

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

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**B.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Milwaukee, WI, Employer**

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**Docket No. 17-1452  
Issued: October 25, 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 June 19, 2017 appellant filed a timely appeal from a December 23, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from December 4, 2015, the date of the most recent merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's December 6, 2016 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

On November 20, 2014 appellant, then a 60-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder injury on October 25, 2014

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

while loading an overloaded trailer. She stopped work on October 26, 2014. The employing establishment controverted continuation of pay, noting that the medical evidence did not support temporary total disability.

In support of her claim, appellant submitted several reports from nurse practitioners dated between October 28 and November 18, 2014.

By letter dated December 5, 2014, OWCP informed appellant of the factual and medical evidence necessary to establish her claim. It noted that she had submitted evidence from nurse practitioners, who were not considered physicians under FECA.<sup>2</sup> Appellant was afforded 30 days to submit the necessary evidence.

In response, appellant submitted notes from physical therapists and nurses dated November 3 to December 17, 2014.

OWCP also received a note dated December 17, 2014 from Dr. John P. Wall, a specialist in family medicine. Dr. Wall diagnosed right shoulder patellar tendinitis and prescribed a work specialty rehabilitation program. In another note of the same date, he recommended restrictions of working no more than four hours daily for five days per week; no lifting over 15 pounds in each arm; and no pushing and pulling of either arm.

By decision dated January 8, 2015, OWCP denied appellant's claim for compensation. It found that appellant had submitted insufficient evidence to establish causal relationship between the accepted October 25, 2014 employment incident and her diagnosed right shoulder condition.

Appellant continued to submit reports dated December 31, 2014 to February 11, 2015 from nurse practitioners and physical therapists.

On May 19, 2015 OWCP received appellant's request for reconsideration of OWCP's January 8, 2015 decision. With her request, she included a narrative statement, clarifying that her date of injury was on October 25, 2014, and that her claim was for a traumatic injury.

On December 4, 2015 OWCP reviewed the merits of appellant's claim, but denied modification of its January 8, 2015 decision as appellant still had not submitted sufficient evidence to establish causal relationship.

On March 3, 2016 OWCP received a report dated November 6, 2015, from Dr. Dennis R. Anderson, Board-certified in emergency medicine, who examined appellant and diagnosed plantar fasciitis of the right foot. Dr. Anderson noted that on November 1, 2015 appellant noticed some pain in her right distal heel, but did not recall an acute injury.

By letter received by OWCP on December 6, 2016, appellant requested reconsideration of OWCP's December 4, 2015 decision. She did not provide additional evidence or a narrative statement with her request for reconsideration.

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<sup>2</sup> *Supra* note 1.

By decision dated December 23, 2016, OWCP denied appellant's request for reconsideration. It found that her request was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, 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>3</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.<sup>4</sup> Timeliness is determined by the document receipt date (i.e., the "received date" in OWCP's Integrated Federal Workers' Compensation System.<sup>5</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>6</sup>

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>7</sup> OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

<sup>5</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016). OWCP's procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate."

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.<sup>12</sup> 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 on the part of OWCP.<sup>13</sup>

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>14</sup> In order to establish clear evidence of error, 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.<sup>15</sup>

### ANALYSIS

In its December 23, 2016 decision, OWCP properly determined that appellant failed to file a timely application for review. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.<sup>16</sup> The last merit decision in this case was dated December 4, 2015. One year from December 4, 2015 was Sunday, December 4, 2016. As this fell on a Sunday, appellant's reconsideration request was due on Monday, December 5, 2016. Because appellant's request for reconsideration was received by OWCP on Tuesday, December 6, 2016, OWCP properly determined that it was untimely filed. Therefore, appellant must demonstrate clear evidence of error with regard to the decision of December 4, 2015.

The Board finds that appellant has not demonstrated clear evidence of error with regard to OWCP's December 4, 2015 decision. She did not submit the type of positive, precise, and explicit evidence manifesting on its face that an error was committed in the denial of her claim.<sup>17</sup>

The only document received by OWCP between December 4, 2015 and December 23, 2016 was a medical report from Dr. Anderson diagnosing appellant with plantar fasciitis and the December 6, 2016 request for reconsideration. The medical report from Dr. Anderson is irrelevant to this claim as it concerns a medical condition of a separate body part, unrelated to the claimed right shoulder injury. As such, appellant has not submitted any relevant medical evidence that raises a substantial question concerning the correctness of OWCP's December 4, 2015 decision.

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<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>15</sup> See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>16</sup> 20 C.F.R. § 10.607(a).

<sup>17</sup> *Supra* note 10.

For these reasons, OWCP properly found that appellant's request for reconsideration was untimely filed, and determined that appellant did not demonstrate clear evidence of error in that decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 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