



## **FACTUAL HISTORY**

OWCP accepted that on or before February 10, 2008 appellant, then a 39-year-old clinical psychologist, sustained right lateral epicondylitis, a right shoulder sprain, and a right wrist sprain due to repetitive keyboarding, grasping, and reaching in the performance of duty. Appellant worked light duty through April 2009, with intermittent work absences beginning on February 11, 2009.

On May 1, 2009 appellant underwent a right lateral epicondylar release, approved by OWCP. On May 5, 2009 OWCP noted that appellant's pay rate as of May 1, 2009, the date that disability began, was \$1,803.92 a week. Appellant had no prior periods of total disability. OWCP paid compensation on the supplemental rolls from May 1 to 29, 2009, based on the \$1,803.92 pay rate. Appellant returned to modified duty for four hours a day effective June 17, 2009. She received compensation for the remaining four hours a day based on the May 1, 2009 pay rate of \$1,803.92 a week.

On December 16, 2009 appellant underwent a plasma graft into the right lateral epicondylar area. She received total disability compensation through January 29, 2010 based on the May 1, 2009 pay rate. Effective January 29, 2010, appellant returned to work for four hours a day on Mondays, Wednesdays, and Fridays, and eight hours on Tuesdays and Thursdays. She continued on this schedule through March 2010 and continuing.

In a March 8, 2010 memorandum, OWCP noted amending appellant's pay rate as the medical evidence indicated that she was temporarily totally disabled for work as of February 11, 2009. It noted that the prior May 1, 2009 pay rate was for medical appointment absences only. OWCP noted, however that appellant's pay rate on both February 11 and May 1, 2009 was \$1,803.92 a week.

On April 8, 2010 appellant underwent closed manipulation of the right shoulder under anesthesia, approved by OWCP. She received compensation at the May 1, 2009 pay rate as of March 23, 2010. Appellant remained off work pending additional surgery. On September 8, 2010 she underwent a plasma graft into the right lateral epicondylar area, and on September 16, 2010 underwent arthroscopic decompression of the right shoulder and rotator cuff repair. Appellant remained off work through October 18, 2010 and received total disability compensation. She returned to part-time modified duty for six hours a day on October 19, 2010. Appellant continued to receive wage-loss compensation for the remaining hours at the February 11, 2009 pay rate.

On December 3, 2010 OWCP expanded the claim to accept the newly diagnosed conditions of adhesive capsulitis of both shoulders and left lateral epicondylitis. Appellant stopped work on December 20, 2010. OWCP continued to issue total disability compensation at the February 11, 2009 rate of \$1,803.92 a week through January 28, 2011.

On February 4, 2011 appellant underwent a plasma graft injection to the left lateral epicondylar area, approved by OWCP. She returned to part-time modified duty on February 9, 2011, working four hours a day on Mondays, Wednesdays, and Fridays, and eight hours a day on

Tuesdays and Thursdays. OWCP paid compensation for the remaining hours through March 25, 2011, using the February 11, 2009 pay rate.

On April 14, 2011 appellant underwent arthroscopic subacromial decompression of the left shoulder, approved by OWCP.

In an April 20, 2011 payment log note, OWCP explained that appellant was “entitled to pay rate of February 11, 2009 but was paid using May 1, 2009 which prevented her from getting CPIs [consumer price index increases] for the first year.” It calculated that she was paid \$733.80 but owed \$758.85, a difference of \$25.05.

Appellant remained off work through May 27, 2011. She received compensation at the February 11, 2009 pay rate.<sup>2</sup> On June 6, 2011 appellant returned to full-duty work for four hours a day. As of September 1, 2011, she worked two hours a day, then four hours a day as of December 5, 2011. OWCP continued to pay compensation based on the February 11, 2009 pay rate through February 10, 2012.

On February 9, 2012 appellant underwent closed manipulation of the left shoulder under anesthesia, approved by OWCP. She returned to work in mid-February 2012 for four hours a day. OWCP continued to pay compensation at the February 11, 2009 rate for the remaining four hours a day.

