

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

D.J., Appellant

and

**U.S. POSTAL SERVICE, CARRIER ANNEX,
Inglewood, CA, Employer**

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**Docket No. 13-2126
Issued: December 20, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 17, 2013 appellant filed a timely appeal from a March 21, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed between the last merit decision dated January 27, 2012 to the filing of this appeal and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant contends that her appeal was timely filed as OWCP received her request on January 30, 2013.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 21, 1998 appellant, then a 48-year-old distribution window clerk, filed a traumatic injury claim alleging that on that date she sustained neck, shoulder and upper back pain due to her employment duties. OWCP accepted the claim for left shoulder tendinitis and cervical strain and authorized left shoulder arthroscopic surgery, which was performed on November 21, 2001.²

Appellant filed claims for wage-loss compensation (Form CA-7) beginning May 5, 2009.

By decision dated June 29, 2009, OWCP denied her claim for wage-loss compensation on and after May 5, 2009.

Following a review of the written record, by decision dated November 13, 2009, the OWCP hearing representative affirmed the June 29, 2009 decision.

By decision dated June 7, 2010, OWCP denied modification of the November 13, 2009 decision.

By decision dated May 5, 2011, OWCP denied modification of its June 7, 2010 decision.³

By decision dated January 27, 2012, OWCP denied modification of its June 7, 2010 and May 5, 2011 decisions.

In a letter dated January 23, 2013 and received by OWCP on January 31, 2013, appellant requested reconsideration of the January 27, 2012 decision. She argued that OWCP erred in finding that the medical evidence did not support her claim. Appellant further argued that OWCP mishandled her claim in denying it. In support of her claim, she resubmitted evidence previously of record. Additionally, appellant also included progress notes by Dr. Michael Esposito, an orthopedic surgeon, dated January 18, 2013. Dr. Esposito reported that appellant should be referred for psychological testing.

By decision dated March 21, 2013, OWCP denied appellant's request for reconsideration finding it was not timely filed and failed to present clear evidence of error.

² On June 12, 2003 OWCP issued a loss of wage-earning capacity determination in which it found that her actual earnings in her modified distribution window clerk position fairly and reasonably represented her wage-earning capacity.

³ By decision dated April 27, 2011, OWCP denied appellant's claim for a recurrence of disability on and after January 20, 2011. An OWCP hearing representative affirmed this denial on January 8, 2013. In another decision dated April 27, 2011, OWCP denied appellant's claim for an additional schedule award, finding that she had no greater than a nine percent impairment of the left upper extremity. An OWCP hearing representative affirmed on December 12, 2011.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁴ It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.⁵ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁶ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of its regulations,⁷ if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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. Evidence which 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 to merely 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. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹

OWCP's procedures note 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear

⁴ See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

⁵ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

⁶ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁷ 20 C.F.R. § 10.607.

⁸ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹¹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 8.

evidence of error.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that any request for reconsideration must be received within one year from the date of the original OWCP decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ As appellant's January 23, 2013 request for reconsideration was received by OWCP on January 31, 2013, more than one year after the last merit decision issued on January 27, 2012, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for wage-loss compensation for the period on and after May 5, 2009.¹⁶

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of wage-loss compensation for the period on and after May 5, 2009 was erroneous. In support of her request, she resubmitted evidence previously of record, which was insufficient to establish clear evidence of error. Additionally, appellant submitted progress notes by Dr. Esposito, dated January 18, 2013, which did not address the issue of disability related to the December 21, 1998 employment injury. Dr. Esposito recommended her for a psychological evaluation. Appellant also noted her disagreement with OWCP's handling of her claim, concluding that she had established her claim based on the evidence as presented. However, she has not shown how OWCP committed any error in denying her claim for wage-loss compensation. Consequently, the Board finds that OWCP properly denied appellant's reconsideration request as it was untimely and failed to establish clear evidence of error.

On appeal appellant argues that she timely filed her request for reconsideration as OWCP received her request on January 30, 2013. Contrary to appellant's contention the receipt of her reconsideration request on January 30, 2013 instead of January 31, 2013 does not render the request timely. In order to have submitted a timely request for reconsideration, the request should have been received by OWCP on or before January 28, 2013.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

¹² *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(c) (October 2011).

¹³ *See M.L.*, *supra* note 8; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁶ 20 C.F.R. § 10.607(a); *see D.G.*, *supra* note 6; *Debra McDavid*, 57 ECAB 149 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 21, 2013 is affirmed.

Issued: December 20, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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