

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

L.M., Appellant)	
)	
and)	Docket No. 16-1514
)	Issued: January 27, 2017
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Bentonville, AR, Employer)	
)	

Appearances:
Richard A. Daniels, for the appellant¹
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 July 13, 2016 appellant, through his representative, filed a timely appeal from a July 6, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 8, 2014 to the filing 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 to consider the merits of the claim.

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.

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.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the Board's June 23, 2014 decision are incorporated herein by reference. The relevant facts follow.

On September 20, 2003 appellant, then a 55-year-old transportation security screener, sustained a work-related injury attempting to move a bag, weighing between 30 and 40 pounds, onto a conveyor belt. OWCP accepted her claim for aggravation of cervical degenerative disc disease, cervical intervertebral disc displacement, and dysphagia. On December 22, 2003 appellant underwent a C6-7 anterior cervical discectomy and fusion. OWCP placed her on the periodic compensation rolls, effective January 25, 2004. By decision dated November 29, 2005, OWCP adjusted appellant's wage-loss compensation based on his ability to earn \$371.20 per week in the constructed position of general office clerk, effective December 25, 2005.

On June 5, 2012 OWCP granted appellant seven percent permanent impairment of the left upper extremity brachial plexus impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). It based the schedule award on the March 2, 2012 report of Dr. Joseph M. Ricciardi, a Board-certified orthopedic surgeon and OWCP referral physician. Appellant requested a hearing before an OWCP hearing representative.

By decision dated December 12, 2012, OWCP's hearing representative affirmed the June 5, 2012 schedule award finding that appellant had not established that he had more than seven percent permanent impairment of the left upper extremity.

On June 4, 2013 appellant, through her representative, requested reconsideration and submitted an April 16, 2013 impairment rating from Dr. Nicholas Diamond, a pain management specialist. Dr. Diamond found 17 percent left upper extremity impairment, and 8 percent right upper extremity impairment due to a combination of motor and/or sensory deficits involving the C6 and C7 nerve roots, bilaterally. He rated appellant pursuant to Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the sixth edition (July/August 2009).

OWCP referred the case record to its district medical adviser (DMA), who in a July 7, 2013 report questioned the thoroughness of Dr. Diamond's April 16, 2013 report.

In a July 17, 2013 decision, OWCP denied modification of its prior decisions. Appellant appealed to the Board.

By decision dated June 23, 2014, the Board set aside OWCP's July 17, 2013 decision and remanded the case for further consideration.⁴ The Board found that OWCP and its medical adviser had failed to review Dr. Diamond's April 16, 2013 report in its entirety. Consequently, the Board remanded the case to OWCP for proper consideration of the medical evidence of record.

³ Docket No. 14-0426 (issued June 23, 2014).

⁴ *Id.*

On remand, in a July 29, 2014 report, OWCP's medical adviser reviewed Dr. Diamond's entire April 16, 2013 report, along with the medical record and advised against its use for schedule award purposes. He noted that Dr. Diamond's examination findings were significant for a negative Hemilte sign and that the grip strength tests were not individually reported, which raised credibility issues. The medical adviser also commented on Dr. Diamond's two-point discrimination findings of nine millimeter in all digits, bilaterally. He questioned whether the so-called radicular dermatomal abnormalities were due to residuals of a cervical spine condition or other systemic conditions or peripheral nerve entrapments. The medical adviser also indicated that Dr. Ricciardi's March 2, 2012 impairment rating, on which OWCP previously relied, was technically unacceptable because he had not based his rating on *The Guides Newsletter*.⁵ He noted that perhaps appellant should be seen by a physician who will provide an impairment rating using *The Guides Newsletter*.

By decision dated August 8, 2014, OWCP denied modification of its prior decisions. It found that Dr. Diamond's April 16, 2013 report was insufficient to support that appellant had more than seven percent permanent impairment of the left upper extremity. OWCP further noted that the latest medical report was insufficient to overcome the weight of the evidence as represented by Dr. Ricciardi's March 2, 2012 impairment rating.

On April 7, 2016 appellant, through her representative, filed a request for reconsideration of the August 8, 2014 decision. While acknowledging that the April 7, 2016 request was untimely, her representative argued that further merit review was required because the DMA questioned the validity of Dr. Diamond's measurements and under the circumstances, OWCP was obligated to request an explanation from Dr. Diamond or refer appellant for a second opinion. Appellant's representative further noted that the medical adviser suggested that appellant be seen by another physician. Lastly, her representative argued that Dr. Diamond was better qualified than OWCP's medical adviser.

By decision dated July 6, 2016, OWCP denied appellant's April 7, 2016 reconsideration request because 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.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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

⁵ Dr. Daniel D. Zimmerman, an internist and the current DMA, previously reviewed Dr. Ricciardi's report on March 9, 2012, and at the time he advised OWCP that Dr. Ricciardi's seven percent impairment rating was acceptable under the A.M.A., *Guides*. The June 5, 2012 schedule award specifically referenced the DMA's March 9, 2012 report as a basis for the seven percent left upper extremity award.

⁶ 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 own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

sought.⁸ 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.”⁹ The request must establish on its face that such decision was erroneous.¹⁰ Where a request is untimely and fails to present clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant filed an untimely request for reconsideration. OWCP’s last merit decision was dated August 8, 2014. It received appellant’s request for reconsideration on April 7, 2016, which was more than one year after the last merit decision. Because more than one year elapsed since the last merit decision, appellant’s April 7, 2016 request for reconsideration is untimely filed.¹² Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in determining that he failed to establish more than seven percent permanent impairment of the left upper extremity.¹³

The Board finds that appellant has not demonstrated clear evidence of error in OWCP’s August 8, 2014 decision. In the April 7, 2016 request for reconsideration, appellant’s representative contended that prior to issuing its August 8, 2014 decision, OWCP should have either sought clarification from Dr. Diamond or referred appellant for another second opinion evaluation as recommended by the DMA.¹⁴ The Board finds that this argument does not raise a substantial question concerning the correctness of OWCP’s August 8, 2014 decision or demonstrate clear evidence of error. He faults OWCP for not having provided Dr. Diamond an opportunity to explain the noted deficiencies in his April 16, 2013 report. However, it is

⁸ *Id.* at § 10.607(a). 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.

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Id.* To establish 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 establish 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 *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).

¹¹ 20 C.F.R. § 10.608(b).

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.607(b).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6f(2)(c) (February 2013).

appellant's burden of proof to establish greater improvement than that previously awarded.¹⁵ Thus, appellant has not demonstrated a clear procedural error on the part of OWCP in determining that Dr. Diamond's April 16, 2013 report was insufficient to warrant modification of its June 5, 2012 schedule award for seven percent left upper extremity permanent impairment.

CONCLUSION

The Board finds that OWCP properly determined that appellant's April 7, 2016 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 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

¹⁵ See *R.E.*, Docket No. 13-397 (issued August 12, 2013); see also *J.A.*, Docket No. 16-1458 (issued December 16, 2016); *K.S.*, Docket No. 15-0741 (issued August 10, 2015).