Appellant returned to full-time modified-duty work as of July 9, 2012. She again stopped work on August 24, 2012. Appellant retired from the employing establishment on August 25, 2012, the date that the Office of Personnel Management (OPM) approved her application for disability retirement benefits.<sup>3</sup>

On November 20, 2012 appellant claimed a schedule award. She provided an October 25, 2012 impairment rating by Dr. Timothy L. Moore, an osteopathic physician Board-certified in osteopathic manipulation, who opined that appellant had attained maximum medical improvement as of that day. Dr. Moore found 14 percent impairment of the right upper extremity and 12 percent impairment of the left upper extremity according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. On December 20, 2012 an OWCP medical adviser reviewed Dr. Moore’s report and concurred with his impairment ratings and the determination of maximum medical improvement.

By decision dated January 2, 2013, OWCP granted appellant a schedule award for 14 percent permanent impairment of the right arm and 12 percent impairment of the left arm. The

---

<sup>2</sup> In a June 9, 2011 note, OWCP stated that appellant was entitled to compensation at the February 11, 2009 rate but that the payment system defaulted to the May 1, 2009 rate. This resulted in an underpayment of \$83.50 for the period April 30 to May 13, 2011.

<sup>3</sup> In October 2012 appellant relocated from California to Nevada. She requested that OWCP approve a change of physicians. By decision dated May 29, 2013, OWCP denied appellant’s request to change physicians. Following a telephonic hearing, by decision dated and finalized January 31, 2014, it affirmed its May 29, 2013 decision denying appellant’s request to change physicians.

period of the award ran from October 25, 2012 to May 15, 2014. OWCP based the schedule award on appellant's February 11, 2009 pay rate of \$1,803.92 a week.<sup>4</sup>

In a June 7, 2014 letter received on July 16, 2014, appellant requested reconsideration of the January 2, 2013 schedule award decision. She asserted that OWCP erred by basing the pay rate on her February 9, 2009 salary of \$1,803.92 a week instead of her wages closer to October 25, 2012, the date that her physician and OWCP concurred that she reached maximum medical improvement. Appellant submitted an August 31, 2014 earnings and leave statement showing that as of her retirement on August 24, 2014, her pay rate was \$1,882.00 a week.<sup>5</sup>

By decision dated September 29, 2014, OWCP denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that her request for reconsideration was received on July 16, 2014, more than one year following the January 2, 2013 merit decision. OWCP also found that appellant's letter and the earnings and leave statement did not establish legal or factual error by OWCP.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>6</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>7</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP 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.<sup>9</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>10</sup>

---

<sup>4</sup> On April 23, 2013 appellant requested that OWCP expand her claim to include bilateral medial epicondylitis, cubital tunnel syndrome, left radial tunnel syndrome, bilateral carpal tunnel syndrome, and bilateral Guyon's canal syndrome sustained on or before August 24, 2012. She also contended that she sustained a recurrence of disability on August 24, 2012. OWCP denied appellant's recurrence claim and the additional upper extremity conditions by decisions issued May 29, September 26, 2013, January 31, and July 9, 2014. These decisions are not before the Board on the present appeal as they were issued more than 180 days prior to January 26, 2015, the date appellant filed her appeal. 20 C.F.R. §§ 501.2(c) and 501.3.

<sup>5</sup> On August 4, 2014 appellant filed an appeal from the January 2, 2013 OWCP decision. By order issued March 12, 2015, the Board dismissed the appeal as it was not filed within 180 days of the January 2, 2013 decision. Docket No. 14-1706 (issued March 12, 2015).

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>8</sup> *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>9</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>10</sup> 5 U.S.C. § 10.607(b); *supra* note 7; *supra* note 8.

In those cases where requests for reconsideration are untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>11</sup> Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in its regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>14</sup> Evidence which does not raise a substantial question concerning the correctness of its decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</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 by OWCP.<sup>17</sup> The Board must make 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>18</sup>

Section 8107 of FECA provides that schedule award compensation for permanent impairment of a scheduled member shall be based on the employee's "monthly pay."<sup>19</sup> Such compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as "[t]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."<sup>20</sup>

---

<sup>11</sup> *Supra* note 7.

