

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

M.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 14-541
Issued: May 27, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2014 appellant, through counsel, filed a timely appeal from a December 20, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's April 20, 2012 decision denying appellant's occupational disease claim. Because more than 180 days elapsed from the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 18, 2012 appellant, then a 57-year-old mail clerk, filed an occupational disease claim (Form CA-2) alleging carpal tunnel syndrome (CTS) as a result of her federal employment duties. She first became aware of her condition and of its relationship to her employment on September 26, 2011.

By letter dated February 3, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. She was advised of the medical and factual evidence needed and asked that she respond to the provided questions within 30 days.

Appellant submitted a narrative statement describing her federal employment duties and the repetitive use of her hands.

In a December 28, 2011 electromyography (EMG) and nerve conduction study, Dr. Mark Rorick, a Board-certified neurologist, reported that testing revealed abnormal for the right upper extremity. He stated that the findings were diagnostic of right median neuropathy at or distal to the wrist (CTS).

In reports dated December 28, 2011 and January 31, 2012, Dr. Rorick diagnosed bilateral carpal tunnel syndrome, right greater than left.

By decision dated April 20, 2012, OWCP denied appellant's claim. It found that the medical evidence of record failed to establish that her diagnosed condition was causally related to the established work-related events.

By letter dated October 9, 2013, appellant stated that she still experienced symptoms of CTS as a result of her federal employment duties. She described her employment duties and stated that her condition was caused by her employment over the course of the prior 30 years.

By letter dated December 9, 2013, appellant requested reconsideration of OWCP's decision. She submitted an October 24, 2013 letter from Dr. Todd S. Hochman, Board-certified in internal medicine. Dr. Hochman opined that appellant's bilateral CTS was caused as a result of her federal employment duties as a mail clerk.

By decision dated December 20, 2013, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.³

³ The Board notes that appellant submitted additional evidence after OWCP rendered its December 20, 2013 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

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.⁴ 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.⁵

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁷

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

In its December 20, 2013 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be received within one year of the date of OWCP's decision.¹² A right to reconsideration within one year also

⁴ 20 C.F.R. § 10.607(a).

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

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² 20 C.F.R. § 10.607 (2011).

accompanies any subsequent merit decision on the issues.¹³ Appellant's December 9, 2013 request for reconsideration was submitted and received more than one year after issuance of the April 20, 2012 merit decision. Therefore, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim.¹⁴

The Board finds that appellant has not established clear evidence of error on the part of OWCP. Appellant submitted an October 24, 2013 report from Dr. Hochman, who stated that appellant's repetitive employment duties caused her bilateral CTS. However, this evidence is insufficient to establish that OWCP erred in the denial of appellant's claim.¹⁵ Dr. Hochman's report did not provide detailed medical rationale explaining how appellant's federal employment duties caused her injury other than generally stating that repetitive use of her upper extremities caused her CTS. Furthermore, this evidence was submitted after OWCP's April 20, 2012 merit decision. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.¹⁶ While Dr. Hochman's report was generally supportive of appellant's claim, it is not sufficient to establish clear evidence of error.¹⁷ This evidence does not raise a substantial question as to the correctness of OWCP's April 20, 2012 merit decision.

On appeal, appellant argues that her 30-year employment as a mail clerk caused her bilateral CTS. The Board notes that the underlying issue is medical in nature. The medical evidence submitted was not sufficient to shift the weight of the evidence in appellant's favor or to establish that OWCP erred in denying her claim.

As none of the evidence raises a substantial question concerning the correctness of OWCP's decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.¹⁸

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations, Time Limitations*, Chapter 2.1602(e)(6) (August 2011).

¹⁴ See *Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ See *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (March 2011).

¹⁷ *V.W.*, Docket No. 12-1901 (issued March 5, 2013).

¹⁸ *A.S.*, Docket No. 11-356 (issued September 16, 2011).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 27, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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