

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

Y.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 16-0748
Issued: January 30, 2017**

Appearances:
Appellant, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 7, 2016 appellant filed a timely appeal from a January 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was the October 7, 2008 decision of the Board, which became final after 30 days of issuance and is not subject to further review.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.³

¹ 20 C.F.R. § 501.6(d).

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted additional evidence with his appeal to the Board. The Board cannot consider this evidence as its review is limited to evidence which was before OWCP at the time of its decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration of the merits on the grounds that they were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated October 7, 2008, the Board affirmed February 22, 2008, July 10 and April 12, 2007 decisions of OWCP.⁴ In a decision dated September 21, 2011, the Board affirmed a November 29, 2010 nonmerit decision of OWCP denying her request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.⁵ In a November 13, 2013 decision, the Board affirmed an April 8, 2013 nonmerit decision of OWCP denying her request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.⁶ In an April 10, 2015 decision, the Board determined that appellant's July 21, 2014 reconsideration request was also untimely filed and failed to demonstrate clear evidence of error.⁷ The facts and circumstances surrounding the Board's prior appeals are incorporated herein by reference.

On November 6, 2015 appellant again requested reconsideration. She repeated her previous arguments that the surveillance video which showed her engaged in various physical activities, was tampered with and this tainted OWCP's denial of the claim. Additionally, appellant argued that the video was the fruit of the poisonous tree and an unlawful error of the case. She contended that if the original unedited video was reviewed it would be revealed that she was "not really using [her] left arm." Appellant also indicated that she was "not aware anyone was following me either." She indicated that she was requesting a third party that was "impartial."

On December 31, 2015 appellant again requested reconsideration due to error of facts and findings. She argued that she was challenging the claim because the surveillance video was tampered with and this tainted OWCP's denial. Appellant argued that her claim was not properly reviewed. She indicated that she wanted OWCP to look at the unedited version of the video and see if she was injured, but they refused to do so. Additionally, appellant argued that

⁴ Docket No. 08-1167 (issued October 7, 2008). On July 12, 2005 appellant, then a 46-year-old modified clerk, filed a traumatic injury claim alleging that she injured her left hand and wrist on June 21, 2005 when using a handgrip machine during a functional capacity evaluation (FCE). OWCP denied appellant's claim and found that appellant did not meet her burden of proof to establish that she sustained a left wrist injury during the June 21, 2005 FCE. The Board on October 7, 2008 affirmed the denial of the claim finding that appellant did not meet her burden of proof to establish causal relationship. The Board denied appellant's petition for reconsideration on June 17, 2009. *Order Denying Petition for Recon.*, Docket No. 09-1167 (issued June 17, 2009).

⁵ Docket No. 11-0685 (issued September 21, 2011). On August 30, 2012 the Board denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 11-0685 (issued August 30, 2012).

⁶ Docket No. 13-1478 (issued November 13, 2013).

⁷ Docket No. 15-1298 (issued April 10, 2015). On October 14, 2015 the Board denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 15-0298 (issued October 14, 2015).

she was injured during an FCE in 2005. She indicated that the employing establishment failed to take responsibility for a 1981 neck injury and the 2005 injury to her left wrist.

In a decision dated January 27, 2016, OWCP denied appellant's requests for reconsideration for the reason that they were untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”⁸

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision.¹⁰ To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹¹

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.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to establish that the evidence could be

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.607(b).

¹¹ *Id.*; *Fidel E. Perez*, 48 ECAB 663 (1997).

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board conducted a merit review of appellant's case on October 7, 2008. Appellant had one calendar year from the date of that decision, or until October 7, 2009, to file a reconsideration request with OWCP.¹⁷ Her November 6 and December 31, 2015 requests for reconsideration were received more than one year after the October 7, 2008 merit decision and were, therefore, untimely.¹⁸ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. With the November 2 and December 26, 2015 requests for reconsideration, appellant repeated arguments that were previously proffered. She argued that the surveillance video had been tampered with and that this tainted OWCP's denial of her claim. As a result, the video was the fruit of the poisonous tree and an unlawful error of the case. Appellant argued that if the original unedited video was reviewed it would be revealed that she was "not really using [her] left arm." She also indicated that she was "not aware anyone was following [her] either." Appellant indicated that she was requesting a third party that was "impartial." Additionally, she argued that their refusal to do so left her with a lifetime of injuries without any medical or compensation due to a tainted and edited video without the master unedited version for comparison. However, the underlying issue in the claim is whether she established a traumatic injury June 21, 2005. These arguments are medical in nature. The claim was denied on a medical component. These arguments therefore do not demonstrate clear evidence of error.¹⁹

Additionally, appellant argued that her left wrist was injured during an FCE in 2005 and that the employing establishment failed to take responsibility for a 1981 neck injury and the 2005 injury to her left wrist. The Board notes that these arguments are unsupported by the evidence and do not show clear evidence of error in OWCP's denial of her claim.²⁰

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Nancy Marcano*, 50 ECAB 110 (1998).

¹⁷ 20 C.F.R. § 10.607(a).

¹⁸ *Id.* The reconsideration request must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

¹⁹ *See H.V.*, Docket No. 14-1210 (issued September 16, 2015).

²⁰ *See F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

On appeal, appellant repeated her arguments from her previous reconsideration request. However, as found her requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error by OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration of the merits on the grounds that they were untimely filed and failed to demonstrate clear evidence of error.

ORDER

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

Issued: January 30, 2017
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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