

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

G.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 16-0681
Issued: October 18, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 22, 2016 appellant, filed a timely appeal of a January 7, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from January 29, 2014, the most recent OWCP merit decision, to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted additional evidence with her appeal to the Board. The Board cannot consider this evidence as its review is limited to evidence which was before OWCP at the time of its merit decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

FACTUAL HISTORY

On June 29, 2010 appellant, then a 47-year-old clerk, filed a traumatic injury claim (Form CA-1), which OWCP accepted for sprain of the wrist, right (tear of the lunotriquetrial ligament of the right wrist), sprain of the wrist, radiocarpal, right (tear of the triangular fibro-cartilage complex of the right wrist). On December 7, 2010 OWCP accepted carpal tunnel syndrome on the right. On February 10, 2011 appellant underwent an authorized right scapholunate ligament repair and right carpal tunnel release.³ On October 19, 2012 OWCP expanded the accepted conditions to include scapholunate advanced collapse of the right wrist and right wrist radio-carpal sprain. It authorized an arthrotomy with arthrodesis, total, right wrist on January 24, 2013, performed by Dr. Christian Fahey, a Board-certified orthopedic surgeon. Appellant received appropriate compensation benefits.

In a June 10, 2013 report, Dr. Fahey, noted that appellant presented for her postoperative visit. He examined her and found that she had tenderness at the distal end of the plate. Dr. Fahey remarked that despite his “admonition last visit, [appellant] did not make it to physical therapy.” He indicated that appellant had not returned to work. Dr. Fahey found that, objectively upon examination, she was no longer swollen and her fingers had full range of motion. He determined that the wrist was fused in the proper position and appellant had good supination and pronation. Dr. Fahey also indicated that there was no crepitus or popping around the plate and the tendons were intact. He opined that “X-rays two views look awesome, everything is healed in good alignment.” Dr. Fahey recommended a return to work full duty and requested therapy. He added, however, that appellant would not be able to do her work without problems, unless she worked on strengthening. On July 22, 2013 Dr. Fahey released her from care and opined that she was at maximum improvement, with no limitations or restrictions.

On September 13, 2013 OWCP proposed to terminate appellant’s wage-loss compensation as the weight of the medical evidence established that she no longer had any residuals or disability as a result of the June 17, 2010 employment injury. It based its proposal on the opinion of Dr. Fahey who released her to full duty.

On October 16, 2013 OWCP terminated appellant’s wage-loss compensation effective October 20, 2013.

On December 18, 2013 appellant requested reconsideration. She did not submit any evidence or argument regarding the request for reconsideration from the October 16, 2013 decision.⁴

By decision dated January 31, 2014, OWCP found that appellant’s request was insufficient to warrant a merit review of the October 16, 2013 decision.

Thereafter, OWCP continued to receive inquiries and treatment records from appellant. This included the results of a July 28, 2014 functional capacity evaluation, which OWCP

³ On May 5, 2011 appellant underwent an authorized right wrist hardware removal.

⁴ Around this time, appellant was also pursuing a schedule award. In a January 29, 2014 decision, OWCP granted her a schedule award for 33 percent permanent impairment of the right arm. The award covered a period of 102.96 weeks from October 20, 2013 to October 10, 2015.

authorized, indicating that appellant provided submaximal effort and that she could return to her clerk duties.

Also received were treatment records from Dr. Kenneth A. Grinspun, a Board-certified orthopedic surgeon. On July 1, 2014 he noted that appellant had complaints of continued pain in the right wrist. Dr. Grinspun noted that the date of injury was June 17, 2010. He diagnosed carpal instability and ordered additional testing. In a December 23, 2014 report, Dr. Grinspun, advised that appellant presented with a wrist complaint. He diagnosed carpal instability. In a January 15, 2015 report, Dr. Grinspun noted that electromyogram (EMG) scan results revealed mild carpal tunnel syndrome and reflex sympathetic dystrophy (RSD).

A December 30, 2014 EMG scan read by Dr. Dale P. Cunningham, Board-certified in physical medicine and rehabilitation, revealed mild right median nerve compression at the wrist. He noted that the rest of the studies were normal. A February 2, 2015 nuclear bone joint image read by Dr. Maria T. Brooks, a Board-certified diagnostic radiologist, revealed no evidence of RSD.

