

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

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| J.M., Appellant |) | |
| |) | |
| and |) | Docket No. 15-1634 |
| |) | Issued: September 16, 2016 |
| U.S. POSTAL SERVICE, POST OFFICE, Pearland, TX, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 27, 2015 appellant filed a timely appeal from a January 27, 2015 nonmerit decision¹ of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated December 13, 2013, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.³

¹ A claimant has 180 days from the date of OWCP's decision to timely file an appeal. 20 C.F.R. § 501.3(e). In this case, the 180-day period for the January 27, 2015 decision expired on Sunday, July 26, 2015. If the last day to file an appeal is on a Saturday, Sunday, or Federal holiday, the 180-day period runs until the close of the next business day. 20 C.F.R. § 501.3(f)(2). The appeal in this case, received by the Board on July 27, 2015, is therefore timely with respect to the January 27, 2015 decision.

² 5 U.S.C. § 8101 *et seq.*

³ The appeal in this case identified the January 27, 2015 decision and provided arguments with respect to the issues in that decision. *See* 20 C.F.R. § 501.3(c) (notice of appeal should include date of OWCP decision and statement explaining appellant's disagreement with the decision). Although the record contains a February 10, 2015 OWCP decision regarding expansion of the accepted conditions in appellant's claim, appellant did not request review of or discuss the issues raised in the February 10, 2015 decision. The Board will not review the February 10, 2015 decision in the absence of any indication in the notice of appeal that such review was sought by appellant.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated July 7, 2010, the Board reversed an October 16, 2008 OWCP decision denying modification of an August 22, 2008 loss of wage-earning capacity determination.⁴ By decision dated March 13, 2012, the Board affirmed May 5 and June 16, 2011 OWCP decisions denying authorization for an orthopedic mattress.⁵ The facts relevant to this appeal regarding appellant's schedule award claim are set forth below.

In the present case, OWCP accepted that appellant, then a 45-year-old rural carrier, was in a motor vehicle accident on December 3, 2005 while in the performance of duty. It accepted the claim for neck, lumbar, left shoulder, and left upper arm sprains. Appellant received intermittent wage-loss compensation through January 5, 2007. She began receiving compensation benefits on the periodic rolls as of November 20, 2011.

On September 18, 2007 appellant filed a claim for compensation, (Form CA-7), for schedule award benefits.

With respect to a permanent impairment, appellant submitted a June 1, 2007 report from Dr. Ricky McShane, an osteopath. Dr. McShane opined that she had a five percent whole person impairment based on her lumbar spine condition. An OWCP medical adviser reviewed the evidence and opined in a November 30, 2007 report that appellant did not have a ratable lower extremity impairment. By decision dated January 2, 2008, OWCP found that she was not entitled to a schedule award.

Appellant was referred by OWCP for a second opinion examination by Dr. James Hood, a Board-certified orthopedic surgeon. In a report dated August 19, 2009, Dr. Hood opined that she had six percent left arm permanent impairment based on left shoulder loss of range of motion. An OWCP medical adviser concurred in a September 25, 2009 report that appellant had six percent permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

⁴ Docket No. 09-2355 (issued July 7, 2010), OWCP issued an August 22, 2008 decision finding that the selected position of dispatcher represented appellant's wage-earning capacity. By decision dated October 16, 2008, it denied modification of the loss of wage-earning capacity determination. As noted, the Board reversed the October 16, 2008 decision, finding that the selected position did not conform to appellant's work restrictions based on the evidence of record.

⁵ Docket No. 11-1829 (issued March 13, 2012). By decision dated May 5, 2011, OWCP denied authorization for a mattress. It reviewed the merits and denied modification by decision dated June 16, 2011. In a decision dated March 13, 2012, the Board affirmed OWCP's decisions denying authorization for a mattress, finding OWCP did not abuse its discretion.

