



further contends that an attending physician's 13 percent whole person impairment rating was consistent with appellant's authorized 1990 cervical surgery and ongoing symptoms, was reasonably stated, and based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Counsel also contends that OWCP refused to submit appellant to an impairment rating evaluation despite authorizing payment for the evaluation.

### **FACTUAL HISTORY**

This case has previously been before the Board. By order dated September 29, 2009, the Board dismissed an appeal of a November 4, 2008 OWCP hearing representative's decision because it had been filed by an attorney but the attorney authorization had not been received.<sup>2</sup> In a December 22, 2010 decision, the Board affirmed a June 17, 2009 OWCP hearing representative's decision finding that appellant had no more than one percent impairment to both the right and left arm for which he had received a schedule award.<sup>3</sup> The Board, however, set aside OWCP's November 13, 2009 nonmerit decision denying appellant's request for reconsideration of the schedule award decision. The Board remanded the case for OWCP to conduct a merit review and issue an appropriate decision. The relevant facts are set forth below.

On April 7, 2003 appellant, then a 47-year-old district conservationist, filed an occupational disease claim under File No. xxxxxx558 alleging that on May 15, 1989 he injured his neck and head when a chair in which he was sitting flipped backwards onto the floor. OWCP accepted his claim for herniated cervical disc and authorized anterior cervical discectomy and fusion at C4-5 performed on February 22, 1990. It accepted appellant's subsequent claim under File No. xxxxxx164 for aggravation of cervical disc disease, including residuals of a failed fusion. The two claims, File Nos. xxxxxx558 and xxxxxx164, were combined into master claim File No. xxxxxx558.

Following the Board's remand, OWCP requested that an OWCP medical adviser review an October 19, 2009 medical report from Dr. John F. McIntyre, an attending family practitioner, to determine if appellant had sustained additional permanent impairment. In the October 19, 2009 report, Dr. McIntyre conducted an impairment evaluation and determined that appellant had 28 percent impairment of the whole person under the fifth edition of the A.M.A., *Guides*.

Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, submitted a January 30, 2011 report finding that appellant had no more than one percent impairment of each upper extremity. He stated that Dr. McIntyre's use of the fifth edition of the A.M.A., *Guides* and his calculation of whole body impairment was not consistent with OWCP guidelines. Utilizing the sixth edition of the A.M.A., *Guides*, Proposed Table 1: Spinal Nerve Impairment Upper Extremity Impairments of *The Guides Newsletter* (July/August 2009), Dr. Berman determined that appellant had a class 1 mild sensory deficit of the C5 nerve root which yielded a grade C default value or one percent impairment of each upper extremity, totaling two percent impairment.

---

<sup>2</sup> Docket No. 09-701 (issued September 29, 2009).

<sup>3</sup> Docket No. 10-414 (issued December 22, 2010).

In a February 11, 2011 decision, OWCP denied modification of its prior schedule award decision. It found that the evidence submitted was insufficient to establish that appellant sustained additional impairment. OWCP stated that Dr. McIntyre did not use the proper edition of the A.M.A., *Guides* to rate appellant's impairment.

On February 8, 2012 appellant requested reconsideration and submitted an August 31, 2011 report from Dr. Avner R. Griver, an attending physician Board-certified in pain medicine and physical medicine and rehabilitation. Dr. Griver calculated 13 percent whole person impairment under the sixth edition of the A.M.A., *Guides*. He determined that appellant had a two percent whole person impairment due to fibromyalgia under Table 3-1 on page 40. Dr. Griver assessed grade modifiers based on functional history, physical examination, and clinical studies under Table 17-6, Table 17-7, and Table 17-9 on pages 575, 576, and 581, respectively, regarding appellant's work-related cervical condition and calculated an 11 percent whole person impairment. He combined this impairment rating with the 2 percent impairment rating for fibromyalgia to calculate a 13 percent impairment of the whole person.

On July 5, 2012 Dr. Berman reviewed Dr. Griver's August 31, 2011 findings. He stated that his whole person impairment rating was not consistent with OWCP guidelines and, therefore, was not acceptable. Additionally, Dr. Berman noted that Dr. Griver's examination did not reveal any neurologic or extremity abnormalities and, therefore, there was no change in his previous recommendation of two percent impairment of the upper extremities, one percent impairment each for the right and left upper extremity, under the sixth edition of the A.M.A., *Guides*, or date of maximum medical improvement.<sup>4</sup>

In a July 17, 2012 decision, OWCP found that the medical evidence submitted failed to establish that appellant had more than one percent impairment to the right and left upper extremity.

On August 3, 2012 appellant requested an oral hearing before an OWCP hearing representative.

In a March 29, 2013 decision, an OWCP hearing representative affirmed the July 17, 2012 decision. She found that Dr. Berman's July 5, 2012 report constituted the weight of the medical opinion evidence in finding that appellant had no more than one percent impairment to both the right and left upper extremity.

