

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

---

C.G., Appellant )

and )

**DEPARTMENT OF LABOR, MINE SAFETY &  
HEALTH ADMINISTRATION,  
Mount Hope, WV, Employer** )

---

**Docket No. 17-0453  
Issued: April 10, 2017**

*Appearances:*

*P. Heith Reynolds, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 28, 2016 appellant, through counsel, filed a timely appeal from a December 2, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated September 22, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup>

---

<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.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### ISSUE

The issue is whether OWCP properly denied appellant's September 23, 2016 request for reconsideration as it was untimely and failed to demonstrate clear evidence of error.

### FACTUAL HISTORY

Appellant, a 65-year-old former mine safety and health specialist (special investigator), has an accepted occupational disease claim (Form CA-2) for coal workers' pneumoconiosis, which arose on or about August 9, 2013. He retired effective November 1, 2013. On August 14, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a September 17, 2014 letter, OWCP advised appellant of the need to have his physician submit an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (2009).

In response on October 21, 2014, appellant submitted an October 15, 2014 report from Dr. Dan Doyle, a Board-certified family practitioner, who opined that based on the A.M.A., *Guides*, appellant had 20 percent whole person impairment due to his occupational pneumoconiosis.<sup>4</sup>

On February 23, 2015 OWCP's district medical adviser (DMA) reviewed Dr. Doyle's October 15, 2014 report and found that his impairment rating was unacceptable for schedule award purposes. He questioned the reliability of the August 9, 2013 PFS upon which Dr. Doyle relied. The DMA recommended that OWCP refer appellant for a second opinion evaluation.

In a July 30, 2015 report, Dr. Dominic J. Gaziano, a Board-certified pulmonologist and OWCP referral physician, diagnosed coal workers' pneumoconiosis and found 10 percent whole person impairment under Table 5-4, Pulmonary Dysfunction, A.M.A., *Guides* 88 (6<sup>th</sup> ed., 2009).<sup>5</sup>

In an August 20, 2015 report, the DMA disagreed with Dr. Gaziano's 10 percent whole person impairment rating. He noted that Dr. Gaziano offered no explanation for assigning the "E" grade rating of 10 percent under Table 5-4.<sup>6</sup> The DMA further noted that Dr. Gaziano

---

<sup>3</sup> Counsel submitted additional evidence on appeal that was not part of the record when OWCP issued its December 2, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

<sup>4</sup> Dr. Doyle referenced the results of appellant's August 9, 2013 pulmonary function study (PFS), but he did not otherwise explain how the reported values represented 20 percent whole person impairment under the latest edition of the A.M.A., *Guides*.

<sup>5</sup> As part of his July 23, 2015 examination, Dr. Gaziano obtained a new chest x-ray and PFS.

<sup>6</sup> The default rating ("C") for class 1 whole person impairment due to pulmonary dysfunction was six percent.

provided no input regarding grade modifiers. Based on information gleaned from Dr. Gaziano's July 30, 2015 second opinion report, the DMA assigned a grade modifier of 1 for functional history and a grade modifier of 0 for physical examination.<sup>7</sup> Applying the net adjustment formula resulted in a -1 adjustment, which reduced the default ("C") rating of six percent to four percent ("B"). Consequently, the DMA found four percent whole person permanent impairment for each lung.

By decision dated September 22, 2015, OWCP granted a schedule award for four percent permanent impairment of the right lung and four percent permanent impairment of the left lung. The award ran for 12.48 weeks for the period July 23 to October 18, 2015.

Appellant requested reconsideration on September 23, 2016.

Since issuing its September 22, 2015 schedule award, OWCP received January 28 and May 5, 2016 progress notes from Dr. Syed A. Zahir, a Board-certified orthopedic surgeon, who treated appellant for a right knee condition. Dr. Zahir's clinical impression was right knee internal derangement, right knee degenerative arthritis, neuropathy, and diabetes mellitus. OWCP also received a June 23, 2016 chest computerized tomography (CT) scan, which revealed nodular thickening at the right minor fissure and no evidence of interstitial pulmonary fibrosis.

By decision dated December 2, 2016, OWCP denied appellant's request for reconsideration on the basis that it was untimely filed and failed to demonstrate 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.<sup>8</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>9</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>10</sup> OWCP will consider an untimely request for reconsideration only if the request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.<sup>11</sup>

---

<sup>7</sup> The DMA further explained that assigning a grade modifier for clinical studies was inappropriate because the latest PFS formed the basis for the class 1 Class of Diagnosis designation.

<sup>8</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>11</sup> 20 C.F.R. § 10.607(b).

The request must establish on its face that such decision was erroneous.<sup>12</sup> Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>13</sup>

### ANALYSIS

The latest merit decision is dated September 22, 2015. In that decision, OWCP granted appellant a schedule award for four percent permanent impairment of each lung, for a total of 12.48 weeks' compensation.<sup>14</sup> Appellant had until September 21, 2016 to timely file for reconsideration. However, OWCP did not receive her request for reconsideration until September 23, 2016. Consequently, the request for reconsideration was untimely pursuant to 20 C.F.R. § 10.607(a). As such, appellant must demonstrate clear evidence of error with respect to OWCP's September 22, 2015 schedule award decision.<sup>15</sup>

Appellant submitted the appeal request form that accompanied OWCP's September 22, 2015 decision. She did not submit any evidence or argument with her request for reconsideration. Since its last decision, OWCP received medical evidence from Dr. Zahir; however, his January 28 and May 5, 2016 progress notes pertain to a knee condition and not the accepted pulmonary condition. In fact, Dr. Zahir did not even mention a history of coal workers' pneumoconiosis. Consequently, this evidence is irrelevant to the issue of whether appellant has greater than four percent impairment of each lung, and therefore, it is insufficient to demonstrate clear evidence of error.<sup>16</sup> His June 23, 2016 chest CT scan is similarly insufficient to demonstrate clear evidence of error because the diagnostic study does not specifically address the extent of any pulmonary impairment. Thus, the Board finds that Dr. Zahir's progress notes and the June 23, 2016 chest CT scan do not demonstrate clear evidence of error as they do not show that OWCP committed an error in determining appellant's entitlement to a schedule award, nor do they raise a substantial question as to the correctness of OWCP's decision.

To demonstrate 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.<sup>17</sup> None of the evidence submitted manifests on

---

<sup>12</sup> *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>13</sup> 20 C.F.R. § 10.608(b).

<sup>14</sup> Compensation for total loss of use of one lung is 156 weeks. 20 C.F.R. § 10.404(b).

<sup>15</sup> *Supra* note 11; see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> See *Dean D. Beets*, *supra* note 12.

<sup>17</sup> *Supra* note 10 at Chapter 2.1602.5a; see *id.*

its face that OWCP committed an error in granting appellant a schedule award for four percent impairment of each lung. 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 demonstrate clear evidence of error.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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