

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Salisbury, MD, Employer**

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**Docket No. 16-1263
Issued: September 14, 2016**

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 June 6, 2016 appellant filed a timely appeal of an April 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision on January 12, 2015, to the filing of this appeal, 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.

ISSUE

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

FACTUAL HISTORY

On July 15, 2009 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a shoulder condition as a result of his federal employment. OWCP

¹ 5 U.S.C. § 8101 *et seq.*

accepted the claim on October 13, 2009 for left rotator cuff sprain.² By report dated April 20, 2010, Dr. Jason Scopp, a Board-certified orthopedic surgeon, diagnosed left shoulder partial articular supraspinatus tendon avulsion, left shoulder impingement syndrome, and a labral tear. Appellant stopped working on August 30, 2010 and received wage-loss compensation through January 23, 2011, when he returned to light duty.

To determine appellant's disability status, OWCP referred appellant to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 26, 2012, Dr. Thompson opined in his report received by OWCP on October 3, 2012 that appellant had suffered a rotator cuff pathology and could not return to full duties of his employment position.

On September 12, 2014 appellant submitted a claim for a schedule award (Form CA-7). By letter dated September 23, 2014, OWCP advised appellant of the evidence necessary to establish an employment-related permanent impairment. No additional evidence was received.

By decision dated January 12, 2015, OWCP denied appellant's claim for a schedule award. It found there had been no medical report submitted by appellant that established permanent impairment.

Appellant submitted a letter dated July 14, 2015 indicating that he would like OWCP to set up a medical appointment for a schedule award examination. In a memorandum of telephone call (Form CA-110) dated September 8, 2015, OWCP indicated that appellant was advised to appeal the denial decision and then request a second opinion. By letter dated October 30, 2015, appellant wrote that he would like to request an appointment for a schedule award examination. OWCP advised him by letter dated November 24, 2015 that he should exercise his appeal rights with respect to the January 12, 2015 decision.

On January 28, 2016 OWCP received a request for reconsideration. Appellant wrote that he was never given an opportunity for a physician to evaluate a schedule award.

By decision dated April 27, 2016, OWCP found the reconsideration request was untimely with respect to the January 12, 2015 decision. It found that appellant had not demonstrated clear evidence of error in the prior decision and the reconsideration request was therefore denied without 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.³ The

² The January 12, 2015 OWCP decision provides that additional accepted claims included acromioclavicular sprain and left articular cartilage disorder of the shoulder.

³ 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.”⁴

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.⁵ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁶ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁷ 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.⁸ 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.⁹

To demonstrate 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.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

ANALYSIS

In the present case, OWCP accepted that appellant sustained left shoulder conditions of rotator cuff sprain, acromioclavicular sprain, and articular cartilage disorder. Appellant indicated

⁴ 20 C.F.R. § 10.605 (2012).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 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.”

⁷ *Supra* note 1.

⁸ 20 C.F.R. § 10.607 (2012).

⁹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

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

on September 12, 2014 that he was requesting a schedule award, and he was advised by letter dated September 23, 2014 to submit probative medical evidence. No evidence was submitted, and by decision dated January 12, 2015, OWCP found that he had failed to establish permanent impairment warranting a schedule award.

Appellant submitted letters dated July 14 and October 30, 2015 indicating that he wanted OWCP to refer him for a second opinion examination. He did not request reconsideration of the January 12, 2015 decision until January 28, 2016. Since this is more than one year after January 12, 2015, it was untimely filed with respect to the January 12, 2015 decision.

As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP. The reconsideration request asserted that appellant did not have an opportunity for a permanent impairment evaluation. It is, however, appellant's burden to submit medical evidence with respect to a permanent impairment.¹⁴ The medical evidence necessary to support a schedule award includes a physician's detailed report that provides a sufficient description of the impairment.¹⁵ OWCP may then determine that further development is warranted on the issue. There was no medical evidence of record regarding a permanent impairment. Appellant has not demonstrated clear evidence of error in the January 12, 2015 decision, and OWCP properly denied merit review.

On appeal, appellant indicates that he had family medical issues that delayed his submission of a reconsideration request. The Board notes that he is not precluded from pursuing the schedule award issue. Appellant may, at any time, request a schedule award by submitting relevant medical evidence with respect to an employment-related permanent impairment and receive a decision on the merits of the claim.¹⁶

CONCLUSION

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

¹⁴ See *A.B.*, Docket No. 12-1392 (issued January 24, 2013).

¹⁵ See *James E. Jenkins*, 39 ECAB 860 (1988); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(b) (February 2013).

¹⁶ See *R.P.*, Docket No. 10-1123 (issued January 25, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 27, 2016 is affirmed.

Issued: September 14, 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