In a February 10, 2015 report, Dr. Grinspun advised that appellant was seen for a recheck of wrist complaint. He diagnosed mild carpal tunnel syndrome in the setting of previous left wrist fusion. Dr. Grinspun saw appellant on May 14, 2015 and diagnosed right wrist sprain. In a July 16, 2015 report, he advised that she was seen for a recheck of wrist complaint. The symptoms were located in the right wrist and the date of injury was June 17, 2010. Dr. Grinspun diagnosed right wrist sprain. In an August 20, 2015 report, he diagnosed chronic right wrist pain with mild carpal tunnel syndrome, status post wrist fusion. Dr. Grinspun saw appellant on September 17, 2015 and found persistent right wrist pain.

On December 14, 2015 OWCP also received a reconsideration request form, which listed the date of the request as November 25, 2013 to October 5, 2015. On that same date, it also received an undated letter from appellant requesting reconsideration. Appellant explained that she was taking a lot of medication and experiencing pain and forgot about paperwork. She argued that she was in need of compensation as she had a family to take care of and bills that she was required to pay. Appellant requested that her compensation benefits be approved.

In a decision dated January 7, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁵

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.⁶ However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁷

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.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

In its January 7, 2016 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision, regarding the termination issue on October 16, 2013. Appellant’s letter requesting reconsideration was received on December 14, 2015, more than one year after the October 16, 2013 merit decision. It was, therefore, untimely.¹³ Appellant’s reconsideration request explained that she was taking a lot of medication for pain and forgot about paperwork. To the extent that she asserts that the effects of her medication prevented her from filing a timely reconsideration request, the Board finds this

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ *See supra* note 6. The reconsideration request must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.

argument unpersuasive. The record contains no probative medical evidence to support that appellant's medication rendered her unable to communicate in any way such that she could not timely request reconsideration.¹⁴ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in issuing the October 16, 2013 decision.

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. OWCP terminated her wage-loss compensation, effective October 20, 2013. On reconsideration appellant explained that she needed compensation as she had a family to take care of and bills that she was required to pay. She requested that her compensation benefits be approved. However, these assertions from appellant do not establish clear evidence of error. The Board notes that OWCP terminated her wage-loss compensation effective October 20, 2013, as the weight of the medical evidence established that she was no longer disabled from work as a result of her June 17, 2010 employment injury. This argument is not relevant as the issue is medical in nature.¹⁵

OWCP also received July 1, 2014 to September 17, 2015 reports from Dr. Grinspun, who noted that appellant had complaints of continued pain in the right wrist dating back to her June 17, 2010 employment injury. These reports documented her status including her claimed continuing symptoms and diagnoses. They did not specifically address whether appellant was disabled on or after October 20, 2013 due to an accepted condition. This evidence does not raise a substantial question as to the correctness of OWCP's merit decision. Furthermore, even if these reports offered reasoned support for causal relationship of the claimed disability, they would be insufficient to demonstrate clear evidence of error. Clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁷

OWCP also received a December 30, 2014 EMG read by Dr. Cunningham, which revealed mild right median nerve compression at the wrist and a diagnostic report dated February 2, 2015 read by Dr. Brooks, which, revealed no evidence of RSD. As noted above, these reports do not address whether appellant was disabled on or after October 20, 2013 due to an accepted condition. This evidence does not raise a substantial question as to the correctness of OWCP's merit decision and they are insufficient to demonstrate clear evidence of error.

OWCP also received a July 28, 2014 functional capacity evaluation from a physical therapist. Physical therapists are not considered physicians as defined under FECA and thus

¹⁴ See 20 C.F.R. § 10.607(c).

¹⁵ See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

¹⁶ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹⁷ *Supra* note 10.

their reports do not constitute competent medical evidence.¹⁸ Consequently, these reports are insufficient to establish clear error by OWCP with respect to the underlying medical issue.

On appeal, appellant repeated the arguments on reconsideration. However, as explained, her request for reconsideration was untimely filed and she has not demonstrate clear evidence of error by OWCP. Because of this, OWCP properly denied a merit review of the claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2016
Washington, DC

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

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

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

¹⁸ *Id.*; *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuck*, 57 ECAB 316, 322 n.11 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).