

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

G.P., Appellant)	
)	
and)	Docket No. 14-649
)	Issued: May 13, 2014
DEPARTMENT OF AGRICULTURE, FOOD)	
SAFETY & INSPECTION SERVICE,)	
Springdale, AR, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 29, 2014 appellant timely appealed an August 15, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which issued its latest merit decision on July 9, 2012; more than 18 months prior to the filing of the instant appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 59-year-old former food inspector (slaughter), has an accepted occupational disease claim for bilateral carpal tunnel syndrome (CTS), which arose on or about

¹ 5 U.S.C. §§ 8101-8193 (2006).

March 11, 1986.² By decision dated December 6, 2002, OWCP terminated her wage-loss compensation on the basis that her work-related disability had ceased. It primarily relied on the October 2, 2002 second opinion examination of Dr. Thomas P. Rooney, a Board-certified orthopedic surgeon, who found that appellant had returned to her preinjury status and was able to resume work without restrictions. Also, appellant's then treating physician, Dr. James F. Moore, a Board-certified orthopedic surgeon, provided an April 24, 2002 work capacity evaluation (Form OWCP-5c) wherein he noted that she could perform full-time work without restrictions.³

Following its December 6, 2002 decision, OWCP has issued 18 decisions with respect to the termination of appellant's wage-loss compensation. The latest merit decision was dated July 9, 2012, and since then OWCP has twice denied further merit review. In its August 15, 2013 decision, OWCP found that appellant's most recent request for reconsideration was untimely and that she failed to demonstrate clear evidence of error.

Appellant's July 5, 2013 request for reconsideration was accompanied by an October 20, 1987 doctor's appointment notice and a January 14, 1998 report from Dr. Dean M. Wingerchuk (Mayo Clinic), who diagnosed possible multiple sclerosis (MS) and bilateral CTS. She also submitted a March 6, 2001 report from Dr. Moore, as well as the results of a March 21, 2001 nerve conduction study. Additionally, appellant submitted Dr. Moore's March 21, 2002 report, his April 24, 2002 Form OWCP-5c, Dr. Moore's July 13, 2002 report and Dr. Rooney's October 7, 2002 Form OWCP-5c. Lastly, she submitted a June 27, 2013 follow-up examination report from Dr. Norman Tubb, a family practitioner, who noted that she continued to complain of bilateral wrist and hand pain, as well as numbness. Dr. Tubb indicated that appellant remained unable to return to work due to pain. His objective findings included bilateral wrist pain with positive Tinel's and Phalen's. Dr. Tubb diagnosed bilateral CTS and recommended a nerve conduction study to confirm his clinical impression.

On reconsideration, appellant questioned Dr. Moore's signature on the April 24, 2002 Form OWCP-5c. She referenced some of the above-noted reports as a means of authenticating Dr. Moore's true signature. Appellant also challenged OWCP's reliance on Dr. Rooney's opinion, noting various inaccuracies in his October 2, 2002 report.

As indicated, the August 15, 2013 decision found appellant's latest reconsideration request untimely. OWCP also found that she had failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the application for

² Appellant underwent a right carpal tunnel release on July 25, 1986, and a left carpal tunnel release on June 6, 1996. She has not been gainfully employed since 1986.

³ Dr. Moore first saw appellant on May 1, 1986 and performed the July 25, 1986 right carpal tunnel release.

⁴ 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).

⁵ 20 C.F.R. § 10.607.

reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ When a 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.⁷

ANALYSIS

Appellant's request for reconsideration is dated July 5, 2013, and OWCP received the request on July 9, 2013, which was more than one year after the July 9, 2012 merit decision. Based on OWCP's date of receipt, the request for reconsideration was untimely by one day.⁸ U.S. Postal Service tracking information reportedly showed that appellant's request was delivered on Monday, July 8, 2013, but U.S. Postal Service tracking information was not part of the record before OWCP and the Board is precluded from reviewing additional evidence for the first time on appeal.⁹ Timeliness is determined based on the iFECS "received date," which in this case was July 9, 2013.¹⁰ Because appellant's July 5, 2013 request for reconsideration was untimely, she must demonstrate clear evidence of error on the part of OWCP in terminating wage-loss compensation effective December 5, 2002.¹¹

Appellant's current challenge to OWCP's reliance on the April and October 2002 reports of Dr. Moore and Dr. Rooney is essentially the same argument she raised more than a decade ago in response to the October 30, 2002 notice of proposed termination of compensation. She has since reiterated those arguments in at least two of her previous requests for reconsideration.

Appellant claims that Dr. Moore did not prepare the April 24, 2002 work capacity evaluation which indicated "No restrictions." The signature on the April 24, 2002 Form OWCP-5c was followed by a slash (/) and the letters "KS," indicating that a colleague of

⁶ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁷ *Id.* at § 10.607(b).

⁸ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4b.

⁹ 20 C.F.R. § 501.2(c)(1).

¹⁰ *See supra* note 8.

¹¹ 20 C.F.R. § 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).

Dr. Moore's was authorized to sign on his behalf. This is not an uncommon practice. The record includes other reports from Dr. Moore where it is evident that someone else signed on his behalf. For example, there is a November 19, 1986 attending physician's report (Form CA-20a) with "/crw" and a similar report dated June 24, 1987 with "/KS." Also, there are several other reports on Dr. Moore's personal stationery/letterhead where "/crw" indicated that he/she signed on the doctor's behalf. The fact that Dr. Moore did not personally sign the April 24, 2002 Form OWCP-5c, does not mean he was unfamiliar with its contents.

With respect to Dr. Rooney's October 2, 2002 second opinion evaluation, appellant has repeatedly argued that his examination was not particularly thorough. Her latest request for reconsideration identified a few discrepancies with respect to names and dates, and what appellant perceived to be significant omissions. For example, Dr. Rooney reported that appellant was evaluated at the Mayo Clinic and was thought to have MS. However, she noted that the Mayo Clinic physicians also diagnosed bilateral CTS in 1998, which Dr. Rooney had not mentioned. Despite this omission regarding part of the Mayo Clinic findings, Dr. Rooney went on to diagnose mild residuals of CTS, cervical disc disease (C4-7) and possibly MS. He concluded that the residuals of the March 11, 1986 work injury were present to a mild degree, but were insufficient to keep appellant from performing normal activities. Dr. Rooney's October 7, 2002 Form OWCP-5c noted "No restrictions." Appellant has not demonstrated clear evidence of error with respect to OWCP's reliance on the April and October 2002 findings of Dr. Moore and Dr. Rooney.¹² Also, Dr. Tubb's June 27, 2013 disability finding does not establish clear evidence of error on the part of OWCP in finding that appellant's employment-related disability had ceased more than a decade earlier. As such, there is no justification for further merit review. Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's July 5, 2013 request for reconsideration was untimely, and she failed to demonstrate clear evidence of error. Therefore, she is not entitled to further merit review.

¹² Appellant noted that the Form OWCP-5c Dr. Moore used in April 2002 expired October 31, 1999, and the one Dr. Rooney used in October 2002 expired August 31, 2002. The bottom of both forms includes a "Public Burden Statement" which reads in relevant part: "Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number." Because the forms were outdated when used, appellant argues in favor of their exclusion. This argument is without merit. The absence of a currently valid OMB control number does not detract from the substance of the physicians' findings that appellant had "No restrictions."

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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