

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

E.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Juan, PR, Employer**

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**Docket No. 15-1545
Issued: October 28, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 10, 2015 appellant filed a timely appeal from a February 19, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated December 2, 2011, 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.²

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted additional evidence on appeal. The Board can review only evidence that was before OWCP at the time of the final decision on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a decision dated October 17, 2000, the Board remanded the case for further development with respect to appellant's claim for a schedule award for permanent impairment of the left leg.³ By decision dated July 16, 2004, the Board found appellant had submitted an application for reconsideration that was sufficient to require a merit review of the claim, regarding the degree of permanent impairment of appellant's right arm.⁴ On the last appeal, the Board affirmed a December 19, 2012 OWCP decision finding that appellant's reconsideration request was untimely filed and failed to show clear evidence of error in a December 2, 2011 OWCP decision which denied an additional schedule award for the left leg or right arm.⁵

As the Board noted in its prior decisions, OWCP accepted that appellant sustained injuries in a motor vehicle accident on March 4, 1988, while in the performance of duty, in his capacity as a distribution clerk. The accepted conditions initially were left femur fracture, left knee laceration, left orbit fracture, and right wrist fracture.⁶ Appellant also had an occupational disease claim filed on March 8, 2007 accepted for bilateral calcifying tendinitis of the shoulder in OWCP File No. xxxxxx855.

With respect to permanent impairment to the left leg, OWCP issued a schedule award for 25 percent impairment on September 11, 1995, 15 percent on April 22, 1997, 18 percent on September 25, 1998, and an additional 8 percent on January 25, 2001, for a total of 66 percent. As to the right arm, the record indicates that it issued a schedule award for 30 percent impairment on September 19, 1995, and an additional 5 percent on December 29, 2004 for a total of 35 percent. The permanent impairment to the right arm was based on impairment to the right wrist.

OWCP referred appellant for a second opinion examination by Dr. Fernando Rojas, an orthopedic surgeon. In a report dated January 29, 2010, Dr. Rojas provided results on examination, including range of motion for the shoulders. He completed a permanent impairment worksheet on March 30, 2010, opining that appellant had 16 percent permanent right arm impairment based on carpal tunnel syndrome and 75 percent permanent left leg impairment. In a report dated May 15, 2010, an OWCP medical adviser reviewed Dr. Rojas' report and opined that the impairment to the left upper extremity was 18 percent and 34 percent to the left leg.

By decision dated September 14, 2010, OWCP determined that appellant was not entitled to an increased schedule award for the right arm or either leg. In a decision dated September 15,

³ Docket No. 99-727 (issued October 17, 2000).

⁴ Docket No. 04-871 (issued July 16, 2004).

⁵ Docket No. 13-1255 (issued December 3, 2013).

⁶ Subsequent development of the record established that additional conditions were accepted: general anxiety disorder, right wrist arthritis, bilateral carpal and cubital tunnel syndromes, cervical radiculopathy, thoracic myositis, bilateral shoulder bursitis or impingement, and lumbar para-radiculopathy.

2010, it issued a schedule award for 18 percent permanent impairment to the left arm. The period of the award was for 56.16 weeks from August 29 to September 25, 2010.

On September 7, 2011 OWCP received a request for reconsideration of the September 14, 2010 decision. Appellant submitted a July 30, 2011 report from Dr. Eric Javier, a psychiatrist, who referred to the right shoulder range of motion results from Dr. Rojas. Dr. Javier opined that appellant had 26 percent permanent right arm impairment based on loss of shoulder range of motion. He also referred to 16 percent whole person impairment based on the right shoulder, and found that appellant had 16 percent permanent right upper extremity impairment for which he had not previously been compensated.

By decision dated December 2, 2011, OWCP reviewed the merits of the claim and denied modification. It found the evidence did not establish an increased schedule award greater than that previously awarded.⁷ OWCP found that appellant had already received schedule awards for 35 percent right arm permanent impairment and 66 percent left leg permanent impairment.

OWCP received a request for reconsideration on December 6, 2012. As noted above, the Board on December 3, 2013 in Docket No. 13-1255, affirmed a December 19, 2012 OWCP decision finding that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

The record indicates that OWCP referred appellant for a second opinion examinations by Dr. Jose Rios-Robles, a psychiatrist, and Dr. Rojas. OWCP requested the physicians discuss whether appellant had continuing employment-related conditions or disability. In a report dated August 11, 2014, Dr. Rios-Robles diagnosed major depressive disorder with anxiety features. He noted that appellant's psychiatric condition may be aggravated by his physical condition, but there was no direct relationship between appellant's job and his emotional condition. In a report dated August 29, 2014, Dr. Rojas opined that appellant was disabled for his date-of-injury position, but could work sedentary duty. Neither physician discussed permanent impairment. Dr. Rojas completed a duty status report (Form OWCP-5c) diagnosing right shoulder bursitis and providing work restrictions.

