

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

L.B., Appellant)
and) Docket No. 12-1017
U.S. POSTAL SERVICE, POST OFFICE,) Issued: October 19, 2012
Pittsburgh, PA, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 12, 2012 appellant filed a timely appeal from a January 9, 2012 decision of the Workers' Compensation Programs (OWCP) which denied her request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed from the most recent merit decision of November 10, 2009 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 501.3.²

¹ 5 U.S.C. § 8101 *et seq.*

² 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).

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.

FACTUAL HISTORY

On May 13, 2003 appellant, then a 36-year-old mail processor, filed an occupational disease claim alleging that she sustained bursitis, a tear in the right rotator cuff and tendinitis in the performance of duty. She did not stop work. OWCP accepted the claim for impingement syndrome of the right shoulder.³ Appellant received wage-loss compensation and benefits.⁴

Appellant claimed a schedule award on July 22, 2008. On September 25, 2008 OWCP advised her of the information needed to establish her claim for a schedule award under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). In a December 5, 2008 report, Dr. Antony M. George, Board-certified in emergency medicine, reviewed appellant's history of injury and treatment. He examined her and found that she had not reached maximum medical improvement. Dr. George provided an impairment rating of seven percent to the right upper extremity. He indicated that this would equate to four percent whole person impairment.

By letter dated June 5, 2009, OWCP contacted Dr. George and advised him that FECA did not provide a schedule award based on whole person impairments.⁵ He was also advised that, effective May 1, 2009, the A.M.A., *Guides* (6th ed. 2009), was used for evaluating permanent impairment. OWCP requested that Dr. George submit a new impairment rating under the sixth edition A.M.A., *Guides*. In a July 27, 2009 report, Dr. George revised his impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. He referred to Table 15-1 and Table 15-5, and opined that appellant had a moderate degree of severity under Class 1 for impingement and shoulder tendon impairment and had seven percent impairment for a Class 1 rotator cuff tear.⁶ Dr. George noted that appellant also had a Class 1 or seven percent impairment for acromioclavicular (AC) joint functional loss and added the values. He opined that this totaled 14 percent impairment of the right upper extremity. Dr. George referred to Table 15-1 and opined that this would correspond to a 10 percent impairment of the whole person.

³ OWCP also noted that appellant utilized a cane in postoperative recovery pertaining to a previous claim File No. xxxxxx565. It advised that the evidence supported that the use of the cane affected her right shoulder condition.

⁴ Appellant retired from the employing establishment on October 23, 2009.

⁵ See *Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither FECA, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

⁶ A.M.A., *Guides* 385, 388.

In a September 2, 2009 report, an OWCP medical adviser reviewed the medical evidence and noted appellant's history of injury and treatment.⁷ He referred to Table 15-5⁸ for the right upper extremity and right shoulder and determined that for mild impingement it was equal to a Class 1 with a default value of three percent of the arm. For the rotator cuff, mild and acromioclavicular joint, with a default value of three percent of the arm, not using any modifiers, the total percentage of impairment was equal to three percent. The medical adviser referred to the Combined Values Chart and found that this totaled six percent impairment of the right arm.⁹ He could not explain Dr. George's finding of seven percent pursuant to the A.M.A., *Guides*.

By decision dated November 10, 2009, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The period of the award ran for 18.72 weeks.

OWCP subsequently received an October 4, 2002 x-ray of the left knee read by Dr. Christina Wirtz, a Board-certified diagnostic radiologist. It revealed a joint effusion and degenerative changes. OWCP also received a May 5, 2008 article on chondromalacia of the patella.

On August 28, 2011 appellant requested that OWCP review her schedule award and provided another copy of Dr. George's July 27, 2009 report. She contended that the medical adviser's impairment rating was incorrect. Appellant argued that she believed she was entitled to a greater award.

In a letter dated September 30, 2011, appellant requested reconsideration. She stated that she had reviewed the A.M.A., *Guides* and believed that the medical adviser did not provide a proper evaluation and her schedule award was miscalculated. The medical adviser did not address or include grade modifiers or adjustment grids. Appellant argued that the calculation of 13 percent provided by her treating physician was correct based upon the diagnosis-based impairments (DBI). She related that the DBI of the rotator cuff injury, AC joint injury and impingement syndrome which were all diagnosed based upon a magnetic resonance imaging scan and not range-of-motion measurements. Appellant explained that this error was sufficient to establish clear evidence of error.

In a decision dated January 9, 2012, OWCP denied appellant's request for reconsideration of the November 10, 2009 decision for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹⁰ This discretionary authority, however, is subject to certain restrictions.

⁷ The date appears to be July 2, 2009; however, it is actually September 2, 2009.

⁸ A.M.A., *Guides* 402.

⁹ *Id.* at 602.

¹⁰ See 5 U.S.C. § 8128(a); Y.S., Docket No. 08-440 (issued March 16, 2009).

20 C.F.R. § 10.607(a) provides that a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.¹¹ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹³

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹⁴ is positive, precise and explicit, and manifests on its face that OWCP committed an error.¹⁵ The evidence 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 for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁶

ANALYSIS

In its January 9, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision is the November 10, 2009 schedule award. Appellant requested reconsideration on September 30, 2011, more than one year after the November 10, 2009 merit decision and her request was untimely.

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 decision was in error. The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The issue is whether she has established clear evidence of

¹¹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

¹² *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

¹⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

error in the November 10, 2009 schedule award decision which rated her impairment at six percent of the right arm.

With her September 30, 2011 request for reconsideration, appellant argued that her schedule award was improperly calculated by the medical adviser and that her physician had properly applied the A.M.A., *Guides*. She argued that her interpretation of the A.M.A., *Guides* supported greater impairment. The Board has held that the degree of impairment to a scheduled member is a question that can only be established by probative medical opinion.¹⁷ Appellant did not submit any new medical evidence to establish greater impairment of her right arm. The evidence of record to which she referred had been previously considered and reviewed by OWCP in its November 10, 2009 schedule award decision.

Following issuance of the November 10, 2009 schedule award decision, the medical evidence submitted by appellant does not address whether she has greater impairment under the A.M.A., *Guides*. OWCP procedures provide that 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 require a review of a case.¹⁸ The evidence submitted by appellant pertained to her left knee. This is not relevant to the issue of the extent of impairment to her right arm.

The Board finds that the evidence and argument from appellant is insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred in its November 10, 2009 decision. Therefore, the Board finds that she has not presented clear evidence of error.

On appeal, appellant repeated her arguments on reconsideration. She noted that she attended a conference where the schedule award procedures were explained and reiterated that there were errors in her schedule award calculation. As noted, the determination of impairment is an issue that must be addressed by the submission of medical evidence from a physician. The Board notes that appellant may request an increased schedule award based on evidence of a new exposure or medical evidence establishing increased impairment of her arm.

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.

¹⁷ See *L.G.*, Docket No. 09-1517 (issued March 3, 2010); 5 U.S.C. § 8101(2).

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

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2012
Washington, DC

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

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

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