

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 14-703
Issued: September 16, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2014 appellant filed a timely appeal from a November 19, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the November 19, 2013 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

FACTUAL HISTORY

This case was previously before the Board.³ On October 31, 2011 appellant, then a 48-year-old mail carrier, filed an occupational disease claim alleging that she sustained back and leg conditions as a result of carrying a heavy mailbag on her route.⁴

Appellant submitted various work status reports, which indicated that she should work modified duty from October 25 to December 21, 2011.

In an October 6, 2011 progress note, Dr. James Nguyen, Board-certified in physical medicine and rehabilitation, noted that appellant worked as a postal carrier and complained of left leg numbness and lower back pain. He conducted an examination and reviewed a magnetic resonance imaging (MRI) scan of the lumbar spine. Dr. Nguyen diagnosed multilevel broad-based disc bulges causing lateral region of narrowing and degenerative disc disease at the L5-S1 level.

In a November 8, 2011 progress report, Dr. Elizabeth Kaiser, Board-certified in occupational medicine, related that appellant worked as a postal carrier and related her complaints of occasional low back pain that radiated to her left buttock, thigh and knee. She provided findings on physical examination and diagnosed degenerative disc disease, chronic low back and bilateral knee strain. Dr. Kaiser recommended that appellant work modified duty. She continued to examine appellant and provide progress reports dated December 7 and 21, 2011 regarding her medical treatment for degenerative disc disease and bilateral knee strain. Dr. Kaiser recommended that appellant remain on modified duty.

In a decision dated January 17, 2012, OWCP denied appellant's occupational disease claim. It accepted that she worked as a mail carrier and was diagnosed with degenerative disc disease and bilateral knee sprains but denied her claim finding insufficient medical evidence to establish that her medical conditions were causally related to factors of her employment.

Appellant filed an appeal before the Board. By decision dated November 9, 2012, the Board affirmed the January 17, 2012 denial decision finding that she had not met her burden of proof to establish that her accepted conditions were causally related to her employment duties.

By letter dated November 3, 2013 and received on November 11, 2013, appellant requested reconsideration. She stated that she had hip problems in addition to back problems, which made it difficult to walk and sit. Appellant also noted that she recently had surgery on September 30, 2013.

In a September 30, 2013 operative report, Dr. Theodore Scott Bucklin, a Board-certified orthopedic surgeon, who specializes in sports medicine, diagnosed labrum hip tear and noted that appellant underwent hip arthroscopic labral repair.

³ Docket No. 12-1273 (issued November 9, 2012).

⁴ The record reveals that appellant filed two previous traumatic injury claims for September 16, 2009 and January 6, 2011 employment incidents.

By decision dated November 19, 2013, OWCP denied appellant's request for reconsideration on the grounds that it was not timely filed, as it was received on November 11, 2013 and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.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 The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.⁷

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 nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹⁰

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.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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

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 also C.J.*, Docket No. 12-1570 (issued January 16, 2013); *D.G.*, 59 ECAB 455 (2008).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

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

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

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.¹⁴

In computing the time for requesting reconsideration, the date of the event from which the designated period of time begins to run shall not be included but the last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday.¹⁵

ANALYSIS

The Board finds that this case must be remanded to OWCP for application of the appropriate standard of review because appellant's request for reconsideration was timely submitted.

The most recent merit decision in this case was the Board's November 9, 2012 merit decision finding that appellant had not met her burden of proof to establish an occupational disease claim in the performance of duty. Appellant had one calendar year from the date of that decision or until November 9, 2013 to ensure that OWCP received any reconsideration request.¹⁶ The Board notes that November 9, 2013 fell on a Saturday. It is well established that, when a time limitation expires on a nonbusiness day, the limitation is extended to include the next business day.¹⁷ The following Monday was November 11, 2013, which was Veterans Day, a federal holiday. Therefore, because the time limitation for filing a request for reconsideration fell on a nonbusiness day, the time period for filing a request for reconsideration did not expire until the next business day, which was Tuesday, November 12, 2013. Because appellant's request for reconsideration was scanned as received on November 11, 2013, the Board finds that it was timely filed.

The case will be remanded to OWCP for consideration of appellant's request under the standard for reviewing a timely request for reconsideration.¹⁸

CONCLUSION

The Board finds that appellant's request for reconsideration received on November 11, 2013 was timely filed.

¹⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁵ *John B. Montoya*, 43 ECAB 1148 (1992); see *Donna A. Christley*, 41 ECAB 90 (1989).

¹⁶ *Supra* note 5.

¹⁷ See *M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488 (2000).

¹⁸ The standard is found at 20 C.F.R. § 10.606(b)(3).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2013 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to OWCP for application of the proper standard for reviewing a timely request for reconsideration.

Issued: September 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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