

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

---

**V.I., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Columbia, SC, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 15-0794  
Issued: July 9, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 26, 2015 appellant filed a timely appeal from a September 8, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As there is no merit decision within 180 days of February 26, 2015, the date appellant filed her appeal with the Board and June 21, 2012, the date of the last merit decision, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration because it was not timely filed and failed to present clear evidence of error.

**FACTUAL HISTORY**

OWCP accepted that on September 11, 2008 appellant, then a 55-year-old manual distribution clerk, sustained a laceration of the left forearm without complications when a sack

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

cutter blade came loose from its safety guard. The laceration was 10 centimeters (cm) in length. Appellant remained under medical care through April 2009 for scar hypertrophy with significant keloid and neuropathic pain. She also participated in physical therapy. Appellant received wage-loss compensation for intermittent work absences.

On April 19, 2010 appellant claimed a schedule award. Dr. David K. Lee, an attending Board-certified orthopedic surgeon, opined on May 18, 2010 that she had reached maximum medical improvement, with no permanent impairment of the left upper extremity according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). An OWCP medical adviser submitted a June 8, 2010 report concurring with Dr. Lee's assessment.

By decision issued June 15, 2010, OWCP denied appellant's schedule award claim as her attending physician opined that she had no ratable impairment of the left arm.

On July 1, 2010 appellant requested a review of the written record. She explained that she was claiming disfigurement and not loss of use. Appellant contended that the accepted injury resulted in a prominent seven-inch scar on her left forearm. She submitted photographs of her left forearm.

By decision dated and finalized October 7, 2010, an OWCP hearing representative affirmed the June 15, 2010 decision, finding that appellant's attending physician and an OWCP medical adviser both found that appellant had no ratable impairment of the left upper extremity.

In a September 20, 2011 letter, appellant, through counsel, requested reconsideration. Counsel noted that following the October 7, 2010 decision, FECA's implementing regulations had been revised to include the skin as a scheduled member. He asserted that new medical evidence was sufficient either to establish a ratable disfigurement of the left arm or to require additional development by OWCP.

Dr. Wiley P. Jordan, a physician Board-certified in emergency medicine, attended to appellant on September 11, 2008. He noted a six-inch laceration on the left anterior forearm, closed with 19 sutures using a two-layer technique.

Dr. Jeremy Ambroziak, an attending Board-certified family practitioner, provided a May 31, 2011 report noting a completely healed 14 to 15 cm laceration of the left forearm. He observed excellent sensation and normal strength. Dr. Ambroziak diagnosed "[n]europathic like pain following a laceration." He prescribed medication.

Tracy Hill, a physical therapist, performed an impairment rating on June 7, 2011. She found a five percent impairment of the left upper extremity due to a class 1 skin disorder according to Table 8-2, page 166 of the A.M.A., *Guides*.<sup>2</sup> Ms. Hill also found one percent impairment due to persistent left upper extremity pain with no loss of function. She submitted physical therapy progress notes.

---

<sup>2</sup> Table 8-2, page 166 of the sixth edition of the A.M.A., *Guides* is entitled "Criteria for Rating Permanent Impairment due to Skin Disorders."

On December 5, 2011 an OWCP medical adviser reviewed Ms. Hill's June 7, 2011 impairment rating, noting that it had not been signed or reviewed previously by a physician. Also, there was no finding of maximum medical improvement. The medical adviser therefore found that there was insufficient evidence of a ratable permanent impairment of the left upper extremity.

In a December 14, 2011 letter, OWCP requested that appellant have her treating physician review Ms. Hill's June 7, 2011 assessment, and opine whether maximum medical improvement had been reached. It afforded appellant 30 days to submit this evidence.

In a January 13, 2012 letter, OWCP advised appellant that her September 20, 2011 reconsideration request would be considered as a new schedule award claim and not a request for reconsideration of the prior schedule award. It explained that at the time of the October 7, 2010 decision, "the skin was not yet a scheduled member for the purpose of schedule award compensation. The new regulations to include the skin as a scheduled member became effective August 29, 2011. Therefore, the October 7, 2010 decision did not encompass a determination of schedule award due to the impairment of the skin." OWCP again requested that appellant submit her physician's review of Ms. Hill's June 7, 2011 assessment, and an opinion regarding whether she had reached maximum medical improvement.

By decision dated June 21, 2012, OWCP denied appellant's schedule award for disfigurement on the grounds that there was no probative medical evidence establishing a ratable impairment of the left upper extremity. It found that appellant did not submit her physician's review of Ms. Hill's impairment rating or an opinion regarding maximum medical improvement.

