

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

B.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 12-1928
Issued: March 13, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2012 appellant filed a timely appeal from an August 15, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As more than 180 days elapsed from OWCP's last merit decision dated September 29, 2010 to 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.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 29, 2002 appellant, then a 59-year-old supervisor, filed a traumatic injury claim alleging that on that date she injured her head, left hand, left arm and left leg when she tripped and fell. OWCP accepted the claim for a left knee strain and an exacerbation of left knee osteoarthritis.² On March 10, 2008 appellant underwent a right knee total arthroplasty.

By decision dated April 2, 2009, OWCP determined that appellant's actual earnings as a modified attendance control supervisor effective November 7, 2008 fairly and reasonably represented her wage-earning capacity. It reduced her wage-loss compensation to zero after finding that her earnings met or exceeded that of her date-of-injury position.

On February 9, 2010 appellant filed a claim for compensation beginning January 30, 2010. In a statement dated March 4, 2010, she related that she had received a new job offer dated January 30, 2010 and requested that OWCP determine whether it was suitable.³

In a decision dated April 8, 2010, OWCP found that appellant failed to establish that modification of the April 2, 2009 loss of wage-earning capacity determination was warranted. It denied her claim for compensation beginning January 30, 2010.

On April 16, 2010 appellant requested an oral hearing. In a decision dated September 29, 2010, an OWCP hearing representative affirmed the April 8, 2010 decision. She found that appellant had not established any of the criteria for modifying a loss of wage-earning capacity determination.

On January 4, 2012 appellant appealed to the Board. In an order dated March 14, 2012, the Board dismissed the appeal as it was filed more than 180 days from the date of issuance of OWCP's September 29, 2010 decision.⁴ It found that appellant had not shown compelling circumstances for her failure to timely file an appeal.

On June 5, 2012 appellant requested reconsideration before OWCP under section 8128. She maintained that she had established compelling circumstances for untimely filing her appeal with the Board as she was undergoing medical treatment as shown by the accompanying medical evidence. Appellant submitted reports documenting her treatment at the hospital on March 14, 2010 for chest pain. She also submitted evidence showing that she received treatment in 2011 for diverticulitis and cholecystitis and in 2010 for low back pain.

² By decision dated November 2, 2006, OWCP granted appellant a schedule award for a 50 percent permanent impairment of the left lower extremity. In a decision dated January 26, 2009, it denied her claim for compensation on December 12, 2008 as the medical evidence did not establish that she received treatment on that date for her work injury. By decision dated February 5, 2010, OWCP denied appellant's claim for an increased schedule award.

³ On February 26, 2010 the employing establishment specified that she was not a part of the National Reassessment Process.

⁴ *Order Dismissing Appeal*, Docket No. 12-490 (issued March 14, 2012).

In a report dated May 9, 2012, Dr. William M. Craven, a Board-certified orthopedic surgeon, evaluated appellant for left knee pain, numbness and stiffness. He diagnosed osteoarthritis of the lower leg and left knee degenerative joint disease. Dr. Craven indicated that appellant's condition had not changed and that she could return to work with restrictions performing sedentary duties with occasional walking or standing not more than one to two hours. In a progress report dated June 15, 2012, he listed similar findings but noted that work status was inapplicable as appellant had retired.

By decision dated August 15, 2012, OWCP denied appellant's request for reconsideration after finding that it was not timely filed and did not show clear evidence of error. It found that she had not raised any allegation or submitted any evidence showing error in its prior decision.

On appeal appellant argued compelling circumstances for failing to timely appeal the September 29, 2010 decision. She related that she continued to receive medical treatment due to her left knee replacement.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁵ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. 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 application must establish, on its face, that such decision was erroneous.⁶

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 medical report which, if submitted prior to the 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 the case on the Director's own motion.⁷ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.⁸

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 20 C.F.R. § 10.607.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

begins on the date of the original OWCP decision.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁰ As appellant's June 5, 2012 request for reconsideration was submitted more than one year after the merit decision of September 29, 2010, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹¹

On September 29, 2010 OWCP denied modification of its April 2, 2009 loss of wage-earning capacity determination. Appellant may again request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP. In this case, however, she did not request modification of the loss of wage-earning capacity decision bolstered by new evidence or argument but instead requested reconsideration before OWCP. Appellant argued that she showed compelling circumstances for failing to timely appeal the September 29, 2010 decision to the Board. She submitted medical evidence in support of appellant's contention that she had established compelling circumstances. The medical evidence described her continued treatment for a left knee condition and treatment for nonemployment-related conditions. Appellant's argument and supporting evidence, however, are not relevant to the issue of whether OWCP erred in its September 29, 2010 decision denying her request for modification of the loss of wage-earning capacity determination. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹²

On appeal appellant contends that she established compelling circumstances for failing to timely appeal the September 29, 2010 decision to the Board. As noted, however, she subsequently requested reconsideration by OWCP. The relevant issue is whether appellant established error by OWCP in the September 29, 2010 merit decision. Her argument is not relevant to this issue and thus does not establish clear evidence of error.¹³

Appellant contends that she still receives treatment for her work injury. Again, the issue is whether she has shown error in OWCP's denial of modification of the loss of wage-earning capacity determination of April 2, 2009. The question of whether appellant continues to receive treatment for her left knee condition is not pertinent to the issue at hand. As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, she has not established clear evidence of error.¹⁴

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Robert F. Stone, supra* note 7.

¹¹ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹² *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹³ *Id.*

¹⁴ *See Veletta C. Coleman*, 48 ECAB 367 (1997).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2013
Washington, DC

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

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

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