

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

C.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Indianapolis, IN, Employer)

Docket No. 17-1967

Issued: November 17, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 10, 2016 appellant filed a timely appeal from a February 11, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 22, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

OWCP accepted that on or before June 7, 2013 appellant, then a 57-year-old rural carrier, sustained bilateral carpal tunnel syndrome due to repetitive upper extremity motion while

¹ 5 U.S.C. § 8101 *et seq.*

sorting, carrying, and delivering mail. Appellant had intermittent work absences beginning June 27, 2013, and stopped work on August 1, 2013.

Appellant was followed by several physicians. In an August 5, 2013 report, Dr. Maria Stamp, an attending Board-certified family practitioner, noted a two-month history of cervical spine pain radiating into the right upper extremity.² On September 17, 2013 Dr. Stamp diagnosed bilateral carpal tunnel syndrome with brachial neuritis or radiculitis. In an October 18, 2013 report, she explained that “the repetitive motion of pitching letters, magazines, and newspapers, casing mail and delivering mail are well known to both cause and permanently aggravate carpal tunnel syndrome.”

Dr. Aaron G. Anderson, an attending Board-certified hand surgeon, held appellant off work from August 8, 2013 for an indefinite period. He diagnosed bilateral carpal tunnel syndrome on September 25, 2013.

Dr. Roman O. Filipowicz, an attending neurosurgeon, held appellant off work beginning August 20, 2013. On September 6, 2013 he diagnosed severe cervical radiculopathy.

In a November 19, 2013 report, Dr. Ralph W. Richter, an attending Board-certified neurologist, diagnosed bilateral carpal tunnel syndrome due to repetitive motion while sorting and delivering mail.

On December 27, 2013 appellant filed a claim for compensation (Form CA-7) for leave buyback covering work absences from June 7 to October 15, 2013.

On March 4, 2014 Dr. Richter performed a right carpal tunnel release, authorized by OWCP.

By decision dated April 10, 2014, OWCP denied appellant’s claim for compensation as she had not submitted complete leave buyback worksheets for the claimed period.

On April 15, 2014 Dr. Richter performed a left carpal tunnel release, authorized by OWCP.

In an appeal form dated and received on May 8, 2014, appellant requested reconsideration and submitted worksheets dated January 28, 2014 pertaining to her claim for leave buyback for the period June 7 to October 15, 2013.

Dr. Richter opined on May 28, 2014 that appellant had recovered completely from bilateral endoscopic carpal tunnel releases and returned appellant to regular duty, effective May 23, 2014.

By decision dated August 22, 2014, OWCP denied modification of its April 10, 2014 decision, finding that appellant had not submitted sufficient medical evidence to establish total disability from work from June 7 to October 15, 2013.

² A July 24, 2013 magnetic resonance imaging (MRI) scan demonstrated multilevel discogenic and arthritic changes in the cervical spine.

On September 9, 2014 appellant requested reconsideration. She asserted that the employing establishment had agreed to complete the employer portion of the leave buyback worksheets. Appellant submitted copies of the January 28, 2014 worksheets, and timekeeping forms from June 7 to August 13, 2013.

By nonmerit decision dated December 5, 2014, OWCP denied reconsideration, finding that appellant had failed to submit relevant and pertinent new evidence or argument warranting reopening the merits of her claim.

On January 12, 2016 appellant again requested reconsideration. She contended that she had submitted a timely request for reconsideration on May 1, 2015. Appellant also submitted additional medical evidence.

Dr. Stamp provided a September 17, 2013 report noting that she held appellant off work beginning August 1, 2013 due to bilateral carpal tunnel syndrome and brachial neuritis or radiculitis. In a January 9, 2014 report, she diagnosed hyperlipidemia, sacroiliac joint pain, and acromioclavicular joint pain. In a March 10, 2015 report, Dr. Stamp opined that appellant was totally disabled from June 7 to October 15, 2013 as she had difficulty manipulating parcels due to bilateral hand weakness.

In a May 14, 2015 report, Dr. Filipowicz opined that appellant was totally disabled from work from June 7, 2013 through May 22, 2014 due to bilateral carpal tunnel syndrome. He asserted that there was “absolutely no way that [appellant] could work during” that period. Appellant also submitted an anesthesia record from the March 4, 2014 right carpal tunnel release with a request for authorization.

By decision dated February 11, 2016, OWCP denied appellant’s request for reconsideration, as the request was untimely filed and failed to demonstrate clear evidence of error. It found that appellant’s letter requesting reconsideration was received on January 12, 2016, more than one year after OWCP’s August 22, 2014 decision, the final merit decision in the claim. OWCP conducted a limited review of the evidence submitted in support of the request for reconsideration, and found that it failed to demonstrate clear evidence of legal or factual error in its August 22, 2014 decision. It noted that there was no evidence of record that appellant had submitted a request for reconsideration on May 1, 2015.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely.

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964 (1990).

In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of the last merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the received date) in the Integrated Federal Employee's Compensation System (iFECS).⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁸ OWCP regulations and procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error by OWCP.¹⁴ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁵

⁶ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ 5 U.S.C. § 10.607(b); *supra* note 4; *Jesus D. Sanchez*, *supra* note 5.

⁸ *Supra* note 4.

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

¹⁰ *Supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5.

¹³ *Supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Gregory Griffin*, *supra* note 6.

ANALYSIS

In a letter dated December 13, 2015 and received by OWCP on January 12, 2016, appellant requested reconsideration regarding her claim for leave buyback. The Board finds that as more than one year elapsed from the most recent merit decision on this issue, OWCP's August 22, 2014 decision, and appellant's request for reconsideration received by OWCP on January 12, 2016, her request for reconsideration was untimely filed.¹⁶

The Board also finds that appellant failed to demonstrate clear evidence of error. In its August 22, 2014 decision, OWCP denied modification of its April 10, 2014 merit decision denying her request to buyback leave for work absences from June 7 to October 15, 2013. The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration, *i.e.*, that she had submitted a timely reconsideration request, is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.¹⁷

The medical evidence submitted by appellant following OWCP's August 22, 2014 decision is insufficient to demonstrate clear evidence of error. The March 4, 2014 anesthesia record and authorization request does not address the claimed period, and is therefore irrelevant. Dr. Stamp, an attending Board-certified family practitioner, and Dr. Filipowicz, an attending neurosurgeon, asserted that appellant was disabled for work from June 7 to October 15, 2013. As noted, the term clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to demonstrate clear evidence of error.¹⁸ The evidence must establish, on its face, that OWCP's decision in question was wrong. Even if Dr. Stamp's and Dr. Filipowicz's reports, if reviewed on their merits, would warrant additional development, they are insufficient to establish that the August 22, 2014 decision was erroneous. The Board, therefore, finds that the medical evidence submitted on reconsideration does not create a substantial doubt as to the correctness of OWCP's August 22, 2014 decision.

CONCLUSION

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

¹⁶ 20 C.F.R. §§ 10.607; 10.608(b).

¹⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁸ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1602.3(c) (March 2011). *M.C.*, Docket No. 16-1135 (issued September 11, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 11, 2016 is affirmed.

Issued: November 17, 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