By decision dated December 2, 2009, OWCP issued a schedule award for six percent permanent impairment to the left arm. The period of the award was 9.15 weeks to run from August 19 to December 28, 2009. On December 16, 2009 OWCP also accepted left lateral epicondylitis and left wrist sprain.⁶

Appellant timely requested reconsideration of the December 2, 2009 decision and submitted a July 23, 2010 report from Dr. Lubor Jarolimek, an orthopedic surgeon. Dr. Jarolimek opined that appellant had two percent permanent left arm impairment based on the left shoulder, one percent impairment for the left wrist, and one percent for the left elbow.

OWCP denied modification of the December 2, 2009 schedule award decision in a decision dated January 26, 2011, but indicated that it would further develop the medical evidence with respect to the left arm impairment due to the additional accepted conditions. The medical record was sent to an OWCP medical adviser for review. In a report dated February 10, 2011, the medical adviser opined that appellant had an additional two percent permanent impairment, based on one percent for the left elbow and one percent for the left wrist.

In a report dated July 26, 2011, Dr. Vivek P. Kushwaha, a Board-certified orthopedic surgeon, provided results from a July 21, 2011 examination. He opined that appellant had 16 percent permanent left upper extremity impairment, based on the left shoulder (7 percent), left wrist (9 percent), and left elbow (1 percent). The evidence was reviewed by an OWCP medical adviser in an August 11, 2011 report. The medical adviser opined that he disagreed with Dr. Kushwaha's application of the wrist regional grid, as the diagnosis of a triangular fibrocartilage complex (TFCC) tear was not established by the record. He opined that appellant had 10 percent permanent impairment to the left arm, and therefore was entitled to an additional 4 percent impairment. The medical adviser found that she had an additional one percent for the left shoulder, one percent for the left elbow, and two percent for the left wrist.

By decision dated August 17, 2011, OWCP issued a schedule award for an additional four percent permanent impairment to the left arm. The period of the award was 12.48 weeks from July 31 to October 26, 2011.

On November 4, 2011 appellant requested reconsideration of the January 26, 2011 OWCP decision. In an October 18, 2011 letter, she discussed the report of Dr. Kushwaha and argued that she was entitled to an increased schedule award.

By decision dated December 12, 2011, OWCP denied modification of the schedule award decisions. It found that the evidence did not warrant modification.

On December 20, 2012 OWCP received a request for reconsideration of the December 12, 2011 decision. It requested that an OWCP medical adviser review the evidence from Dr. Kushwaha with respect to a permanent impairment.

In a report dated December 26, 2012, the medical adviser opined that appellant had eight percent left arm permanent impairment. He opined that she had seven percent permanent

⁶ OWCP indicated on June 23, 2011 that it had also accepted left carpal tunnel syndrome and left lesion of the ulnar nerve.

impairment based on the left shoulder and one percent for the elbow. As to the left wrist, the medical adviser noted the August 11, 2011 report from another OWCP medical adviser that the diagnosis of TFCC had not been established.

By decision dated January 2, 2013, OWCP denied modification of the prior schedule award decisions. By decision dated April 9, 2013, it found that appellant was not entitled to an increased schedule award based on the medical evidence.⁷

On December 10, 2013 appellant requested reconsideration of the January 2 and April 9, 2013 OWCP decisions. She argued that she had only been paid two percent for the left wrist and was entitled to an additional seven percent.

By decision dated December 13, 2013, OWCP denied modification of the January 2, 2013 decision. It found that the medical evidence was insufficient to warrant modification.

On December 16, 2014 OWCP received a request for reconsideration of the December 13, 2013 decision. Appellant submitted a brief statement dated December 12, 2014 that she was requesting a trigger finger release. On December 23, 2014 OWCP received a December 1, 2014 report from Dr. Kenneth Berliner, a Board-certified orthopedic surgeon. Dr. Berliner provided results on examination, diagnosed multiple herniated lumbar and cervical discs, chronic S1 radiculopathy, and left carpal tunnel syndrome. In a separate report also dated December 1, 2014, he discussed results on examination and reported appellant's work restrictions were permanent.

