

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

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N.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Jersey City, NJ, Employer )

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**Docket No. 17-0157  
Issued: April 24, 2017**

*Appearances:*

*James D. Muirhead, Esq., for the appellant<sup>1</sup>*

*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 October 31, 2016 appellant, through counsel, filed a timely appeal from an August 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed since the last merit decision, dated September 26, 2008, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

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

## FACTUAL HISTORY

On January 14, 2005 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her right knee in the performance of duty on January 4, 2005, when her right leg buckled. OWCP accepted the claim for contusion and sprain/strain of the right knee and leg. Appellant stopped work and received wage-loss compensation commencing February 22, 2005.

In addition to the present case, the record indicates that appellant had five prior claims. The claims are: (1) a December 15, 1988 claim accepted for neck and right shoulder sprain OWCP File No. xxxxxx989; (2) a June 24, 1993 claim accepted for left shoulder and arm strain while delivering mail OWCP File No. xxxxxx409; (3) a June 5, 1996 slip on ice, accepted for right elbow and right shoulder sprain, and cervical myalgia OWCP File No. xxxxxx963; (4) a March 2, 2001 claim accepted for left carpal tunnel syndrome OWCP File No. xxxxxx447; and (5) a July 31, 2001 claim accepted for right shoulder sprain OWCP File No. xxxxxx868.

On May 14, 2008 OWCP referred appellant for a second opinion examination with Dr. Jeffrey Larkin, a Board-certified orthopedic surgeon. Dr. Larkin was provided with the statement of accepted facts (SOAF) for the current and prior claims.

In a report dated June 17, 2008, Dr. Larkin provided a history, review of medical records, and results on examination. He diagnosed cervical spondylosis, most pronounced at C6-7, with bilateral neuroforaminal encroachment present at C5-6 and changes of degenerative disc disease most pronounced at C6-7. Dr. Larkin opined that all the work-related conditions had resolved. He reported that appellant had restriction of motion of the cervical spine and pain that radiated into the upper extremities to the shoulders, but the present symptomology was due to underlying degenerative disease, not a work-related condition.

In a letter dated August 26, 2008, OWCP advised appellant that it proposed to terminate compensation based on the June 17, 2008 report from Dr. Larkin. It listed the current claim number as well as the five claims noted above. By decision dated September 26, 2008, OWCP terminated compensation for wage-loss and medical benefits effective September 28, 2008, as it found the weight of the evidence was represented by Dr. Larkin.

On August 22, 2016 appellant, through counsel, requested reconsideration. He argued that Dr. Larkin had found cervical degenerative disc disease was a preexisting condition, without providing rationale. Counsel asserted that Dr. Larkin had failed to refer to schedule awards for permanent impairment of the upper extremities that were noted in the SOAF. He therefore concluded that Dr. Larkin's report was incomplete and clearly erroneous.

By decision dated August 25, 2016, OWCP found that the reconsideration request was untimely filed. In addition, it found that appellant had failed to demonstrate clear evidence of error and was therefore not entitled to a merit decision.

### **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.<sup>3</sup> 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.”<sup>4</sup>

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.<sup>5</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>7</sup> As one such limitation, an application for reconsideration must be mailed within one year of the date of OWCP’s decision for which review is sought.<sup>8</sup> 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.

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> 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.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.605 (2012).

<sup>5</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 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.”

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> For decisions before August 29, 2011, a claimant had one year to mail a reconsideration request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). 20 C.F.R. § 10.607 (2012).

<sup>9</sup> *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>11</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>12</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup>

### **ANALYSIS**

The last merit decision in this claim was dated September 26, 2008. In that decision, OWCP terminated compensation for wage-loss and medical benefits. Appellant's request for reconsideration was dated August 22, 2016. Since this is more than one year after the September 26, 2008 decision, it was untimely filed. As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP in order to receive a merit review of the claim.

Appellant did not submit additional evidence in support of the reconsideration request. Counsel argued that Dr. Larkin's report was of diminished probative value and insufficient to terminate compensation. He asserted that Dr. Larkin failed to explain why he opined that the cervical degenerative condition was preexisting, since appellant had prior accepted cervical injuries, including a 1996 injury. Dr. Larkin was provided a detailed medical and factual background which correctly noted that OWCP has never accepted a cervical degenerative condition as employment related. As noted above, even if the evidence could be construed to reach a different conclusion, this is not clear evidence of error.<sup>15</sup> Counsel also refers to prior schedule awards not mentioned by Dr. Larkin. The issue presented was not for a rating of permanent impairment. Dr. Larkin was provided a proper background and opined in his June 17, 2008 report that appellant did not have residuals of a condition causally related to the accepted January 4, 2005 employment injury.

The arguments provided on reconsideration fail to demonstrate clear evidence of error.<sup>16</sup> The Board accordingly finds that OWCP properly denied merit review of the claim.

On appeal, counsel reiterates the argument that Dr. Larkin's report was not well rationalized and was insufficient to terminate compensation. The issue presented was whether appellant demonstrated clear evidence of error and, for the reasons discussed, appellant has failed to demonstrate clear evidence of error in this case.

### **CONCLUSION**

The Board finds that OWCP properly found appellant's reconsideration request was untimely and failed to show clear evidence of error.

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<sup>13</sup> *Id.*

<sup>14</sup> *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

<sup>15</sup> *Supra* note 12.

<sup>16</sup> *See S.G.*, Docket No. 14-1893 (issued January 7, 2015); *see also G.C.*, Docket No. 16-0681 (issued October 18, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 25, 2016 is affirmed.

Issued: April 24, 2017  
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