

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

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H.L., Appellant)	
)	
and)	Docket No. 13-276
)	Issued: March 27, 2013
U.S. POSTAL SERVICE, POSTAL STORE, Anchorage, AK, Employer)	
)	

<i>Appearances:</i> <i>Alan J. Shapiro, Esq., for the appellant</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On November 19, 2012 appellant, through her attorney, filed a timely appeal of a July 2, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration without further merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed from September 21, 2009, the date of the most recent OWCP merit decision, to November 20, 2012, the Board lacks jurisdiction to review the merits of the case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 22, 2008 appellant, then a 55-year-old sales associate, filed an occupational disease claim alleging that she sustained right carpal tunnel syndrome as a result of her routine duties, including processing passport applications and other forms, typing and writing transmittals, managing bank deposits and stamp inventory, dispatching mail and closing the store. She became aware of her condition and its relationship to her federal employment on January 4, 2008.

Dr. Jessica J. Jachimiec, a Board-certified family practitioner, noted in a January 4, 2008 report that appellant's work entailed repetitive hand movements, which produced numbness and tingling after an extended period. After eliciting positive right Tinel's and Phalen's signs on examination, she diagnosed carpal tunnel syndrome. In a January 9, 2008 report, Dr. Bruce J. Gardner, a Board-certified family practitioner, evaluated appellant and observed wrist abnormalities. He diagnosed carpal tunnel syndrome and remarked that the condition worsened whenever she used a computer at work. Dr. Gardner prohibited repetitive use of the right wrist and lifting of items weighing above five pounds. An April 23, 2008 emergency department record from Dr. Shawn P. Cullen, a Board-certified emergency physician, stated that appellant continued to experience right wrist pain.

By decision dated August 14, 2008, OWCP denied appellant's claim, finding that the medical evidence failed to substantiate the diagnosis of carpal tunnel syndrome.

Appellant requested reconsideration on September 25, 2008. She submitted a physician assistant's report dated June 2, 2008 and an occupational therapist's records for the period May 20 to June 18, 2008.

On January 14, 2009 OWCP denied modification of the August 14, 2008 decision.

Appellant requested reconsideration on August 24, 2009 and provided copies of the occupational therapist's records dated May 29 and June 18, 2009.

On September 21, 2009 OWCP modified the January 14, 2009 decision to accept that the medical evidence substantiated the diagnosis of carpal tunnel syndrome, but denied appellant's claim on the grounds that the medical evidence did not sufficiently establish that her federal employment caused or contributed to the condition.

Counsel requested reconsideration on December 14, 2011 and submitted new evidence. In two reports dated July 20, 2009, Dr. Jamie L. Guyden, a Board-certified physiatrist, conducted nerve conduction studies and found evidence of mild sensory demyelinating median mononeuropathy of the left wrist and moderate sensorimotor demyelinating median mononeuropathy of the right wrist. She added that appellant, who recently retired, previously worked for the employing establishment and performed tasks that involved pulling, pushing, writing and typing.

In a May 19, 2011 report, Dr. William N. Grant, a Board-certified internist, related that appellant experienced bilateral hand and wrist paresthesia since 2006. Appellant underwent right and left carpal tunnel release surgeries in January and February 2010, respectively. On

examination, Dr. Grant observed limited range of motion (ROM) and positive bilateral Tinel's and Phalen's signs. He diagnosed bilateral carpal tunnel syndrome.²

By decision dated July 2, 2012, OWCP denied appellant's request for reconsideration, finding that it was not filed within one year of the September 21, 2009 decision and did not otherwise establish 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.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

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.⁶

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise and explicit and manifests on its face that it committed an error.⁸ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also 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

² Dr. Grant also supplied impairment ratings of 19 percent for the left upper extremity and 19 percent for the right upper extremity.

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a). See also *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *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.").

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

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

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.⁹

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last OWCP merit decision in this case was issued on September 21, 2009. Counsel filed an application to reopen this decision for further merit review on December 14, 2011. Because more than two years passed between September 21, 2009 and December 14, 2011, OWCP properly determined that the reconsideration request was not timely filed.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its September 21, 2009 decision, OWCP denied her occupational disease claim on the grounds that the medical evidence did not establish that her job duties for the employing establishment, namely processing passport applications and other forms, typing and writing transmittals, managing bank deposits and stamp inventory, dispatching mail and closing the store, caused or contributed to carpal tunnel syndrome. Thereafter, counsel submitted two July 20, 2009 reports from Dr. Guyden and a May 19, 2011 report from Dr. Grant. As noted, the question of whether a 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. Neither of these reports, however, manifested on its face that OWCP erred in denying appellant's claim in view of the earlier, deficient case record.¹⁰ Since this new evidence did not raise a substantial question as to the correctness of the September 21, 2009 decision, OWCP properly determined that the untimely request failed to establish clear evidence of error.

Counsel contends on appeal that the July 2, 2012 decision is contrary to fact and law. The Board has already addressed the deficiencies of the reconsideration request.

CONCLUSION

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

⁹ See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁰ See also *D.G.*, 59 ECAB 455, 460 (2008) (the submission of a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted before the denial was issued, is not clear evidence of error; the evidence must shift the weight of the evidence in favor of the claimant).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 27, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board