

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

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**S.G., Appellant**

**and**

**U.S. POSTAL SERVICE, GARY-TOLLESTON  
STATION, Gary, IN, Employer**

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**Docket No. 17-1433  
Issued: October 24, 2017**

*Appearances:*  
*Stephanie N. Leet, 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 June 19, 2017 appellant, through counsel, filed a timely appeal from a May 24, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision in this case was an August 21, 2013 Board decision.<sup>2</sup> As there was no merit decision issued by OWCP within 180 days of this appeal, pursuant to the Federal Employees'

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<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> The decision of the Board is final upon the expiration of 30 days from the date of issuance, and is final as to the subject matter appealed. 20 C.F.R. § 501.6(d).

Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal counsel contends that OWCP erred as it did not consider her brief and a new medical report dated June 13, 2016 from Dr. Neil Allen, a Board-certified internist and neurologist, submitted by appellant along with her request for reconsideration. She asserts that this evidence establishes causal relationship and requests that the Board accept appellant's claim.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On June 15, 2012 appellant, then a 44-year-old supervisor of customer services, filed an occupational disease claim (Form CA-2) alleging work-related tendinitis. She noted that she first became aware of her condition on November 19, 2009 and realized its connection to her federal employment on December 8, 2009.

By letter dated July 10, 2012, OWCP informed appellant of the deficiencies in her claim and afforded her 30 days to submit additional evidence and respond to its questionnaire.

In an August 3, 2012 statement, appellant indicated that she performed the duties of a clerk for a two-week period due to a staff shortage. She pushed all-purpose containers, gurneys, and hand trucks, carried tubs and parcels, and sorted and loaded mail for deliveries. As a result, appellant injured both shoulders. She submitted medical evidence dated March 13 to May 9, 2012 which addressed her bilateral shoulder conditions and physical therapy.

By decision dated September 7, 2012, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record did not contain a medical diagnosis from a physician in connection with the accepted factors of employment. It noted that the reports from a nurse practitioner and a physical therapist were not countersigned by a qualified physician, and were therefore of no probative value.

On October 15, 2012 appellant requested reconsideration. She did not submit any additional evidence. In an October 24, 2012 decision, OWCP denied appellant's request for

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that appellant submitted new evidence with her appeal. The Board, however, is precluded from reviewing evidence as its review of the case record is limited to the evidence of record which was before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1); *see Steven S. Saleh*, 55 ECAB 169 (2003).

<sup>5</sup> Docket No. 13-0896 (issued August 21, 2013).

reconsideration of the merits of the claim under section 8128(a) of FECA. It found that her reconsideration request neither raised substantive legal questions nor included relevant and pertinent new evidence.

On December 17, 2012 appellant again requested reconsideration and submitted new evidence. On March 1, 2013 OWCP denied modification of the September 7, 2012 decision. It found that the medical evidence submitted did not contain a rationalized medical opinion explaining how appellant's diagnosed bilateral shoulder conditions were caused by the established employment factors.

On March 5, 2013 appellant appealed the September 7, 2012 and March 1, 2013 decisions to the Board. The Board, on August 21, 2013, affirmed these decisions, finding that appellant had not met her burden of proof to establish a bilateral shoulder condition causally related to the accepted employment factors.

Appellant again requested reconsideration on March 10, 2014. She did not submit any additional evidence. In a May 28, 2014 decision, OWCP denied appellant's request for reconsideration of the merits of the claim under section 8128(a). It again found that her reconsideration request neither raised substantive legal questions nor included relevant and pertinent new evidence.

On June 3, 2015 appellant again requested reconsideration.

By decision dated May 24, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that it had neither raised substantive legal questions nor included relevant and pertinent new evidence sufficient to warrant reopening the case for further merit review under section 8128(a).

### **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.”<sup>6</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that

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<sup>6</sup> 5 U.S.C. § 8128(a).

an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>7</sup>

OWCP should review the file to determine whether the application for reconsideration was received within one year of a merit decision. Timeliness is determined by the document receipt date of the reconsideration request the received date in the Integrated Federal Employees' Compensation System (iFECS). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>8</sup>

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>9</sup>

The term clear evidence of error is intended to represent a difficult standard.<sup>10</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>11</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded to OWCP for application of the appropriate standard of review.<sup>12</sup>

An application for reconsideration must be received by OWCP within one year of the date of the last merit review of the claim, including any merit review by the Board.<sup>13</sup> The last merit decision of record was the Board's August 21, 2013 decision.<sup>14</sup> On March 10, 2014 appellant submitted a timely reconsideration request, within one year of the Board's August 21, 2013 decision. On May 28, 2014 OWCP denied her request for reconsideration finding that she neither raised substantive legal questions nor included relevant and pertinent new evidence sufficient to warrant merit review. Appellant again requested reconsideration on June 3, 2015. By decision dated May 24, 2017, OWCP denied her request, finding that she neither raised substantive legal questions nor included relevant and pertinent new evidence sufficient to warrant merit review.

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<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (February 2016).

<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> *Supra* note 8 at Chapter 2.1602.5.a (February 2016).

<sup>11</sup> *Id.* at Chapter 2.1602.5.b.

<sup>12</sup> *See C.W.*, Docket No. 17-0836 (issued August 7, 2017); *K.K.*, Docket No. 16-1187 (issued February 7, 2017); *E.B.*, Docket No. 16-0746 (issued June 1, 2016).

<sup>13</sup> *See Mary E. Schipske*, 43 ECAB 318 (1991); *see also C.V.*, Docket No. 14-1293 (issued February 23, 2015).

<sup>14</sup> *Supra* note 5.

The Board finds that, in its May 24, 2017 decision, OWCP erroneously applied the standard of review for timely requests for reconsideration as set forth at 20 C.F.R. §§ 10.605 through 10.607. As more than one year had elapsed from the August 21, 2013 merit decision to the filing of appellant's request for reconsideration on June 3, 2015, OWCP should have applied the clear evidence of error legal standard.<sup>15</sup> This is the appropriate standard for cases in which a reconsideration request is untimely filed.<sup>16</sup> As such, the Board will remand the case to OWCP for application of the standard for reviewing an untimely request for reconsideration as set forth in 20 C.F.R. § 10.607(b) under the more stringent clear evidence of error standard.<sup>17</sup> Following any necessary further development, OWCP shall issue an appropriate decision.

On appeal counsel contends that OWCP committed clear evidence of error as it did not consider her brief and a new medical report dated June 13, 2016 from Dr. Allen submitted by appellant along with her request for reconsideration.<sup>18</sup> She asserts that this evidence establishes causal relationship and asks that the Board accept appellant's claim. As set forth above, the Board does not have jurisdiction over the merits of the claim. Furthermore, the case will be remanded to OWCP for application of the appropriate standard of review because appellant's request for reconsideration was untimely submitted.

### **CONCLUSION**

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

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<sup>15</sup> See *John W. O Connor*, 42 ECAB 797 (1991).

<sup>16</sup> See *Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>17</sup> *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).

<sup>18</sup> The Board notes that the evidence counsel claimed he submitted to OWCP on reconsideration is not contained in the case record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 24, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision.

Issued: October 24, 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