

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

M.K., Appellant)	
)	
and)	Docket No. 15-693
)	Issued: June 4, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Charlotte, NC, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
Alan J. Shapiro, Esq., for the appellant	
Office of Solicitor, for the Director	

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2015 appellant, through counsel, timely appealed the September 18, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision issued by OWCP on July 16, 2012, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On May 30, 2010 appellant, then a 46-year-old transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that she suffered a back strain earlier that

¹ 5 U.S.C. §§ 8101-8193 (2006).

evening when lifting a bag onto a search table.² She stopped work following the May 30, 2010 lifting incident and has yet to return.³ OWCP initially denied appellant's claim for an employment-related back injury. However, in a May 6, 2011 decision, the Branch of Hearings and Review partially reversed the denial and accepted the claim for right latissimus dorsi muscle strain (ICD-9 847.2 -- Lumbar Sprain/Strain).⁴

On January 9, 2012 OWCP advised appellant's treating physician, Dr. Mark C. Hines, of the accepted condition and requested that he examine appellant and submit a rating for spinal nerve extremity impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (February 2010). OWCP also advised appellant and her counsel that it was their responsibility to ensure that the necessary medical evidence was submitted within 30 days. However, no such evidence was received within the allotted time frame.

Appellant later filed a claim for a schedule award (Form CA-7), which OWCP denied by decision dated February 14, 2012. The Branch of Hearings and Review affirmed OWCP's decision denying a schedule award on July 16, 2012. The hearing representative found the medical evidence insufficient to support appellant's claim of having sustained permanent impairment of a scheduled member.⁵

On August 30, 2012 counsel submitted various medical reports and treatment records from Dr. Hines regarding appellant's cervical condition.⁶ Dr. Hines' treatment records and reports covered the period June 10, 2010 through April 22, 2011. Some of these documents were already part of the case record. In his latest report, Dr. Hines indicated, *inter alia*, that appellant's May 30, 2010 work injury exacerbated her cervical degenerative disc disease at C3-C7. Counsel requested that the enclosed medical evidence be reviewed in light of the additional conditions that had been diagnosed. He further asked that the evidence be processed under OWCP's "usual procedure."

In an October 4, 2012 letter, OWCP acknowledged receipt of the 2010-11 medical records counsel submitted. It advised counsel that a formal decision had already been issued regarding "additional conditions," and if he was dissatisfied with the hearing representative's May 6, 2011 decision, he should pursue the specific appeal rights that accompanied the decision.

² Appellant reported feeling a twinge in her back as though she had twisted it. She identified the site of her injury as the center right side of her back. Appellant had a prior history of anterior cervical discectomy and fusion at C6-C7. She also previously sustained a work-related injury to her neck and left upper extremity in June 2008 (xxxxxx221). At the time of her reported back injury, there was contemporaneous evidence of cervical degenerative disc disease at C3-C7, cervical stenosis, and cervical spondylosis.

³ The record indicates that appellant received continuation of pay from June 6 through July 18, 2010.

⁴ The hearing representative also found that the medical evidence was insufficient to establish that the May 30, 2010 lifting incident aggravated appellant's preexisting cervical spine conditions.

⁵ OWCP did not receive any additional medical evidence while appellant's claim was pending before the Branch of Hearings and Review.

⁶ Dr. Hines specializes in pain medicine.

On February 19, 2014 counsel requested reconsideration of the hearing representative's July 16, 2012 schedule award decision. He acknowledged that his request was untimely. Counsel identified the issue as whether there was clear evidence of error in the hearing representative's July 16, 2012 decision, and prior decisions.⁷ He argued that the error in this case began with the May 6, 2011 decision where the hearing representative found that Dr. Hines had not provided a well-reasoned opinion on how the May 30, 2010 lifting incident materially aggravated or altered appellant's preexisting cervical spine condition(s). To the contrary, counsel believed that Dr. Hines' opinion was sufficient to establish at least a work-related cervical strain, if not severe aggravation of cervical degenerative disc disease at C3-C7. He further argued that appellant's employment-related cervical condition affected her left upper extremity, resulting in permanent partial impairment under the A.M.A., *Guides* (6th ed. 2008). Lastly, counsel argued that OWCP should expand the claim to include appellant's cervical condition(s), and then undertake further medical development to ascertain the full extent of any cervical-related left upper extremity impairment.

By decision dated September 18, 2014, OWCP denied appellant's request for reconsideration as it was untimely and failed to demonstrate clear evidence of error on the part of OWCP in denying a schedule award with respect to her accepted condition.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁰ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.¹¹

⁷ Apart from the evidence OWCP received in September 2012, neither appellant nor her counsel submitted any additional evidence with the February 19, 2014 request for reconsideration.

⁸ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ 20 C.F.R. § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹¹ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

OWCP accepted the current claim for right latissimus dorsi muscle strain. When appellant filed for a schedule award in December 2011, OWCP wrote Dr. Hines and requested that he examine appellant and prepare an impairment rating with respect to her accepted right mid-back condition. OWCP provided Dr. Hines specific instructions on rating spinal nerve extremity impairment under the A.M.A., *Guides* (6th ed. 2008). However, he did not provide an impairment rating in accordance with OWCP's January 9, 2012 instructions. Consequently, by decision dated February 14, 2012, OWCP denied appellant's claim for a schedule award. By decision dated July 16, 2012, the Branch of Hearings and Review affirmed OWCP's February 14, 2012 denial.

OWCP received appellant's request for reconsideration on February 19, 2014, which is more than 18 months after the July 16, 2012 merit decision regarding entitlement to a schedule award. Appellant's February 19, 2014 request for reconsideration was, therefore, untimely, and¹² as such, she must demonstrate clear evidence of error on the part of OWCP in denying her claim for a schedule award.¹³ Counsel essentially argued that the July 16, 2012 decision was issued in error because the hearing representative did not consider left upper extremity impairment due to appellant's cervical condition. As noted, he believed appellant's cervical conditions were work related and should have been accepted by OWCP in May 2011.

In both the February 14 and July 16, 2012 schedule award decisions, OWCP properly focused on the extent of any permanent impairment attributable to appellant's accepted condition of right latissimus dorsi muscle strain. Counsel's February 19, 2014 request for reconsideration focused almost entirely on OWCP's alleged failure to accept a work-related cervical condition. This issue relates to the hearing representative's May 6, 2011 decision, which OWCP has yet to revisit. The September 18, 2014 decision currently before the Board did not specifically address any additional work-related cervical conditions, but instead focused on whether appellant established clear evidence of error with respect to entitlement to a schedule award based on her accepted right mid-back condition. Appellant has not submitted any evidence or argument relevant to her accepted condition. Accordingly, the Board finds that she failed to establish clear evidence of error on the part of OWCP in denying her claim for a schedule award.

CONCLUSION

OWCP properly found that appellant's February 19, 2014 request for reconsideration was untimely and failed to demonstrate clear evidence of error.

¹² See *supra* note 11. Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b.

¹³ 20 C.F.R. § 10.607(b).

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2015
Washington, DC

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

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

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