

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

P.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 18-0494
Issued: July 9, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 9, 2018 appellant filed a timely appeal from a September 25, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated March 8, 2016, 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 as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 30, 2010 appellant, then a 51-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained injury to both shoulders due to the repetitive lifting

¹ 5 U.S.C. § 8101 *et seq.*

and pulling required by her job. She indicated that she first became aware of her claimed condition on June 1, 2010 and first realized on November 30, 2010 that it was caused or aggravated by her federal employment. Appellant did not stop work.

After development of the evidence and denial of her claim by decisions dated March 23, 2011, May 3, 2012, and March 15, 2013, OWCP accepted in April 2014 (under File No. xxxxxx746) that appellant sustained bilateral complete ruptures of the rotator cuffs of her shoulders.² It paid her disability on the daily rolls for time lost from work in May, August, and September 2014 when she attended treatment sessions for her accepted employment injury.

On November 20, 2015 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted employment injury.

In a December 18, 2015 development letter, OWCP requested that appellant submit a report from her attending physician containing a rating of upper extremity permanent impairment derived in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

Appellant submitted a November 19, 2015 report from Dr. Thesselon W. Monderson, an attending Board-certified orthopedic surgeon, who detailed the findings of the physical examination he conducted on that date. Dr. Monderson noted that appellant complained of left shoulder pain and he reported normal results upon inspection and palpation of the skin/subcutaneous tissue of the left shoulder. He diagnosed primary osteoarthritis of the left shoulder and indicated that a corticosteroid joint injection would be provided for that region.

By decision dated March 8, 2016, OWCP denied appellant's claim for a schedule award. It found that she failed to submit a rating of upper extremity permanent impairment derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

On March 9, 2017 appellant requested reconsideration of the March 8, 2016 decision. She noted that Dr. Monderson had left the country and she discussed her attempts to obtain a report containing a rating of her upper extremity permanent impairment.

Appellant submitted a document memorializing her rescheduling of a physical therapy session originally scheduled for May 12, 2016.

By decision dated March 16, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence and argument submitted by appellant was irrelevant or immaterial to the underlying schedule award issue.⁴

² The record also contains documents showing that in October 2002 OWCP had accepted (under File No. xxxxxx987) that appellant sustained bilateral carpal tunnel syndrome.

³ A.M.A., *Guides* (6th ed. 2009).

⁴ OWCP indicated that appellant's reconsideration request was untimely filed, but noted that she was "given the benefit of doubt due to inclement weather on the East Coast."

In an undated letter received on September 14, 2017, appellant again requested reconsideration of OWCP's March 8, 2016 decision. She indicated that her attending physician advised her that he could only provide an impairment rating for her if she visited him as a workers' compensation patient. Appellant requested that OWCP send her for a "proper" examination or allow her attending physician to see her as a workers' compensation patient.

Appellant submitted a copy of a January 19, 2011 OWCP development letter⁵ on which a person with an illegible signature made handwritten notations. The individual provided examination and test results, a diagnosis of bilateral rotator cuff tears, and a summary of the work duties that appellant believed caused the diagnosed condition. Appellant also submitted a portion of OWCP's March 16, 2017 decision with handwritten notations by an unidentified individual.

By decision dated September 25, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that her request for reconsideration was untimely filed because it was not received until September 14, 2017, more than one year after issuance of its March 8, 2016 merit decision. OWCP further found that the evidence and argument appellant submitted in connection with her untimely reconsideration request failed to demonstrate clear evidence of error in its March 8, 2016 decision denying her schedule award claim.

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 end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.⁶

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁸

⁵ OWCP sent this development letter to appellant in conjunction with the development of the occupational disease claim she filed on November 30, 2010.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁹ The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

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

The Board initially finds that OWCP properly determined in its September 25, 2017 decision that appellant had failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁵ As appellant's request for reconsideration of its March 8, 2016 merit decision was not received by OWCP until September 14, 2017, more than one year after issuance of its March 8, 2016 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its March 8, 2016 decision.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its March 8, 2016 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its March 8, 2016 decision.¹⁶ The evidence and argument she submitted did not raise a substantial question concerning the correctness of OWCP's decision. Appellant submitted a statement in which she discussed her unsuccessful attempts to obtain a rating of her upper extremity permanent impairment. However, she did not

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Id.*

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ *See supra* note 7.

¹⁶ *See supra* note 8.

explain how this evidence raised a substantial question as to the correctness of OWCP's March 8, 2016 decision denying her schedule award claim.¹⁷

Appellant submitted two documents in support of her untimely reconsideration request, a copy of a January 19, 2011 OWCP development letter on which a person with an illegible signature made handwritten notations and a portion of OWCP's March 16, 2017 decision with handwritten notations by an unidentified individual. Neither of these nonmedical documents show that OWCP erred in issuing its March 8, 2016 decision denying her schedule award claim.¹⁸

The Board finds that appellant's application for review does not show on its face that OWCP committed error when it denied her schedule award claim in its March 8, 2016 decision.¹⁹ As noted, clear evidence of error is intended to represent a difficult standard²⁰ and appellant has not met this standard in this case.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's March 8, 2016 decision and OWCP properly 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 as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ See *supra* notes 9 and 11.

¹⁸ The Board has held that a report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence. *C.B.*, Docket No. 09-2027 (issued May 12, 2010). The Board notes that, even if the document with notations on the January 19, 2011 development letter constituted medical evidence, the document does not contain any rating of appellant's upper extremity permanent impairment, which is the underlying issue.

¹⁹ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

²⁰ See *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2018
Washington, DC

Christopher J. Godfrey, 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