 18, 2011, OWCP denied appellant's request for reconsideration of the November 19, 2008 decision for the reason that it was not timely filed and failed to present clear evidence of error.

² Appellant also filed a prior claim, number xxxxxx261, for an injury sustained on January 19, 2005, when a swivel chair broke causing her to fall. OWCP accepted the claim for sprain/strain of the neck, sprain of the back, sprain/strain of the thoracic region and unspecified thoracic lumbosacral neuritis or radiculitis. Appellant's two claims were administratively combined. In claim number xxxxxx261, OWCP subsequently referred appellant for a second opinion regarding permanent impairment, in which the specialist found that appellant had two percent impairment of the right leg due to L5 radiculopathy. In a March 26, 2009 decision, OWCP granted appellant a schedule award for two percent right leg impairment. Appellant subsequently requested reconsideration of the decision several times and OWCP issued decisions pursuant to these requests. On the present appeal, appellant indicates that she seeks review of the May 18, 2011 decision issued in claim number xxxxxx632.

³ Appellant also requested reconsideration in claim number xxxxxx261 after which OWCP issued a May 18, 2011 decision. OWCP denied merit review of the claim. On appeal, appellant did not indicate that she sought review of matters adjudicated under xxxxxx261. *See id.*

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’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁵ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The reconsideration request must establish that OWCP’s decision was, on its face, erroneous.⁷

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 manifest on its face that OWCP committed an error. Evidence that 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.⁸ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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

⁴ 5 U.S.C. § 8128(a).

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

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.⁹

ANALYSIS -- ISSUE 2

In its May 18, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision in the claim for which appellant sought reconsideration on August 20, 2008. Appellant requested reconsideration on February 16, 2011, more than one year after the August 20, 2008 merit decision and her request was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. OWCP reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that appellant did not submit evidence in support of her application for review to demonstrate clear evidence of error. With her February 16, 2011 request for reconsideration, she indicated that she was submitting medical evidence but no such evidence accompanied the request. Appellant also asserted that she had additional back conditions that caused pain and radiculopathy. The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred. Appellant's assertions on reconsideration do not raise a substantial question as to the correctness of OWCP's decision. Therefore, the Board finds that she has not presented clear evidence of error.

On appeal, appellant indicated that her reconsideration request was timely. As explained, the February 16, 2011 reconsideration request in file number xxxxxx632 was not timely filed.¹⁰ The Board notes that the request for reconsideration of the August 20, 2008 decision was received on February 22, 2011 and was therefore untimely. Furthermore, as noted in the first issue, OWCP addressed her other request of the same date, as she specified the date of the decision for which she was appealing.

The Board also notes that appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing

⁹ *Id.*

¹⁰ As indicated, *supra* notes 2-3, this decision does not affect adjudication of matters under appellant's other claim, number xxxxxx261.

progression of an employment-related condition resulting in permanent impairment or increased impairment.¹¹

CONCLUSION

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 show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹¹ The Board notes that subsequent to the OWCP's May 18, 2011 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).