

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

C.R., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Quincy, IL, Employer)

**Docket No. 17-0226
Issued: June 26, 2018**

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 November 19, 2016 appellant filed a timely appeal from an August 18, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from November 17, 2014, the date of the last merit decision, 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 to review the merits of appellant's 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 December 29, 2004 appellant, then a 54-year-old clerk, filed an occupational disease claim (Form CA-2) which OWCP accepted for aggravation of bilateral osteoarthritis. OWCP also accepted other complications due to internal joint prosthesis localized and unspecified

¹ 5 U.S.C. § 8101 *et seq.*

osteoarthritis, lower leg, bilateral. It authorized a left knee arthroscopy in 1991, a left knee total replacement on October 22, 2003 and a right knee total replacement on December 2, 2011. OWCP paid appellant appropriate compensation and medical benefits, which included a schedule award for 28 percent permanent impairment of the right lower extremity and 50 percent permanent impairment of the left lower extremity on April 17, 2008.

Appellant filed a claim for an increased schedule award (Form CA-7) on March 25, 2013.

By development letter dated March 29, 2013, OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days. Appellant was advised that, any impairment rating must utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (hereinafter, A.M.A., *Guides*)² as the appropriate edition for all awards issued after that date.

In a June 19, 2013 report, OWCP's medical adviser determined that appellant had not submitted a report from a treating physician which included a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

On July 8, 2013 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions, and the medical record to Dr. Richard Katz, Board-certified in physical medicine and rehabilitation.

In a report dated August 6, 2013, Dr. Katz described appellant's history of injury and treatment, examined appellant, and provided his findings. He utilized the applicable sections of the A.M.A., *Guides* and determined that appellant had 21 percent permanent impairment for each knee. Dr. Katz determined that December 11, 2012, one year after the last surgery, was the date of maximum medical improvement.

In an August 15, 2013 report, OWCP's medical adviser, explained that the Dr. Katz' ratings were acceptable, but they must be subtracted from the previously received schedule award. He subtracted the current amounts from the prior amounts (21 percent minus 28 percent for the right lower extremity = negative 7 percent or 0 percent) and (21 percent minus 50 percent for the left lower extremity = negative 29 percent or 0 percent). The medical adviser explained that there was no increase of impairment. He explained that the date of maximum medical improvement was incorrect. The medical adviser explained that it should be the date of Dr. Katz' August 6, 2013 report, which was the date of his examination and the date his findings were used to calculate the percentages of permanent impairment.

By decision dated August 19, 2013, OWCP denied appellant's claim for an increased schedule award. It found that there was no additional permanent impairment greater than that which was previously awarded.

Appellant requested reconsideration on August 12, 2014 and submitted additional evidence.

² A.M.A., *Guides* (6th ed. 2009).

By decision dated November 17, 2014, OWCP denied modification of the August 19, 2013 denial of his claim for an increased schedule award. It found that there was no rationalized evidence of record sufficient to support that the decision was incorrect or that she had increased impairment.

Appellant again requested reconsideration on November 18, 2015. She argued that she was submitting notes from her physicians, Dr. Randal R. Trecha, a Board-certified orthopedic surgeon, and Dr. Peter K. Buchert, a Board-certified orthopedic surgeon, as well as a statement from her husband about the changes in her lifestyle. Appellant indicated that, despite having knee replacement surgery, she was totally debilitated and could no longer climb stairs or walk very far, and she could no longer do her basic household chores. She argued that her life changes were substantial and she requested another evaluation.

The March 27, 2015 treatment notes from Dr. Trecha contained a diagnosis of lumbosacral spondylosis and osteoarthritis, unspecified of the leg and degenerative joint disease of the knee. Dr. Trecha also noted that there was no myelopathy.

April 20, 2015 treatment notes from Dr. Buchert revealed osteoarthritis of the right knee. Dr. Buchert indicated that he was worried that appellant was having trouble with her back and it was causing her right leg to be weak. He recommended additional diagnostic testing and would check on her in six weeks. Dr. Buchert saw appellant on June 1, 2015 and noted that he did not “see anything major going on with her knee.”

