

FACTUAL HISTORY

On May 15, 2012 appellant, then a 61-year-old engineering equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on May 12, 2012 he sustained injury to his left index finger while in the performance of duty. He stated on the claim form that his finger was caught as he pulled a gate shut. On August 6, 2012 OWCP accepted the claim for open wound of the finger without complications, left.

Appellant submitted a claim for compensation (Form CA-7) on May 2, 2013, checking a box indicating that he was claiming a schedule award. By letter dated June 16, 2013, OWCP advised him that he needed to submit medical evidence with a diagnosis, a detailed description of any permanent impairment, and a rating of the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By decision dated July 18, 2013, OWCP denied appellant's claim for a schedule award, finding that the medical evidence was insufficient to establish permanent impairment.

On July 23, 2013 OWCP received a July 12, 2013 report from Dr. Ramon DeJesus, a Board-certified hand surgeon, who provided results on examination. Dr. DeJesus reported that appellant's grip strength of the left hand was 4/5. He noted that appellant had reached maximum medical improvement. Dr. DeJesus diagnosed a finger contusion. On September 16, 2013 appellant submitted a revised copy of the July 12, 2013 report from Dr. DeJesus, containing an additional diagnosis of finger open wound and a note: "correction [September 9, 2013] to include original diagnosis." Follow-up on the same injury.

The record contains a January 28, 2014 e-mail correspondence from an employing establishment compensation specialist requesting that OWCP schedule a second opinion physician examination. The compensation specialist stated that appellant was having difficulty obtaining a permanent impairment rating.

On November 4, 2014 OWCP received a reconsideration request dated October 10, 2014. Appellant did not submit additional evidence or argument.

By decision dated June 1, 2015, OWCP found that the reconsideration request was untimely and failed to establish clear evidence or error. The reconsideration request was accordingly denied.

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.² The

² 5 U.S.C. § 8128(a).

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.”³

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.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ It, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁶ 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’s decision for which review is sought.⁷ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it 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.⁸

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.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

ANALYSIS

In the present case, appellant submitted an application for reconsideration on November 4, 2014. When the underlying compensation issue is a schedule award, an initial question is whether the claimant has submitted an application for reconsideration or has

³ 20 C.F.R. § 10.605 (2012).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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.”

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.607 (2012).

⁸ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

requested an increased schedule award. Even if appellant has requested “reconsideration,” if there is new and relevant evidence with respect to an increased permanent impairment, then a claimant may be entitled to a merit decision on the issue.¹³ However, when a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision.¹⁴ In this case, appellant did not submit any relevant evidence with respect to an increased permanent impairment. He did not submit any medical evidence or refer to any medical evidence submitted after July 18, 2013. The July 12, 2013 report from Dr. DeJesus, submitted on July 23, 2013, does not provide an opinion as to a permanent impairment under the A.M.A., *Guides*. The September 9, 2013 addendum report from Dr. DeJesus also does not address a permanent impairment. Therefore OWCP properly considered appellant’s submission as an application for reconsideration.

As an application for reconsideration of the July 18, 2013 decision, it must have been received by OWCP within one year of OWCP’s decision from which review is sought, to be considered timely. The application in this case was received on November 4, 2014. As this was more than one year after the July 18, 2013 decision, it is untimely filed.

An untimely application for reconsideration must show clear evidence or error by OWCP. The Board finds that appellant did not show clear evidence of error in this case. Appellant did not submit any evidence or argument with respect to error by OWCP in determining that he was not entitled to a schedule award. OWCP found that the medical evidence was insufficient to establish an employment-related permanent impairment to a scheduled member or function of the body, and no clear evidence of error was presented.

On appeal, appellant indicates that he had requested that OWCP schedule a second opinion examination. He may at any time request an increased schedule award and submit new and relevant medical evidence to OWCP with respect to an employment-related permanent impairment. The Board’s review in the present case is limited to the clear evidence of error issue. For the reasons stated, the Board will affirm the June 1, 2015 decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant’s application for reconsideration was untimely filed and failed to show clear evidence of error.

¹³ See *Linda T. Brown*, 51 ECAB 115 (1999).

¹⁴ See *W.J.*, Docket No. 12-1746 (issued February 5, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2015 is affirmed.

Issued: October 27, 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