

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

S.G., Appellant)	
)	
and)	Docket No. 18-0421
)	Issued: August 17, 2018
U.S. POSTAL SERVICE, GARY-TOLLESTON)	
STATION, Gary, IN, Employer)	
)	

Appearances:
Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 21, 2017 appellant, through counsel, filed a timely appeal from a November 29, 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 which became final after 30 days of issuance, and is not subject to further review.² As there is no merit decision by OWCP within 180 days of the filing of this appeal, the Board lacks jurisdiction to

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 20 C.F.R. § 501.6(d); see *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

review the merits of the case pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.⁴

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

This case has previously been before the Board.⁵ The facts and circumstances as set forth in the Board's prior decisions 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 employment-related tendinitis. She claimed that she supervised carriers and clerks, which involved counting the mail at carriers' cases and maintaining work hours, reports, and time-keeping on a daily basis. Appellant alleged that she first became aware of her claimed condition on November 19, 2009 and realized its relationship to her federal employment on December 8, 2009.

By decision dated September 7, 2012, OWCP denied appellant's occupational disease claim. It found that she had failed to submit medical evidence containing a diagnosis in connection with the established factors of employment. OWCP related 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.

Appellant requested reconsideration on October 15, 2012. She did not submit any additional evidence.

By decision dated October 24, 2012, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 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 requested reconsideration and submitted new medical evidence.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the issuance of OWCP's November 29, 2017 decision and on appeal, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. Thus, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *see Steven S. Saleh*, 55 ECAB 169 (2003).

⁵ Docket No. 13-0896 (August 21, 2013); Docket No. 17-1433 (issued October 24, 2017).

By decision dated March 1, 2013, OWCP modified the September 7, 2012 decision to reflect that appellant had now established diagnosed conditions of bilateral shoulder subacromial syndrome and acromioclavicular joint arthritis. However, the claim remained denied as she had not submitted a rationalized medical opinion sufficient to establish causal relationship between her diagnosed conditions and the established employment factors.

Appellant appealed to the Board on March 5, 2013. By decision dated August 21, 2013, the Board affirmed OWCP's September 7, 2012 and March 1, 2013 decisions.⁶ The Board found that appellant had not submitted rationalized medical opinion evidence sufficient to establish that the established employment factors had caused or contributed to a bilateral shoulder condition.

By appeal request form received on March 10, 2014, appellant requested reconsideration before OWCP regarding its September 7, 2012 and March 1, 2013 decisions. She resubmitted the results of diagnostic testing of her right and left shoulders dated June 1, 2013 from Dr. Jay L. Korach, a Board-certified radiologist, and a medical report also dated June 1, 2013 from Dr. Harry A. Moffit, an orthopedic surgeon.

By decision dated May 28, 2014, OWCP again denied appellant's request for reconsideration of the merits of her claim under section 8128(a) of FECA, finding that it neither raised substantive legal questions, nor included relevant and pertinent new evidence.

On June 3, 2015 appellant again requested reconsideration. She submitted medical reports dated March 15, 2014 to February 8, 2016, which addressed her lumbar spine conditions and resultant medical treatment, work capacity, and restrictions.

By decision dated May 24, 2017, OWCP again denied appellant's request for reconsideration of the merits of her claim pursuant to section 8128(a). It found that the evidence submitted was irrelevant or immaterial because it had no bearing on the issue of her claim for a bilateral shoulder injury. OWCP noted that appellant had submitted medical evidence relevant to her claim for a lumbar injury, assigned OWCP File No. xxxxxx176.

Appellant appealed to the Board on June 19, 2017. By decision dated October 24, 2017, the Board set aside the May 24, 2017 decision and remanded the case to OWCP for further review under the clear evidence of error standard.⁷ The Board found that OWCP received appellant's latest request for reconsideration on June 3, 2015, which was more than one year after the last merit decision dated August 21, 2013. Thus, the Board found that OWCP applied the wrong standard of review to the untimely request for reconsideration. Regarding counsel's contentions on appeal that OWCP committed error as it did not consider her brief and Dr. Allen's June 13, 2016 report which allegedly established causal relationship, the Board found that Dr. Allen's June 13, 2016 report was not of record.

On remand, by decision dated November 29, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁶ Docket No. 13-0896 (issued August 21, 2013).

⁷ Docket No. 17-1433 (issued October 24, 2017).

It noted that she had not submitted any new evidence pertaining to her claim for a bilateral shoulder condition.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁸ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹² is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹³ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁴

⁸ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁹ 20 C.F.R. § 10.607(a). 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.

¹⁰ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

ANALYSIS

The Board finds that OWCP properly determined that appellant's reconsideration request was untimely filed. OWCP's regulations¹⁵ and procedures¹⁶ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. The most recent merit decision was the Board's August 21, 2013 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. As her June 3, 2015 request for reconsideration was received more than one year after the August 21, 2013 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her June 15, 2012 occupational disease claim.¹⁷

The Board finds that appellant failed to demonstrate clear evidence of error on the part of OWCP in the denial of her occupational disease claim. The medical evidence submitted by her in support of the untimely reconsideration request does not raise a substantial question concerning the correctness of OWCP's decision. The reports dated March 15, 2014 to February 8, 2016 addressed appellant's lumbar spine conditions for which she had filed a claim under OWCP File No. xxxxxx176. This evidence did not address the relevant issue of causal relationship between her claimed bilateral shoulder conditions in the instant case and the accepted employment factors. The Board has held that clear evidence of error is not established if appellant's new evidence does not address the issue upon which OWCP originally denied the claim.¹⁸ Thus, the medical evidence submitted by her on reconsideration does not manifest on its face that OWCP committed error in denying her occupational disease claim.¹⁹

On appeal counsel contends that OWCP committed clear evidence of error as it did not consider the new medical report dated June 13, 2016 from Dr. Allen. She asserts that this evidence establishes causal relationship between appellant's claimed bilateral shoulder injury and her federal employment. Counsel requests that the Board accept appellant's claim. As discussed above, the Board does not have jurisdiction over the merits of this claim. Appellant therefore did not establish 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.

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

¹⁶ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

¹⁸ *A.W.*, Docket No. 16-1344 (issued November 2, 2016); *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

¹⁹ 20 C.F.R. § 10.607(a); *see also Barbara W. Williams.*, Docket No. 00-1331 (issued February 21, 2002).

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board