

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

P.M., Appellant)	
)	
and)	Docket No. 15-1873
)	Issued: January 6, 2016
DEPARTMENT OF LABOR, OFFICE OF)	
FEDERAL CONTRACT COMPLIANCE)	
PROGRAMS, San Francisco, CA, Employer)	
)	

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 September 10, 2015 appellant filed a timely appeal from a March 20, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed since the most recent merit decision dated December 20, 2013 and the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3,² the Board lacks jurisdiction to review the merits of appellant's case.

ISSUE

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

On appeal, appellant argues the merits of her claim.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the March 20, 2015 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On September 20, 2013 appellant, a 58-year-old equal employment opportunity specialist, filed an occupational disease claim (Form CA-2) alleging that she developed trigger finger due to factors of her federal employment. On the claim form, the employing establishment indicated that she had been out of work since April 2013, that the medical evidence she provided was more than a year old, and that she had intervening bilateral carpal tunnel surgery.

In a September 24, 2013 letter, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted an October 15, 2013 narrative statement indicating that she met with her doctor on October 11, 2013 and was awaiting his medical report.

By decision dated December 20, 2013, OWCP denied the claim finding that appellant had failed to establish fact of injury. It found that the evidence was insufficient to establish a medical diagnosis causally related to a compensable factor of employment.

Appellant requested reconsideration on an appeal request form dated December 18, 2014 and received by OWCP on December 23, 2014. She submitted the first page of an occupational disease claim (Form CA-2) indicating that her federal duties included continuous computer typing, lifting, and carrying work-related equipment and materials. Appellant also submitted a June 23, 2006 letter from the employing establishment stating that she was “required to keyboard and has carried materials, including laptops” during the course of her federal employment. She further submitted pages one and six of an incomplete October 17, 2012 second opinion report from Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, who indicated that appellant had an accepted claim for bilateral carpal tunnel syndrome under OWCP File No. xxxxxx231 and found that she had “trigger fingers in both little fingers,” as well as triggering of the right ring finger and mild triggering of the left ring finger. In a December 19, 2014 report Dr. Maury Harwood, a Board-certified orthopedic surgeon, opined that appellant’s carpal tunnel syndrome contributed to the development of trigger fingers and that her condition was a direct result of her severe bilateral carpal tunnel syndrome. He concluded that trigger fingers should be included in appellant’s bilateral carpal tunnel syndrome claim under File No. xxxxxx231.

By decision dated March 20, 2015, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP’s decision for which

³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

review is sought.⁵ 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).⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.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 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.¹²

To establish 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 the OWCP decision.¹³ The Board makes 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.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to establish clear evidence of error.

⁵ 20 C.F.R. § 10.607(a).

⁶ See *F.R.*, Docket No. 09-575 (issued January 4, 2010).

⁷ 20 C.F.R. § 10.607(b).

⁸ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁹ See *M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹⁰ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² See *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations¹⁵ and procedures¹⁶ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's December 20, 2013 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive her request until December 23, 2014, it was filed outside the one-year time period.¹⁷ As appellant's December 23, 2014 request for reconsideration was submitted more than one year after the December 20, 2013 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁸

In its December 20, 2013 decision, OWCP originally denied appellant's occupational disease claim because she had failed to establish fact of injury. It found that the evidence was insufficient to establish a diagnosis causally related to a compensable factor of employment. An incomplete October 17, 2012 second opinion report from Dr. Swartz relating to conditions from another claim cannot establish error in the December 20, 2013 OWCP decision. Dr. Swartz did not address the present claim and matters pertaining to OWCP File No. xxxxxx231 are not presently before the Board. This report does not establish clear evidence of error, nor does it raise a substantial question as to the correctness of OWCP's decision.

In Dr. Harwood's December 19, 2014 report, the trigger finger conditions were said to be related to appellant's carpal tunnel syndrome. Dr. Harwood failed to address the present claim. His report does not establish clear evidence of error, nor does it raise a substantial question as to the correctness of OWCP's decision.

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹⁹ None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

¹⁵ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011); *see supra* note 13.

¹⁷ OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. *See* 20 C.F.R. § 10.607 (2011). Therefore, OWCP utilized the new regulations and found that as OWCP received appellant's request for reconsideration on December 23, 2014, or over one year after the December 20, 2013 decision, appellant's request was untimely filed.

¹⁸ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011); *see Dean D. Beets*, *supra* note 8.

On appeal, appellant argues the merits of her claim. The Board noted above that it only has jurisdiction over OWCP's March 20, 2015 nonmerit decision which denied her request for reconsideration and, therefore, is precluded from conducting a merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2016
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