By decision dated January 27, 2015, OWCP found that the reconsideration request was untimely. It denied the request for reconsideration, finding that it did not show clear evidence of error.

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.⁸ 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."⁹

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.¹⁰ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹¹ OWCP, through

⁷ There is no indication that appellant had requested reconsideration of the January 2, 2013 decision prior to the April 9, 2013 decision denying an increased schedule award.

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.605 (2012).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ 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."

regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.¹² 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.¹³

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.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷

ANALYSIS

In the present case, OWCP issued a merit decision with respect to a schedule award dated December 13, 2013. Appellant submitted a request for reconsideration that was received on December 16, 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 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,¹⁸ but when a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that she has filed an application for reconsideration of a schedule award decision.¹⁹ In this case, she did not submit any relevant evidence with respect to an increased permanent impairment, and therefore OWCP properly considered her submission as an application for reconsideration.

¹² 20 C.F.R. § 10.607 (2012).

¹³ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁶ *Id.*

¹⁷ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁸ *See Linda T. Brown*, 51 ECAB 115 (1999).

¹⁹ *See W.J.*, Docket No. 12-1746 (issued February 5, 2013).

As noted above, a request for reconsideration must be received by OWCP within one year of the date of OWCP's final decision. In this case, December 13, 2014 was a Saturday. If the last day falls on a Saturday, Sunday, or a legal holiday, the claimant has until the next business day to timely request reconsideration.²⁰ Therefore, appellant had until Monday, December 15, 2014 to submit a timely reconsideration request. The date of receipt is the "received date" in the Integrated Federal Employees' Compensation System.²¹ Since the reconsideration request was received on December 16, 2014, it is untimely.

An untimely reconsideration request must show clear evidence of error by OWCP. In this case, appellant requested reconsideration, but did not submit any pertinent new or relevant evidence or argument with respect to error by OWCP in her schedule award decisions. She had submitted a December 1, 2014 report from Dr. Berliner, but this report did not evaluate her permanent impairment pursuant to the A.M.A., *Guides*.²² This report therefore did not establish that appellant's prior schedule award was clearly erroneous, or that she might be entitled to an additional schedule award.²³

OWCP issued a schedule award for six percent permanent impairment to appellant's left arm by decision dated December 2, 2009, and an additional four percent on August 17, 2011. The December 2, 2009 schedule award was based on the August 9, 2009 report from Dr. Hood with respect to the left shoulder and review by an OWCP medical adviser. The August 17, 2011 schedule award was based on the July 26, 2011 report from Dr. Kushwaha and an August 11, 2011 review by an OWCP medical adviser. The medical adviser explained that the diagnosis of TFCC tear was not established by the record. The December 2, 2011 and January 2, April 9, and December 13, 2013 merit decisions found that the medical evidence was insufficient to establish an additional impairment. The Board finds no clear evidence of error was presented in this case.

On appeal, appellant stated that she mailed her reconsideration request on December 12, 2014. As discussed above, it is the date of receipt by OWCP that is the date of filing of the reconsideration request. Appellant also refers to the report from Dr. Kushwaha and Dr. McShane. The only issue presented on appeal was whether she had established clear evidence of error. For the reasons indicated, appellant did not establish clear evidence of error in this case.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

²⁰ See A.A., Docket No. 15-540 (issued April 22, 2015); *Debra McDavid*, 57 ECAB 149 (2005).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011).

²² OWCP evaluates the degree of permanent impairment according to the standards set forth in the A.M.A., *Guides*. See *K.W.*, 59 ECAB 284 (2007).

²³ See *K.D.*, Docket No. 15-524 (issued August 3, 2015).

CONCLUSION

The Board finds that OWCP properly found 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 January 27, 2015 is affirmed.

Issued: September 16, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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