Appellant requested reconsideration on August 16, 2013. She asserted that a new report from Dr. J. Mark Tyler, an attending Board-certified family practitioner, was sufficient to establish her schedule award claim. In a January 18, 2012 letter received on August 20, 2013, Dr. Tyler reviewed Ms. Hill's June 7, 2011 impairment rating and concurred with her evaluation and conclusion. He opined that appellant's September 11, 2008 injury had reached maximum medical improvement.<sup>3</sup>

By decision dated August 23, 2013, OWCP denied appellant's request for reconsideration, because it was not timely filed and failed to present clear evidence of error. It found that appellant's request for reconsideration was received on August 20, 2013 more than one year following the June 21, 2012 decision. OWCP further found that Dr. Tyler's January 18, 2012 letter did not establish error in the June 21, 2012 decision.<sup>4</sup>

In an August 6, 2014 letter, appellant requested reconsideration. She contended that Dr. Tyler's January 18, 2012 letter was sufficient to establish her entitlement to a schedule

---

<sup>3</sup> Appellant also submitted duplicate copies of forearm photos and Ms. Hill's June 7, 2011 impairment rating.

<sup>4</sup> On September 4, 2013 appellant claimed a schedule award and submitted copies of evidence previously of record. In a September 17, 2013 letter, OWCP advised her that if she disagreed with "any of the decisions issued regarding a schedule award in this case, [she] should follow" her appeal rights "paying particular attention to any time limitations that apply."

award. Appellant submitted duplicate copies of photographs of her left forearm, Dr. Tyler's January 18, 2012 letter, and Ms. Hill's June 7, 2011 evaluation.

By decision dated September 8, 2014, OWCP denied appellant's request for reconsideration, finding it untimely filed and that it failed to present clear evidence of error. It found that her request for reconsideration was received on August 12, 2014, more than one year following the June 21, 2012 merit decision. OWCP further found that the medical evidence submitted did not establish error in the June 21, 2012 decision.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>5</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>6</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> It, 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 filed within one year of the date of that decision.<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>

In those cases where requests for reconsideration are not timely 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>10</sup> OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by OWCP.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

---

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>7</sup> *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>8</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>9</sup> 20 C.F.R. § 10.607(b); *supra* note 6; *Jesus D. Sanchez*, *supra* note 7.

<sup>10</sup> *Supra* note 6.

<sup>11</sup> 20 C.F.R. § 10.607(b).

<sup>12</sup> *Supra* note 6.

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</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>17</sup>

### ANALYSIS

In its September 8, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on June 21, 2012. Appellant requested reconsideration by August 6, 2014 letter, received by OWCP on August 12, 2014, more than one year from the issuance of the merit decision. OWCP denied her request for merit review in a September 8, 2014 decision as it was not timely filed and failed to present clear evidence of error. The August 6, 2014 reconsideration request was not timely filed. The Board will consider whether the request demonstrated clear evidence of error in OWCP's June 21, 2012 merit decision.

In support of her August 6, 2014 reconsideration request, appellant submitted duplicate copies of a June 7, 2011 impairment rating by Ms. Hill, a physical therapist, a duplicate copy of a January 18, 2012 letter from Dr. Tyler, an attending Board-certified family practitioner, approving Ms. Hill's impairment rating, and duplicate copies of photographs of appellant's left forearm.

OWCP's June 21, 2012 merit decision denied appellant's schedule award claim for disfigurement because Ms. Hill's June 7, 2011 impairment rating did not constitute medical evidence as it was not signed or reviewed by a physician. In his January 18, 2012 letter, Dr. Tyler reviewed Ms. Hill's report and adopted its findings and conclusions. He also opined that appellant had attained maximum medical improvement. Dr. Tyler's letter provides some support to appellant's allegation, but is not sufficient to demonstrate that the decision was in error at the time it was issued.<sup>18</sup> The duplicate impairment rating and photographs had already received merit consideration by OWCP in its June 21, 2012 decision. They do not establish clear evidence of legal or factual error.

---

<sup>14</sup> *Supra* note 7.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>17</sup> *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); *Gregory Griffin*, *supra* note 8.

<sup>18</sup> *Supra* note 13.

The Board finds that the evidence submitted on reconsideration does not demonstrate clear evidence of error. Appellant has not provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's June 21, 2012 merit decision. The submission of a detailed, well rationalized medical report which, if submitted timely, would have created a conflict of medical opinion requiring further development, is still not enough to establish clear evidence of error. *Joseph R. Santos*, 57 ECAB 554 (2006). Consequently, OWCP properly denied appellant's August 6, 2014 reconsideration request as it did not establish clear evidence of error.

On appeal, appellant contends that she submitted medical evidence establishing a ratable impairment of the skin. She also asserts that OWCP falsely stated that she disagreed with the June 15, 2010 schedule award. These assertions pertain to the merits of her claim, which are not before the Board on the present appeal.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely 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 8, 2014 is affirmed.

Issued: July 9, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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