

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

E.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Carol Stream, IL, Employer

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**Docket No. 15-1380
Issued: December 11, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 10, 2015 appellant filed a timely appeal from a February 12, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated September 17, 2013, to the filing of this 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 the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 11, 2009 appellant, then a 49-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that on December 19, 2008 she first became aware of her bilateral hand/wrist tendinitis, but that it was not until May 7, 2009 that she realized it was due to

¹ 5 U.S.C. § 8101 *et seq.*

the repetitive tasks she performed. OWCP accepted the claim for bilateral wrist and carpus enthesopathy, bilateral ulnar nerve lesion, bilateral carpal tunnel syndrome, and cervical intervertebral disc displacement at C5-6 without myelopathy. By letter dated February 24, 2010, it placed appellant on the periodic rolls for temporary total disability effective February 6, 2010.²

In a January 8, 2013 report, Dr. Bruce Montella, a treating Board-certified orthopedic surgeon, diagnosed cervical disc herniation and bilateral carpal tunnel syndrome due to her employment. He reported appellant was last seen on November 7, 2012 and provided physical examination findings. A neck physical examination revealed limited range of motion, paraspinal spasms, decreased motor function, and negative bilateral Spurling's, Hawkins, and impingements tests. An examination of her wrists revealed no effusion or crepitus, tenderness, normal range of motion, and positive Tinel's and Phalen's signs.

On January 23, 2013 appellant filed a claim for a schedule award (Form CA-7).

By correspondence dated February 4, 2013, OWCP informed appellant that the evidence of record was insufficient to support her claim for a schedule award and referenced Dr. Montella's report. OWCP advised appellant as to the requirements that a medical report should contain for impairment rating purposes.

By letter dated March 13, 2013, OWCP informed appellant that it was closing her claim for a schedule award as no impairment rating had been provided.

On April 1 and 12, 2013 appellant filed additional claims for a schedule award.

In a June 3, 2013 report, Dr. Montella assigned 25 percent permanent impairment for her neck, 1 percent right wrist impairment and, 1 percent left wrist impairment.

In an August 19, 2013 report, an OWCP medical adviser (OMA) reviewed Dr. Montella's June 3, 2013 impairment rating. He found no objective evidence supporting a diagnosis of radiculopathy and, thus, no additional upper extremity permanent impairment based on the neck impairment was warranted. In concluding, the OMA concurred with Dr. Montella's one percent impairment for the right upper extremity and one percent impairment for the left upper extremity, but opined that appellant was not entitled to a permanent impairment rating for her neck.

By decision dated September 17, 2013, OWCP denied her claim for a schedule award. It found that she had previously been granted schedule awards for 20 percent left upper extremity impairment and 21 percent right upper extremity impairment under OWCP File No. xxxxxx448 and was granted a schedule award for an additional 15 percent left upper extremity under OWCP File No. xxxxxx639. As the permanent impairment found by the OMA was less than what she had previously been awarded, OWCP denied her request for an increased schedule award for her right and left upper extremities.

² On August 1, 2010 the employing establishment issued an administrative separation effective July 22, 2010 due to appellant's inability to perform the essential duties of her date-of-injury job.

On September 19, 2014 OWCP received appellant's request for reconsideration dated August 25, 2014 and a January 8, 2014 medical report. Appellant contended that this was a new claim with an injury of cervical disc herniation, which was unrelated to conditions accepted in prior claims as noted in the September 17, 2013 decision.

In support of her request, appellant submitted a January 8, 2014 report of Dr. Montella who diagnosed cervical disc herniation and bilateral carpal tunnel syndrome due to her employment. Dr. Montella noted that appellant has a permanent employment injury requiring treatment and that a functional capacity evaluation had been conducted on March 13, 2013.

By decision dated December 15, 2014, OWCP denied reconsideration. It found appellant's request was untimely and that she had failed to establish clear evidence of error. OWCP informed appellant that a cervical herniated disc had been accepted, but that FECA does not provide for a schedule award based on a permanent impairment of the spine unless there is evidence of upper or lower extremity impairment caused by a spinal nerve injury.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ 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.⁴

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ OWCP regulations and procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (December 2011). OWCP procedures further provide 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 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. *Id.* at Chapter 2.1602.3(c).

⁷ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ To show 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted above, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹³ As appellant's request for reconsideration was not received by OWCP until September 19, 2014, more than one year after issuance of the most recent merit decision dated September 17, 2013, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in its September 17, 2013 decision, which found that she was not entitled to an additional schedule award.¹⁴

The Board also finds that appellant did not demonstrate clear evidence of error. The evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is therefore insufficient to demonstrate clear evidence of error.

With her request for reconsideration, appellant submitted a January 8, 2014 report by Dr. Montella diagnosing employment-related cervical disc herniation and bilateral carpal tunnel syndrome and also assigning a rating of permanent impairment. The Board finds that this medical evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred denying her claim for an increased schedule award.

In her request for reconsideration, appellant argued that her cervical disc herniation was a new injury and unrelated to conditions accepted in prior claims. As OWCP explained in its December 15, 2014 decision, FECA does not provide for a schedule award based on a permanent impairment of the spine unless there is evidence of upper or lower extremity impairment caused by a spinal nerve injury. It also stated that a cervical herniated disc had been accepted. Thus, this argument does not show that OWCP erred in denying her claim for a schedule award for her

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

cervical condition or denying her claim for an increased schedule award for upper extremity impairment. Therefore, the Board finds that appellant has not presented clear evidence of error.

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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2014 is affirmed.

Issued: December 11, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board