

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

L.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Winterville, NC, Employer)

**Docket No. 15-216
Issued: April 1, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 27, 2014 appellant filed a timely appeal from an April 29, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, and because more than 180 days elapsed between the last merit decision, December 7, 2012, and the filing of this appeal on October 27, 2014, the Board lacks jurisdiction to review the merits of this claim.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim as her request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On October 26, 2012 appellant, then a 47-year-old rural letter carrier, filed a traumatic injury claim alleging that on October 20, 2012 she was involved in a motor vehicle accident in the performance of duty. She alleged that she sustained a left shoulder strain and a possible left scaphoid fracture. Appellant stopped work on October 20, 2012.

In an October 22, 2012 statement, appellant noted that she was in the process of making a U-turn when she saw another car approaching. She advised that she stopped in the road because she could not complete the turn safely and the other driver kept going and hit her postal vehicle.

Medical records that were submitted included an October 20, 2012 disability status report from Vidant Medical Center with an illegible signature advising that appellant was able to return to work on October 23, 2012, an October 25, 2012 emergency room report, in which Dr. Nicholas Benson, Board-certified in emergency medicine, diagnosed a sprained neck and wrist, and an October 26, 2012 disability status report in which a physician assistant found appellant unable to work.

By letter dated November 5, 2012, OWCP notified appellant that evidence was insufficient to establish her claim and advised her of the type of evidence needed.

On November 6, 2012 an employing establishment continuation of pay report reflected that appellant was off work due to a fractured left scaphoid with immobilization of her left thumb, wrist, and forearm. The report advised that her anticipated return to work was November 20, 2012.

By decision dated December 7, 2012, OWCP denied appellant's claim because the medical evidence had not established a diagnosed condition causally related to the work-related incident.

Appellant continued to submit evidence. In an October 20, 2012 diagnostic report, Dr. Bruce Schroeder, a Board-certified diagnostic radiologist, noted that appellant had left prominent snuffbox tenderness after a motor vehicle collision. He advised that an x-ray of the left hand revealed no evidence of fracture or dislocation. Dr. Schroeder further noted that, if there was a clinical concern for a radiographically occult scaphoid fracture, then he recommended splinting with a repeat radiograph in 7 to 10 days or magnetic resonance imaging (MRI) scan. In a November 5, 2012 disability status report, a physician assistant advised that appellant was unable to work. In another November 19, 2012 disability status report, Dr. Christopher Hasty, a Board-certified orthopedic surgeon, advised that appellant was able to return to full duty without restrictions.

In a January 29, 2014 telephone call to OWCP's district office, appellant alleged that she had not received a development or denial letter. When advised that those letters were sent to the address listed on her notice of traumatic injury, she stated that she had not been at that address in over a year. OWCP representative further advised appellant that no returned mail had been received. By letter dated January 30, 2014, appellant advised of her change of address.

On March 25, 2014 appellant requested reconsideration. She recounted how the motor vehicle accident occurred and her actions and medical treatment thereafter. Appellant noted that her address had changed and that she was unaware that her claim had been denied until December 2013. Accident reports from October 20 and 23, 2012 were submitted. An employing establishment accident investigation report advised that appellant was making a U-turn when three-fourths of the way into the turn she came to a complete stop after seeing another vehicle approaching. The other vehicle apparently did not see her until it was too late and collided with her postal vehicle. The report advised that appellant was ticketed for failure to yield and noted that she had previously injured her wrist in another work-related incident. Also submitted was an October 20, 2012 emergency department discharge note indicating that she was diagnosed with left wrist pain and motor vehicle collision muscle strain.

By decision dated April 29, 2014, OWCP denied appellant's request for reconsideration as untimely and found that there was no clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.³ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.⁶

OWCP procedures note 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

³ *Id.* at § 10.607(a) (2011).

⁴ *Id.* at § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁵ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

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.⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on December 7, 2012. Appellant did not request reconsideration until March 25, 2014, more than one year after the December 7, 2012 merit decision. Therefore, it was not timely filed. Appellant has alleged that she did not receive the development letter or the decision letter denying her claim. The record establishes that OWCP sent the December 7, 2012 decision to her address on record at that time which was the same address provided on the notice of traumatic injury. The presumption is that the decision was received as under the mailbox rule it was mailed in the normal course of business to the address of record.⁹ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her request for a merit review of her claim.

The Board finds that appellant has not established clear evidence of error in OWCP's December 7, 2012 decision. Appellant submitted an October 20, 2012 diagnostic report from Dr. Schroeder, who noted that she had left prominent snuffbox tenderness after a motor vehicle collision. Dr. Schroeder advised that an x-ray of the left hand revealed no evidence of fracture or dislocation. He further noted that, if there was a clinical concern for a radiographically occult scaphoid fracture, then he recommended splinting with a repeat radiograph in 7 to 10 days or MRI scan. Although this report provides a history of the injury, it is not sufficient to establish clear evidence of error. Other medical evidence submitted after the December 7, 2012 decision equally does not establish clear evidence of error.

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.¹⁰ This evidence does not raise a substantial question as to the correctness of OWCP's decision in its denial of appellant's claim.

Appellant also submitted several accident reports. However, the occurrence of the October 20, 2012 work incident is not in dispute. The claim was denied because the medical evidence did not establish that the incident caused an injury. Thus, this evidence is not relevant

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

⁹ *See Kenneth E. Harris*, 54 ECAB 502 (2003).

¹⁰ *See supra* note 7.

to the issue decided by OWCP.¹¹ Consequently, OWCP properly found that the untimely reconsideration request did not establish clear evidence of error.

On appeal, appellant argues that she was legitimately injured on the job and that she and her supervisor followed the proper protocol. However, the Board does not have jurisdiction over the merits of the claim. As explained, appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ See *supra* note 6.