

FACTUAL HISTORY

On October 20, 1999 appellant, a 31-year-old federal law enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained a minor concussion and abrasions to her body after a fall due to heavy crosswinds on the parkway, which caused her to lose control of her bike. OWCP accepted the claim for contusion to head and body and closed head concussion.

On March 29, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a January 17, 2014 report, Dr. Wendy Ann J. Hutcheson, a Board-certified family practitioner, diagnosed diabetes, joint pain, gastroesophageal reflux disease (GERD), hiatal hernia, arthropathy of left shoulder, bilateral hip joint pain, right toe pain, and chronic maxillary sinusitis.

On January 24, 2014 Dr. Hutcheson diagnosed bursitis of the left shoulder.

In a May 28, 2014 report, Dr. Hutcheson diagnosed bilateral knee joint pain and low back pain.

On December 31, 2014 Dr. Hutcheson diagnosed right lateral epicondylitis, screening for colon cancer, lumbar muscle strain, migraine, and headache.

In a September 8, 2015 report, Dr. Audrey K. Tsao, a Board-certified orthopedic surgeon, diagnosed bilateral trochanteric bursitis.

On September 16, 2015 Dr. Tsao diagnosed left trochanteric bursitis and bursitis of the bilateral hips.

Appellant further submitted physical therapy reports dated February 12, 2014 and September 10, 2015.

In an April 28, 2016 development letter, OWCP notified appellant of the deficiencies of her claim and requested a medical report from a physician assessing her permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and establishing that she had reached maximum medical improvement. No additional evidence was received.

By decision dated June 2, 2016, OWCP denied appellant's schedule award claim, finding no medical evidence of record to establish permanent impairment of a scheduled member or function of the body. A memorandum in the case record indicates that on June 9, 2016 appellant telephoned OWCP to request a copy of its June 2, 2016 decision, which she claimed she never received. Appellant requested that her address of record be changed to a new address. On June 9, 2016 OWCP mailed another copy of the June 2, 2016 decision to the new address provided by appellant.

On June 8, 2017 appellant requested reconsideration by appeal request form dated June 5, 2017. In support thereof, she submitted a June 5, 2017 narrative statement contending that her reconsideration request was timely filed since she did not receive the June 2, 2016 OWCP decision until after it was resent to her on June 9, 2016.

Appellant submitted a November 9, 2016 report from Dr. Heather Devick, a Board-certified internist, who noted that “[p]ermanent impairment ratings have been deferred to physical therapy for a functional capacity evaluation” and a functional capacity evaluation dated March 8, 2017 that advised her not to return to her date-of-injury position.

A December 6, 2016 computerized tomography (CT) scan of the bilateral hips revealed degenerative changes of the hips with subchondral cystic changes greater on the right than the left.

In a June 12, 2017 letter, OWCP acknowledged receipt of appellant’s change of address request and advised that action had been taken to change her address for the purposes of case management.

By decision dated September 6, 2017, OWCP denied appellant’s request for reconsideration, finding that 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.² OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.⁴ 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).⁵

Section 10.607(b) provides that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP’s decision was, on its face, erroneous.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so

² See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁴ 20 C.F.R. § 10.607(a).

⁵ See *Jesus D. Sanchez*, *supra* note 2; *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

⁶ 20 C.F.R. § 10.607(b).

⁷ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁸ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-0956 (issued April 15, 2010).

⁹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

as to produce a contrary conclusion.¹⁰ 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.¹¹

To demonstrate 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.¹² The Board makes 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.¹³

In schedule award cases, a distinction is made between an application for a schedule award and a request for reconsideration of the denial of a schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. A claim for a schedule award or increased schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in greater permanent impairment.¹⁴ Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award. A request for a schedule award or increased schedule award is not subject to time limitations. OWCP should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.¹⁵ The Board has held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in Integrated Federal Employees'

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ See *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994); *C.M.*, Docket No. 17-0310 (issued February 15, 2017); see also *B.K.*, 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate an application for reconsideration); see also *J.F.*, Docket No. 13-0112 (issued November 6, 2013); *R.B.*, Docket No. 16-1863 (issued April 3, 2017).

¹⁵ 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

Compensation System (iFECS).¹⁶ The most recent merit decision was OWCP's June 2, 2016 schedule award decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since appellant's request was not received by OWCP until June 8, 2017, it was filed outside the one-year time period.¹⁷ As appellant's June 8, 2017 request for reconsideration was received more than one year after the June 2, 2016 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁸ Appellant requested reconsideration on June 8, 2017. When the underlying compensation issue is a schedule award, an initial question is whether the claimant has submitted an application for reconsideration or has requested an increased schedule award. Even if appellant has requested reconsideration, if there is new and relevant evidence with respect to an increased permanent impairment, then a claimant may be entitled to a merit decision on the issue,¹⁹ but when a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that she has filed an application for reconsideration of a schedule award decision.²⁰ The Board finds that appellant did not submit relevant evidence with respect to the extent of her permanent impairment and, thus OWCP properly considered her submission as an application for reconsideration.

The record indicates that OWCP mailed a copy of the June 2, 2016 merit decision to appellant's correct address of record. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual.²¹ This presumption known as the mailbox rule arises when it appears from the record that the notice was properly addressed and duly mailed.²² The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of OWCP itself, will raise the presumption that the original was received by the addressee.²³

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, *supra* note 12.

¹⁷ OWCP's procedures were changed, effective August 29, 2011. Section 10.607 of the new regulations provides that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. *See* 20 C.F.R. § 10.607 (2011); *see also C.B.*, Docket No. 13-1732 (issued January 28, 2014) (where the Board held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in iFECS). Therefore, OWCP utilized the new regulations and found that as OWCP received appellant's request for reconsideration on September 23, 2016, or over one year after the September 22, 2015 decision, appellant's request was untimely filed.

¹⁸ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ *Supra* note 15.

²⁰ *See W.J.*, Docket No. 12-1746 (issued February 5, 2013).

²¹ *See George F. Gidicsin*, 36 ECAB 175 (1984) (the Board held that when OWCP sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice). *See also D.L. Solano*, Docket No. 04-0702 (issued July 2, 2004).

²² *See Michelle Lagana*, 52 ECAB 187 (2000).

²³ *See Larry L. Hill*, 42 ECAB 596 (1991).

In its June 2, 2016 decision, OWCP denied appellant's schedule award claim, finding that no medical evidence was submitted to establish permanent impairment of a scheduled member or function of the body. In support of her untimely request for reconsideration, appellant submitted a November 9, 2016 report from Dr. Devick. Dr. Devick failed to provide an impairment rating based on the sixth edition of the A.M.A., *Guides*. Thus, the Board finds that this evidence does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's schedule award claim, nor raise a substantial question as to the correctness of OWCP's decision.

Similarly, December 6, 2016 CT scan and March 8, 2017 functional capacity evaluation fail to provide an impairment rating from a physician based on the sixth edition of the A.M.A., *Guides*. Therefore, the Board finds that this documentation does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's schedule award claim, nor raise a substantial question as to the correctness of OWCP's decision.

To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.²⁴ None of the evidence or argument submitted on reconsideration manifests on its face that OWCP committed an error in denying appellant's claim for a schedule award. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant's untimely request for reconsideration is insufficient to demonstrate clear evidence of error.

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.

²⁴ *Supra* note 16 at Chapter 2.1602.5.a (February 2016); see *Dean D. Beets, supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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