



## **FACTUAL HISTORY**

This case was previously before the Board. In a decision dated October 17, 2000, the Board remanded the case for further development with respect to appellant's permanent impairment to the left leg.<sup>3</sup> In a decision dated July 16, 2004, the Board found that he had submitted an application for reconsideration that was sufficient to require further merit review of the claim.<sup>4</sup> The history of the case as contained in the Board's prior decisions is incorporated herein by reference.

OWCP accepted that appellant sustained injuries in a motor vehicle accident on March 4, 1988 while in the performance of duty. The accepted conditions were left femur fracture, left knee laceration, left orbit fracture and right wrist fracture.<sup>5</sup> Appellant also had an occupational claim filed on March 8, 2007 accepted for bilateral calcifying tendinitis of the shoulder.

OWCP issued a schedule award for a 25 percent impairment of the left leg on September 11, 1995, an additional 15 percent on April 22, 1997, an additional 18 percent on September 25, 1998 and an additional 8 percent on January 25, 2001 (for a total of 66 percent). As to the right arm, it issued a schedule award for a 30 percent impairment on September 19, 1995 and an additional 5 percent on December 29, 2004.

By decision dated September 14, 2010, OWCP determined that appellant was not entitled to an additional schedule award for the right arm or either leg. In a decision dated September 15, 2010, it issued a schedule award for an 18 percent permanent impairment to the left arm. The period of the award was 56.16 weeks from August 29, 2010.

On September 7, 2011 OWCP received a request for reconsideration of the September 14, 2010 decision. In a July 30, 2011 report, Dr. Eric Javier, a physiatrist, opined that appellant had a 16 percent impairment based on his right shoulder condition.

By decision dated December 2, 2011, OWCP reviewed the merits of the claim and denied modification. It found that the evidence did not establish an additional permanent impairment greater than appellant had previously received.<sup>6</sup>

On December 6, 2012 OWCP received a request for reconsideration of the December 2, 2011 OWCP decision. The request was dated November 28, 2012. Appellant submitted two brief notes from Dr. Javier dated November 27, 2012 addressed to another physician requesting evaluation for shoulder surgery. He also submitted a February 3, 2012 magnetic resonance

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<sup>3</sup> Docket No. 99-727 (issued October 17, 2000).

<sup>4</sup> Docket No. 04-871 (issued July 16, 2004).

<sup>5</sup> Subsequent development of the record indicated that additional conditions were accepted: generalized anxiety disorder, right wrist arthritis, bilateral carpal and cubital tunnel syndromes, cervical radiculopathy, thoracic myositis, bilateral shoulder bursitis or impingement and lumbar para-radiculopathy.

<sup>6</sup> The decision incorrectly stated that the reconsideration request received on September 7, 2011 requested review of the September 15, 2010 decision. The December 2, 2011 decision does address the medical evidence submitted with respect to right arm permanent impairment.

imaging scan report diagnosing right shoulder mild infraspinatus tendinopathy and findings suggestive of a superior labral tear from anterior to posterior injury. Appellant resubmitted a December 23, 2004 report from an OWCP medical adviser with respect to a right arm permanent impairment.

By decision dated December 19, 2012, OWCP determined that appellant's application for reconsideration was untimely. It found that the application for reconsideration did not show clear evidence of error and therefore was not sufficient to warrant merit review of the claim.

### **LEGAL PRECEDENT**

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>7</sup> The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>8</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.<sup>9</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>10</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>11</sup> As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>12</sup> OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup>

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.<sup>14</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.605 (2012).

<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>11</sup> 5 U.S.C. §§ 8101-8193.

<sup>12</sup> 20 C.F.R. § 10.607 (2012).

<sup>13</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>14</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> 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.<sup>17</sup>

### ANALYSIS

When the underlying compensation claim is for a schedule award, an initial question is whether the claimant has submitted an application for reconsideration or has requested an increased schedule award. Even if appellant has requested “reconsideration,” if there is new and relevant evidence with respect to an increased permanent impairment, then a claimant may be entitled to a merit decision on the issue.<sup>18</sup> But when a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision.<sup>19</sup> In this case, appellant did not submit any relevant evidence with respect to an increased permanent impairment. Therefore, the Board finds that OWCP properly considered his submission as an application for reconsideration.

The last OWCP decision on the merits of the schedule award issue was dated December 2, 2011. According to 20 C.F.R. § 10.607, the application for reconsideration must be received by OWCP within one year of December 2, 2011 to be considered timely. The date received is determined by the document received date in the Integrated Federal Employees’ Compensation System (IFECS).<sup>20</sup> In this case, the date received in IFECS was December 6, 2012. Since this is more than one year after the December 2, 2011 merit decision, it is an untimely reconsideration request.

As an untimely application for reconsideration, appellant must establish clear evidence of error by OWCP to require his claim to reopened for merit review. In this case, appellant did not establish clear evidence of error. He did not present any argument with respect to error by OWCP. The evidence submitted with the application for reconsideration did not address the degree of permanent impairment with respect to any scheduled member of the body as of December 2, 2011. Dr. Javier did not discuss a permanent impairment to the right arm in the November 27, 2012 notes submitted with the application for reconsideration. The medical adviser report was from 2004 and does not show error with respect to the December 2, 2011 decision.

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<sup>15</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>16</sup> *Id.*

<sup>17</sup> *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

<sup>18</sup> *See Linda T. Brown*, 51 ECAB 115 (1999).

<sup>19</sup> *See W.J.*, Docket No. 12-1746 (issued February 5, 2013).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). This section provides that, for decisions prior to August 29, 2011, the application for reconsideration must be mailed within one year.

As noted above, the clear evidence of error standard requires that the evidence raise a substantial question as to the correctness of OWCP's decision and shift the weight in favor of appellant. Appellant did not meet that standard in this case and OWCP properly denied merit review.

On appeal, appellant states that Dr. Javier had found a 16 percent impairment to his right shoulder alone, whereas the previous right arm impairment was based on the wrist. The Board notes that appellant may, as noted above, claim an increased schedule award based on relevant evidence. Appellant may pursue the issue of whether there is an additional impairment that is not duplicative of a previous impairment. The only issue on this appeal was with respect to the untimely application for reconsideration received by OWCP on December 6, 2012. For the reasons stated, appellant did not establish clear evidence of error and OWCP properly denied merit review.

**CONCLUSION**

The Board finds that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 19, 2012 is affirmed.

Issued: December 3, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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