

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

K.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coconut Creek, FL, Employer**

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**Docket No. 16-1187
Issued: February 7, 2017**

Appearances:
Russell J. Brown, for the appellant¹
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 May 11, 2016 appellant, through her representative, filed a timely appeal from a January 4, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed since the last merit decision dated December 4, 2014 to the date of this appeal, 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 this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On appeal appellant requests that the Board restore her benefits. She contends that OWCP should not have denied merit review as her request for reconsideration was timely filed. Appellant discusses residuals from the injury.

FACTUAL HISTORY

On May 8, 2006 appellant, then a 50-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she suffered injury to her left shoulder and upper arm while unloading her vehicle. She stopped work on May 9, 2006. Appellant's claim was accepted for left shoulder strain and synovitis of the left shoulder, and later for candidiasis of mouth and recurrent major depressive disorder. Compensation benefits were paid on the supplemental and periodic rolls from June 26, 2006 through December 13, 2014.

OWCP continued to receive medical evidence pertaining to treatment of appellant's accepted conditions, and which discussed her disability status.

In a May 6, 2013 report, Dr. Paul I. Meli, a Board-certified orthopedic surgeon, noted that appellant was status post left shoulder arthroscopy and had significant degenerative osteoarthritis of her left shoulder. He also noted that, at this point, she was clearly at maximum medical improvement and had an impairment rating of zero percent. Dr. Meli reported that appellant was not a candidate for a shoulder replacement in view of her young age. He completed a work capacity evaluation and found that she was able to work eight hours a day with a limitation of pushing/pulling/lifting no more than one pound with the left arm.

On June 19, 2014 the employing establishment offered appellant a position as a modified rural carrier. The physical duties limited pushing/pulling/lifting of containers of packages and parcels weighing 0 to 20 pounds with right arm only intermittently. On June 21, 2014 appellant refused the job offer, contending that her first employment injury of February 18, 1997 injury was "directly responsible for entire scope of my negative physicalities."

On October 30, 2014 OWCP informed appellant that it had determined that the duties and physical requirements of the position of modified rural carrier with the employing establishment were in accordance with medical limitations provided by Dr. Meli that pushing, pulling, and lifting be limited to one pound with the left arm. It noted that it had been advised that appellant failed to report to this position. Appellant was advised that she had 30 days to accept the position or provide reasons for not accepting the position. OWCP did not receive further evidence or argument from appellant.

By decision dated December 4, 2014, OWCP terminated appellant's entitlement to compensation for wage loss and schedule award benefits effective December 14, 2014 due to her refusal to accept suitable work.

Appellant requested reconsideration of the December 4, 2014 decision on December 10, 2015. She alleged that the employment offer was based solely on her left shoulder injury, but that her right arm was no better than her left arm because of a previous employment injury, OWCP file number xxxxxx089, which had caused a cervical condition affecting both arms. She contended that her injuries were debilitating. Appellant stated that she needed surgery. She noted that her cervical condition was chronic and caused spasms of her neck, both shoulders, arms, hands and fingers. Appellant requested that her benefits be restored and surgery approved.

In support of her request for reconsideration, appellant submitted a September 11, 2000 report from Dr. Ross Schwarz, a Board-certified internist, which discussed appellant's prior employment injuries. She also submitted the results of November 5, 2007 and November 19, 2014 magnetic resonance imaging (MRI) scans of the cervical spine taken by Dr. Siddharth Pandya, a Board-certified radiologist. In the November 19, 2014 MRI scan report, Dr. Pandya found degenerative changes with posterior disc osteophyte complexes and facet arthropathy creating foraminal stenosis. He also noted at C5-6 the prominent posterior disc osteophyte complex is paracentral to the left approximating the cord and bilateral foraminal stenosis. Finally, appellant submitted reports by Dr. Roberto C. Heros, a Board-certified neurosurgeon, dated April 20, 2015. Dr. Heros listed appellant's primary diagnosis as neck pain, and also noted cervical spondylosis and cervical radiculopathy.

By decision dated January 4, 2016, OWCP denied appellant's request for a merit review, noting that the evidence she had submitted was cumulative. It noted that it had received the cervical MRI scan dated November 19, 2014 and Dr. Heros' report, but that this evidence was cumulative because Dr. Meli's report dated May 28, 2013 supported that "sensory dermatomes from C4-T1 are completely within normal limits with two point sensory discrimination. Motor strength is 5/5 and bilateral symmetry."

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵ 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.⁶ The

³ This section provides in pertinent part: [the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (2014).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be mailed to OWCP within one year of OWCP's decision for which review is sought.

⁶ 20 C.F.R. § 10.607(b).

request must establish, on its face, that such decision was erroneous.⁷ Where a request is untimely filed and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

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.⁹

ANALYSIS

On December 4, 2014 after considering the medical evidence of record, OWCP terminated appellant's compensation benefits as it determined that she refused an offer of suitable employment. As noted above, the Board does not have jurisdiction to review this decision. Accordingly, the Board is limited to review of the nonmerit decision denying reconsideration issued on January 4, 2016.

The Board finds that this case is not in posture for decision. As noted, the last merit decision in this case is OWCP's December 4, 2014 decision terminating appellant's wage-loss and schedule award compensation benefits effective December 14, 2014. OWCP received appellant's reconsideration request on December 10, 2015. Accordingly appellant's request for reconsideration was untimely filed because more than one year had elapsed between the last OWCP merit decision issued on December 4, 2014 and the date OWCP received appellant's reconsideration request.¹⁰ OWCP applied the wrong standard in determining whether further merit review was warranted under 20 C.F.R. § 10.608. Accordingly, the case must be remanded to OWCP for proper adjudication of appellant's untimely request for reconsideration.¹¹

CONCLUSION

The Board finds that this case is not in posture for decision.

⁷ 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 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁸ 20 C.F.R. § 10.608(b).

⁹ 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.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

¹¹ See *E.B.*, Docket No. 16-0746 (issued June 1, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 4, 2016 is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: February 7, 2017
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