

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

S.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Albemarle, NC, Employer**

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**Docket No. 13-738
Issued: July 8, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2013 appellant, through her attorney, filed a timely appeal of the January 7, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed and lacking clear evidence of error. Because more than 180 days have elapsed from the most recent merit decision dated November 29, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, but has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant's counsel contends that OWCP's decision was contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 12, 2010 appellant, then a 32-year-old sales and distribution clerk, filed a traumatic injury claim alleging that on November 4, 2010 her hand slipped and hit the postbox below, causing numbness in her right hand and wrist. She contended that, as a result thereof, she suffered from carpal tunnel syndrome in the right palm of her hand. The employing establishment controverted the claim.

By decision dated December 23, 2010, OWCP denied appellant's claim as it found that the evidence was not sufficient to establish that the event occurred as she described. Appellant's claim was also denied as OWCP determined that she did not submit any medical evidence to establish that a diagnosed medical condition was causally related to the work injury or event. She requested an oral hearing before an OWCP hearing representative and the hearing was held on April 21, 2011.

By decision dated June 7, 2011, the hearing representative found that appellant submitted sufficient evidence to establish that she was diagnosed with a medical condition, bilateral carpal tunnel syndrome, and that this condition could be related to the claimed employment incident, but that the medical evidence did not include a rationalized opinion on the cause of appellant's condition or discuss the relationship of appellant's condition to the claimed incident. Accordingly, the hearing representative affirmed as modified the decision based on the determination that the medical evidence of record did not establish that appellant sustained a condition related to the claimed employment incident of November 4, 2010. On October 20, 2011 appellant again requested reconsideration and submitted an updated medical report.

On November 29, 2011 OWCP denied modification after conducting a merit review. It noted that the medical evidence did not provide medical rationale linking the diagnosed carpal tunnel syndrome to the employment incident of November 4, 2011.

By letter dated August 22, 2012 and received by OWCP on August 30, 2012, appellant's counsel forwarded new medical evidence, asked OWCP to review the evidence and to provide him with accepted allowance codes. The letter included a notation to OWCP's file number for appellant's claim. In a November 8, 2010 report, Dr. David W. Schmidt, a neurologist,² noted that appellant has right-sided carpal tunnel syndrome. He also noted that electrodiagnostically, her left side is almost as bad as her right side and that he suspected she will develop bilateral left-sided symptoms in the near future. Dr. Schmidt took a patient history, and discussed that on November 4, 2010 she hit her hand on a postbox. He also noted that her job involves a considerable amount of wrist motion used for sorting mail. Dr. Schmidt noted that carpal tunnel syndrome has been associated with high levels of hand-arm vibration, prolonged work with a flexed or extended wrist, high requirements for hand force, high repetitiveness and their combination. He noted that, although pregnancy can aggravate preexisting carpal tunnel syndrome, it was unlikely that appellant had the degree of axonal injury present solely due to her pregnancy. Appellant's counsel also submitted a July 20, 2010 form report by Dr. Joseph Zucker, a Board-certified orthopedic surgeon, wherein he described the incident that caused the

² The Board is unable to confirm that Dr. Schmidt is Board-certified.

injury as “patient hit palm of hand on a metal box at work.” Dr. Zucker conducted a physical examination and a nerve conduction study and electromyogram. He diagnosed right carpal tunnel syndrome.

By letter dated December 10, 2012, appellant’s attorney contended that on “October 22, 2012” [sic] he submitted additional medical evidence and that constituted a request for reconsideration. He contended that the previous decision requested medical evidence, that the medical evidence was submitted within one year from the date of the decision, and that OWCP could not simply ignore the evidence. Counsel contended that the procedures of FECA do not require that a request for reconsideration have a specific title or label, and that the prior submission clearly constituted a request for reconsideration of the previous decision.

By letter dated December 14, 2012, appellant, through counsel, requested reconsideration of the November 29, 2011 decision. He contended that the reconsideration was actually submitted on August 22, 2012 when he submitted additional medical reports.

By decision dated January 7, 2013, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.³ The 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.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ OWCP regulations and procedure provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows clear evidence of error on the part of OWCP.⁶

³ 20 C.F.R. § 10.607(a).

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

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further 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 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 evidence of error. *Id.* at Chapter 2.1602.3c.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which 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 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.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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 a substantial question as to the correctness of OWCP's decision.¹²

ANALYSIS

The one-year time limitation begins to run on the date following the date of the original OWCP decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³ Therefore, appellant had one year from November 29, 2011 to submit a timely request for reconsideration. OWCP found that her December 14, 2012 letter requesting reconsideration was untimely as it was received more than one year after the November 29, 2011 merit decision. It proceeded to deny appellant's request for reconsideration using the clear evidence of error standard for untimely appeals.

However, the Board notes that on August 30, 2012 OWCP received a letter from appellant's counsel dated August 22, 2012 which pertained to appellant's claim. The Board finds that this letter constituted a request for reconsideration. Although the August 22, 2012 letter did not mention the word "reconsideration," the Board has held that there may be a request for reconsideration in situations where the letter does not contain the word "reconsideration." In *Jack D. Johnson*, the Board determined that a letter filed by appellant, which advised OWCP that it was enclosing pertinent information related to the claim which had not been accepted and provided the file number, constituted a request for reconsideration. The Board discussed prior case law that found that while no special form is required for a letter to be considered a request for reconsideration, the request must be in writing, identify the decision and the specific issue for reconsideration and be accompanied by relevant and pertinent new evidence or argument not previously considered. In *Johnson*, the Board noted that the decision below specifically advised

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona D. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ *Donna M. Campbell*, 55 ECAB 241 (2004).

appellant that, if he disagreed with the attached decision, he had the right to submit new evidence and request reconsideration, or if he had no additional information, he could appeal the decision to the Board. The Board found that appellant addressed the information related to his claim, provided the file number and submitted pertinent information.¹⁴

In the present case, appellant's counsel wrote a letter to OWCP dated August 22, 2012, within the one-year period for filing a request for reconsideration of the November 29, 2011 decision. The November 29, 2011 decision listed appellant's appeal rights, and noted that, if she had additional evidence or legal argument, she may submit that evidence within one year to OWCP. With the August 22, 2012 letter, appellant's counsel submitted new evidence, asked OWCP to review the evidence and to provide him with the accepted allowance codes. The letter clearly referred to OWCP's file number for appellant's claim. Considering these factors, the Board finds that appellant's August 22, 2012 letter constituted a timely request for reconsideration of the November 29, 2011 OWCP merit decision.

As appellant timely requested reconsideration, the Board finds that OWCP improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to OWCP for review of the new medical evidence under the proper standard of review for a timely reconsideration request and to undertake any appropriate additional development as necessary.

CONCLUSION

The Board finds that appellant's counsel's August 22, 2012 letter constituted a request for reconsideration which was timely filed within one year of the November 29, 2011 merit decision. The Board will remand the case for review of this evidence under the proper standard for review for a timely reconsideration request,¹⁵ to be followed by any necessary further development and the issuance of an appropriate decision.

¹⁴ 57 ECAB 593 (2006) (and cases cited therein).

¹⁵ See 20 C.F.R. § 10.606(b)(3).

ORDER

IT IS HEREBY ORDERED THAT the decision of the January 7, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: July 8, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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