

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

_____)
M.S., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
FOREST SERVICE, St. Maries, ID, Employer)
_____)

Docket No. 13-1093
Issued: September 12, 2013

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2013 appellant timely appealed from the March 7, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied reconsideration. The most recent merit decision is dated August 2, 2011, which was more than 180 days prior to the filing of the appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction extends only to the March 7, 2013 nonmerit decision.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for merit review was untimely and failed to establish clear evidence of error.

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¹ 5 U.S.C. §§ 8101-8193 (2006).

² The current record includes evidence received after the March 7, 2013 decision. The Board is precluded from considering evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case was previously before the Board.³ Appellant, a 56-year-old forestry technician, has an accepted claim for right shoulder acromioclavicular sprain, right rotator cuff sprain and right shoulder impingement syndrome which occurred on August 24, 2007. He underwent an OWCP authorized right shoulder arthroscopy on November 23, 2009.

By decision dated August 6, 2010, OWCP granted a schedule award for 10 percent impairment of the right upper extremity. The award was based on the May 11, 2010 report of Dr. George R. Harper, a Board-certified orthopedic surgeon, who rated 10 percent impairment of the right arm based on appellant's November 2009 right shoulder arthroscopy. Dr. Harper applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).⁴ An OWCP district medical adviser reviewed the record on June 24, 2010 and concurred with Dr. Harper's impairment rating. On appeal, the Board affirmed the August 6, 2010 schedule award. The Board's August 2, 2011 decision is incorporated herein by reference.

On February 13, 2013 appellant requested reconsideration. He check marked the appeal request form that accompanied the August 6, 2010 schedule award decision. Appellant did not submit additional relevant medical evidence or advance any particular argument in support of an increased schedule award.⁵

In a March 7, 2013 decision, OWCP denied reconsideration. Appellant's February 13, 2013 request for reconsideration was found untimely and he failed to demonstrate clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the application for

³ Docket No. 11-126 (issued August 2, 2011).

⁴ See Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 401, 403 (6th ed. 2008) (acromioclavicular joint injury/disease, status post distal clavicle resection).

⁵ Since issuing the August 6, 2010 schedule award, OWCP received various treatment records for chronic right upper extremity pain including physical therapy records. However, appellant has not submitted a more recent right upper extremity impairment rating in accordance with the A.M.A., *Guides* (6th ed. 2008). The post-August 6, 2010 record also includes psychiatric treatment records and other medical records pertaining to appellant's cervical degenerative disc disease and possible Parkinson's disease. None of these conditions have been accepted as being causally related to appellant's August 24, 2007 right shoulder injury.

⁶ This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

reconsideration must be sent within one year of the date of the merit decision for which review is sought.⁸

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰ If the request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of OWCP in its “most recent merit decision.”¹¹

ANALYSIS

Appellant’s request for reconsideration was dated February 13, 2013, which was more than 18 months after the merit decision regarding his schedule award.¹² Because appellant failed to file his request within a year of the last merit decision, he must demonstrate “clear evidence of error” on the part of OWCP in determining the extent of his right upper extremity permanent impairment.¹³

Appellant’s request for reconsideration consisted of the appeal request form that accompanied the August 6, 2010 schedule award. He placed a checkmark in the appropriate space indicating his desire to pursue reconsideration before OWCP. The February 13, 2013 request was not accompanied by the submission of any additional medical evidence or argument in support of an increased schedule award. Appellant’s request failed to identify any medical evidence that would support an increased award. While appellant continued to receive medical

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.606(b)(2).

¹⁰ *Id.* at § 10.608(b).

¹¹ *Id.* at § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² *See supra* note 3.

¹³ 20 C.F.R. § 10.607(b).

treatment, including physical therapy for right upper extremity pain, documentation of ongoing treatment is not relevant to the rating of impairment under the A.M.A., *Guides*.¹⁴

The Board finds that appellant has not demonstrated clear evidence of error. As such, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied merit review with respect to appellant's February 13, 2013 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2013
Washington, DC

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

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

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

¹⁴ Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists and social workers are not considered "physician[s]" as defined under FECA. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to benefits. *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).