Appellant submitted an August 24, 2014 report from Dr. Dwight Santiago, an internist, on September 9, 2014. Dr. Santiago opined that appellant was permanently disabled. He did not discuss a permanent impairment rating.

On December 2, 2014 OWCP received a November 22, 2014 application for reconsideration. Appellant stated that it had erroneously interpreted Dr. Javier's July 30, 2011 report. He argued that Dr. Javier awarded 35 percent for the right wrist and an additional 16 percent for the right shoulder. Appellant also referred to the reports of Dr. Rojas and Dr. Santiago. As to medical evidence, he resubmitted the following: a September 16, 1999 shoulder sonogram; a brief note dated March 6, 2002, diagnosing right shoulder tendinitis, and

⁷ The decision incorrectly stated that the reconsideration request received on September 7, 2011 requested review of the September 15, 2010 decision. Appellant requested review of a schedule award with respect to the right arm and the legs, which was the subject of the September 14, 2010 decision. The December 2, 2011 decision does address the medical evidence submitted with respect to a right arm permanent impairment.

right wrist capsulitis;⁸ an October 12, 2006 report from Dr. Efrain Asmar, an orthopedic surgeon, diagnosing bilateral shoulder impingement syndrome and shoulder tendinitis; the July 30, 2011 report from Dr. Javier; and the August 29, 2014 Form OWCP-5c report from Dr. Rojas. Appellant also submitted a brief note dated May 6, 2002 from Dr. Jan Zegarra, an orthopedic surgeon, providing diagnoses for the right shoulder and wrist.

By decision dated February 19, 2015, OWCP found that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error by OWCP. It was therefore, insufficient to warrant reopening the case for merit review.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁹ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹⁰

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.¹¹ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA. As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.¹³ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

⁸ The signature of the physician is illegible.

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.605.

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² Under section 8128 of FECA, "[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."

¹³ 20 C.F.R. § 10.607 (2012).

¹⁴ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁸

ANALYSIS

In the present case, appellant submitted a November 22, 2014 letter requesting reconsideration which was received by OWCP on December 2, 2014. As the Board noted in its prior decision, there are circumstances when a claimant submits a request for reconsideration of a schedule award decision, but is actually seeking an increased schedule award.¹⁹ When a claimant does not submit any new evidence regarding permanent impairment, it may properly be considered a request for reconsideration.²⁰ Since appellant did not submit any new evidence with respect to an increased permanent impairment, and the record does not contain any new evidence with respect to a permanent impairment, the November 22, 2014 letter is considered a reconsideration request of the last merit decision dated December 2, 2011. As the November 22, 2014 letter was received more than one year after the December 2, 2011 decision, it is therefore an untimely request for reconsideration.

As an untimely request, appellant must show clear evidence of error. He has resubmitted the July 30, 2011 report from Dr. Javier. Appellant argues that his prior schedule awards for the right arm were based on the right wrist, while Dr. Javier discussed the right shoulder. He is correct that the prior schedule awards were based on the right wrist. However, this does not itself establish clear evidence of error by OWCP in determining appellant was not entitled to an additional schedule award for the right arm. The evidence must be of such probative value that it *prima facie* shifts the weight to appellant. In this regard, Dr. Javier's report does not meet such a standard. He refers to range of motion results not based on his own examination, but an examination by Dr. Rojas more than a year earlier. Dr. Javier does not discuss use of range of motion for impairment ratings under the A.M.A., *Guides*, or provide additional explanation.²¹ He also refers to a whole person impairment, which is not used under FECA.²² In addition, there is no discussion of causal relationship between any impairment and the employment injuries. Dr. Javier does not explain why he believed a right shoulder impairment was causally related to appellant's federal employment.

¹⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁷ *Id.*

¹⁸ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁹ *See Linda T. Brown*, 51 ECAB 115 (1999).

²⁰ *See W.J.*, Docket No. 12-1746 (issued February 5, 2013).

²¹ *See A.M.A., Guides* 461.

²² *Janae J. Triplette*, 54 ECAB 792 (2003).

The clear evidence of error standard is a difficult one to meet. For the reasons discussed, appellant did not show clear evidence of error with respect to a right arm permanent impairment.

On appeal, appellant argues that there was clear evidence of error by OWCP. For the reasons noted, the Board finds he did not establish clear evidence of error.

The Board reiterates that a claimant may at any time submit new and relevant medical evidence to OWCP with respect to an increased schedule award, and receive a decision on the merits.

CONCLUSION

The Board finds appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 19, 2015 is affirmed.

Issued: October 28, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board