On August 19, 2013 OWCP responded to appellant's request for authorization of payment in advance for an impartial medical examination. It advised him that it could not authorize prepayment of an evaluation, but noted that his claim was open for medical bills and he could have an attending physician refer him to a specialist for evaluation.

In a letter dated March 28, 2014 and received by OWCP on April 3, 2014, appellant, through counsel, requested reconsideration of the March 29, 2013 schedule award decision. Counsel contended that the hearing representative erred in finding that Dr. Berman's report was

---

<sup>4</sup> In a prior report dated February 21, 2008, Dr. Berman had determined that appellant had reached maximum medical improvement on March 13, 2006.

entitled to the weight of the medical opinion evidence. He argued that Dr. Berman's evaluation was flawed and not based on the substantial competent evidence of record as he erred in rejecting Dr. Griver's 13 percent impairment rating. Dr. Berman interpreted the impairment rating as a whole person impairment rating as opposed to a rating based on appellant's May 15, 1989 work-related upper extremity injuries. Counsel contended that Dr. Griver's 13 percent whole person impairment rating was consistent with appellant's 1990 cervical fusion of the C4/5 level. He noted that since that time his medical records documented ongoing complaints of neck pain and radicular symptoms in both shoulders and arms. Counsel further contended that his report was reasonably stated and based on the sixth edition of the A.M.A., *Guides*. He asserted that reconsideration and a remand of the case was required because the district office refused to submit appellant to an impairment rating evaluation despite authorizing payment for the evaluation on August 19, 2013.<sup>5</sup>

Medical records dated November 10, 2011 to June 30, 2014 addressed, among other things, appellant's cervical condition and medical treatment.

In a July 2, 2014 decision, OWCP denied appellant's request for reconsideration without a merit review because it was not timely filed and failed to present 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.<sup>6</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>7</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>9</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>10</sup>

---

<sup>5</sup> The Board notes that on August 19, 2013 OWCP responded to appellant's request for authorization of payment in advance for an impartial medical examination. It advised him that it could not authorize prepayment, but noted that his claim was open for medical bills and he could have an attending physician refer him to a specialist for evaluation.

<sup>6</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> See *Jesus D. Sanchez*, *supra* note 6; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>10</sup> 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>12</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> 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.<sup>15</sup>

To establish clear evidence of error, 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.<sup>16</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> As appellant's request for reconsideration was not received by OWCP until April 3, 2014, more than one year after issuance of the most recent merit decision dated March 29, 2013, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its March 29, 2013 decision finding that he had no more than one percent impairment to both the right and left upper extremity.<sup>19</sup>

In his March 28, 2014 request for reconsideration, appellant's attorney contended that OWCP hearing representative erred in finding that Dr. Berman's report was entitled to the weight of the medical opinion evidence as he misinterpreted Dr. Griver's 13 percent whole person impairment rating as not being related to appellant's accepted May 15, 1989 work-related upper extremity injuries. He further contended that Dr. Griver's impairment rating was entitled

---

<sup>11</sup> See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>12</sup> See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>13</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>14</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>15</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>16</sup> See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>17</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>18</sup> 20 C.F.R. § 10.607(a).

<sup>19</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

to the weight of the medical opinion evidence as it was consistent with appellant's 1990 cervical fusion of the C4/5 level, reasonably stated, and based on the sixth edition of the A.M.A., *Guides*. The Board has held that the degree of impairment to a scheduled member is a question that can only be established by probative medical opinion.<sup>20</sup> Appellant did not submit any new medical evidence to establish greater impairment of his right and left arm. The evidence of record to which appellant referred had been previously considered and reviewed by OWCP in its March 29, 2013 schedule award decision. Further, the medical records dated November 10, 2011 to June 30, 2014, which appellant submitted in support of his request for reconsideration addressed, among other things, his cervical condition and medical treatment, but did not provide an opinion as to whether he sustained any additional employment-related permanent impairment to both upper extremities in accordance with the sixth edition of the A.M.A., *Guides*.

Counsel further contended that reconsideration and a remand of the case was required because OWCP refused to submit appellant to an impairment rating evaluation despite authorizing payment for the evaluation on August 19, 2013. Appellant's contention does not address the relevant medical issue of whether he sustained more than one percent impairment to both the right and left upper extremity. Moreover, the Board notes that OWCP did not authorize payment for an impairment evaluation, as alleged. On August 19, 2013 OWCP advised appellant that it could not authorize prepayment for an impartial medical examination and recommended that an attending physician refer him to a specialist since his claim was open for medical expenses.

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>21</sup> None of the arguments or evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim for an increased schedule award. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant's counsel reiterated assertions that he made before OWCP indicating that Dr. Griver's opinion and not Dr. Berman's opinion was entitled to the weight of the medical opinion evidence and that OWCP erred in refusing to refer appellant to an impairment evaluation despite authorizing payment for the evaluation. As explained above, appellant has not established clear evidence of error by OWCP.

### **CONCLUSION**

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

---

<sup>20</sup> See *L.G.*, Docket No. 09-1517 (issued March 3, 2010); 5 U.S.C. § 8101(2).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 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