

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

F.B., Appellant

and

**U.S. POSTAL SERVICE, NORTH METRO
PROCESSING & DISTRIBUTION CENTER,
Duluth, GA, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 13-1926
Issued: January 30, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 10, 2013 appellant filed a timely appeal from a February 12, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.¹ Because more than 180 days has elapsed from the most recent merit decision dated January 19, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.³

¹ Appellant's AB-1 form submitted with his appeal to the Board indicates that he is appealing a December 22, 2011 OWCP decision. The Board notes, however, that an appeal of this decision is not timely filed as more than 180 days has elapsed from the date of issuance to the filing of this appeal on August 10, 2013. See 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

³ By order dated December 20, 2013, the Board denied appellant's request for oral argument. *Order Denying Request for Oral Argument*, Docket No. 13-1926 (issued December 20, 2013).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant disagrees with OWCP's decision granting him a schedule award for 10 percent impairment to his left arm. He contends that he has greater impairment due to physical limitations and chronic pain and discomfort in his left shoulder and low back. Appellant further contends that his treating physician minimized his loss of strength and permanent damage in his left arm which negatively affected his job performance and failed to include his disfigurement from a scar.

FACTUAL HISTORY

OWCP accepted that on February 2, 2010 appellant, then a 51-year-old clerk, sustained a left shoulder sprain as a result of repetitive work duties. It authorized left shoulder arthroscopy which was performed on November 24, 2010.

In a December 22, 2011 decision, OWCP granted appellant a schedule award for 10 percent impairment to the left arm. The award ran for the period July 15, 2010 to February 18, 2011.⁴ On January 19, 2012 OWCP issued a corrected decision, noting that the period of the schedule award ran from July 15, 2011 to February 18, 2012. Appeal rights attached to the decision notified appellant that a request for reconsideration had to be dated and received within one calendar year of the date of its decision.

In an appeal request form dated December 17, 2012, received by OWCP on January 14, 2013, appellant requested reconsideration of the December 22, 2011 decision. In a December 19, 2012 narrative statement, he contended that Dr. Pennington made critical errors or inaccurate determinations in the evaluation of his claim. Dr. Pennington failed to acknowledge appellant's limited or diminished ability to reach behind his back which was a result of his employment-related injury. He inaccurately stated that appellant had no diminished strength. Dr. Pennington failed to reference the visible scar on appellant's shoulder. Appellant noted his continuing left side complaints and physical limitations. He contended that his treating physician's statement that he could return to light-duty work supported his limitations. In an August 22, 2011 letter, appellant described his left shoulder symptoms and limitations.

In a July 24, 2011 report, Dr. Pennington advised that a bone scan of the left arm revealed a single lytic lesion in the anterior cortex of the left humerus, a large differential of benign and malignant etiologies for a solitary lytic lesion of the bone and degenerative changes.

⁴ In a December 8, 2011 medical report, Dr. Scott P. Pennington, an attending orthopedic surgeon, opined that appellant had three percent impairment to the left upper extremity. On December 19, 2011 OWCP's medical adviser determined that appellant had 10 percent impairment to the left upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).

In a February 12, 2013 decision, OWCP denied appellant's request for reconsideration, without a merit review, finding that it was not timely filed and failed to establish clear evidence of error in its December 22, 2011 decision.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and procedures provide that it 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

⁵ 20 C.F.R. § 10.607(a).

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

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.*; 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.

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁴

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹⁵

ANALYSIS

In its February 12, 2013 decision, OWCP denied appellant's December 17, 2012 request for reconsideration finding that it was not timely filed and failed to present clear evidence of error. The Board finds that it improperly determined that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

The Board notes that appellant sought review of the December 22, 2011 OWCP decision which granted him a schedule award for 10 percent impairment to the left arm. The last merit decision issued by OWCP on the underlying issue in this case is a January 19, 2012 decision which corrected the compensation period set forth in its prior schedule award decision. As the decision was issued on January 19, 2012, appellant's appeal rights attached at that time and the regulations in place on the date of the January 19, 2012 decision should be determinative as to whether his appeal request was timely filed. At the time that OWCP's January 19, 2012 decision was issued, OWCP's regulations provided that a request must be received within one year of the date of its decision for which review was sought.¹⁶ The December 17, 2012 request for reconsideration was received by OWCP on January 14, 2013, less than one year from the last merit decision of January 19, 2012. The Board finds, therefore, that appellant's request for reconsideration is timely.

As appellant's December 17, 2012 request for reconsideration was timely, the Board finds that OWCP improperly denied his request by applying the legal standard reserved for cases where reconsideration is requested after one year.

Since OWCP erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of the evidence under the proper standard of review for a timely reconsideration request.¹⁷

¹⁴ *Leon D. Faidley, Jr., supra* note 6.

¹⁵ 20 C.F.R. § 10.607.

¹⁶ *Id.*

¹⁷ In light of the disposition of this case, the Board will not address appellant's arguments on appeal.

CONCLUSION

The Board finds that OWCP improperly found that appellant's request for reconsideration was untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: January 30, 2014
Washington, DC

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

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

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