<sup>12</sup> 20 C.F.R. § 10.607(b).

<sup>13</sup> *Supra* note 7.

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

<sup>15</sup> *Jesus D. Sanchez*, *supra* note 8.

<sup>16</sup> *Supra* note 14.

<sup>17</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>18</sup> *Gregory Griffin*, *supra* note 9; *G.G.*, Docket No. 13-1886 (issued February 12, 2014). *Cf. B.K.*, 59 ECAB 228 (2007) (where the claimant submitted a request for a schedule award based on new and current medical evidence, OWCP would be required to issue a decision on the schedule award claim rather than adjudicate an application for reconsideration).

<sup>19</sup> 5 U.S.C. § 8107(a).

<sup>20</sup> *Id.* at § 8101(4).

The Board has held that where an injury is sustained over a period of time, as in the present case, the date of injury is the date of last exposure to those work factors causing injury.<sup>21</sup> Applying this principle to schedule award claims, the Board has held that the date of injury is the date of the last exposure which adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.<sup>22</sup> OWCP must determine both the date of last exposure to employment factors and the date of the supporting medical evaluation upon which the degree of permanent impairment is determined.<sup>23</sup> In a case where a claimant continues to be exposed to injurious work factors and the medical evidence documents continued worsening of the claimed condition, OWCP selects the date of last exposure to injurious work factors as the date of injury.<sup>24</sup>

### ANALYSIS

In its September 29, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review of the January 2, 2013 merit decision. Appellant requested reconsideration by July 7, 2014 letter, received by OWCP on July 16, 2014, more than one year from the issuance of the January 2, 2013 merit decision. OWCP denied the request by September 29, 2014 decision as it was untimely filed and failed to present clear evidence of error. As the July 16, 2014 reconsideration request was untimely filed, it must next be determined whether appellant's request demonstrated clear evidence of error in OWCP's January 2, 2013 merit decision.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its January 2, 2013 schedule award decision. Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error.<sup>25</sup>

In her June 7, 2014 letter received on July 16, 2014, appellant requested reconsideration of the June 2, 2013 schedule award determination and challenged the pay rate used for compensation purposes in that decision. She noted that OWCP based the award on her pay rate as of February 11, 2009, the date that disability began, but argued that her compensation should have been based on her pay as of August 24, 2012, as this was closest to her attainment of maximum medical improvement on October 25, 2012.

Appellant's argument does not show clear evidence of error in the pay rate upon which OWCP relied in the January 2, 2013 schedule award. She alluded to principles of law regarding schedule award pay rates without explaining how they would apply to the particular facts of her case. Appellant did not explain why her August 24, 2012 pay rate should be controlling. She

---

<sup>21</sup> *Sherron A. Roberts*, 47 ECAB 617 (1996).

<sup>22</sup> *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

<sup>23</sup> *Id.*

<sup>24</sup> *G.L.*, Docket No. 12-1795 (issued September 24, 2013).

<sup>25</sup> *J.C.*, Docket No. 14-905 (issued April 23, 2015).

did not discuss the medical evidence or explain that it demonstrated continued injurious exposures through August 24, 2012, such that she would be entitled to the later pay rate in calculating the schedule award.

For these reasons, appellant's argument does not raise a substantial question concerning the correctness of OWCP's January 2, 2013 decision. OWCP properly determined that appellant did not show clear evidence of error in that decision.<sup>26</sup>

On appeal, appellant contends that OWCP erred by calculating the amount of the schedule award using her pay rate as of February 11, 2009. As set forth above, this argument does not establishment clear evidence of error in OWCP's January 2, 2013 schedule award.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of the claim as her request was untimely filed and failed to present clear evidence of error.

**ORDER**

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

Issued: August 7, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>26</sup> *Id.*