In a November 12, 2015 note, appellant’s husband indicated that appellant’s injuries resulted in her being unable to perform basic chores around the house, limited her walking abilities, and precluded her from gardening. He indicated that she was mostly bedridden due to the extreme pain she experienced and was more crippled with osteoarthrosis.

OWCP also received physical therapy notes dated April 22, 24, and 29, May 1, 13, and 15, 2014. The April 22, 2014 physical therapy notes were cosigned by Dr. David M. Bingham, an orthopedic surgeon and osteopath.

In a memorandum of telephone call dated May 16, 2016, appellant called to advise that her original reconsideration request was submitted within the one-year timeframe and she received a letter dated November 23, 2015 advising her that there was no decision within the date she requested reconsideration.³ She argued that she resubmitted the request on November 12, 2015. However, she was advised that there was no receipt until February 5, 2016.

In a memorandum of telephone call dated June 10, 2016, appellant called to argue that she received a letter dated November 23, 2015 advising her that there was no decision within the date she requested reconsideration. OWCP explained that they would process the request and render a decision in up to 90 days.

³ The letter was attached and had a case File No. xxxxxx893.

In a memorandum of telephone call dated August 4, 2016, appellant contacted OWCP to ascertain the status of her request for reconsideration. She was advised that her request was still under review.

By decision dated August 18, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that regardless of the request being inadvertently placed in a different file, the request was untimely.

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.”⁴

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.⁵ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish 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.⁶

To show 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.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to establish that the evidence could be

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a)

⁶ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

construed so as to produce a contrary conclusion.⁹ 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.¹⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹¹

ANALYSIS

In the present case, OWCP issued a merit decision with respect to a schedule award dated November 17, 2014. That award denied modification of the August 19, 2013 decision, which denied his claim for an increased schedule award. OWCP found that there was no rationalized evidence to support that the decision was incorrect or that he had increased impairment.

Appellant requested reconsideration on November 18, 2015. 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,¹² 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.¹³ In this case, she did not submit any relevant evidence with respect to an increased permanent impairment and, therefore; OWCP properly considered her submission as an application for reconsideration.

As noted above, a request for reconsideration must be received by OWCP within one year of the date of OWCP's final decision. Therefore, appellant had until November 17, 2015 to submit a timely reconsideration request. The date of receipt is the received date in the Integrated Federal Employees' Compensation System.¹⁴ Since the reconsideration request was received on November 18, 2015, the Board finds that it was untimely.

An untimely reconsideration request must demonstrate clear evidence of error by OWCP. In this case, appellant requested reconsideration, but did not demonstrate error by OWCP in its November 17, 2014 schedule award decision.

Appellant argued that she had changes in her life that made her life such that she was totally debilitated and could no longer climb stairs or walk very far, and she could no longer do her basic household chores. She argued that her life changes were substantial and she requested another

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Nancy Marcano*, 50 ECAB 110 (1998).

¹² *See Linda T. Brown*, 51 ECAB 115 (1999).

¹³ *See W.J.*, Docket No. 12-1746 (issued February 5, 2013).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

evaluation. However, appellant did not submit any pertinent new or relevant evidence or argument with respect to error by OWCP in her schedule award decisions. Although she submitted reports from Drs. Trecha and Buchert, the physicians did not evaluate her permanent impairment pursuant to the A.M.A., *Guides*.¹⁵ These reports, therefore, did not demonstrate that appellant's prior schedule award was clearly erroneous, or that she might be entitled to an additional schedule award.¹⁶

The Board also notes that physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.¹⁷ To the extent they were signed by Dr. Bingham, he did not offer any opinion that appellant's prior schedule award was clearly erroneous. Consequently, these reports are insufficient to establish clear error by OWCP.

Likewise, the letter from appellant's husband describing her pain and limited activities would not establish clear evidence of error, as his opinion does not establish that the prior schedule award was clearly erroneous, or that she might be entitled to an additional schedule award.

OWCP issued a schedule award for 28 percent permanent impairment to the right lower extremity and 50 percent permanent impairment to the left lower extremity on April 17, 2008. By decision dated November 17, 2014, it denied modification of its August 19, 2013 decision, which denied her claim for an increased schedule award. OWCP found that there was no rationalized evidence to support that the decision was incorrect or that she had increased impairment.

On appeal appellant states that she mailed her reconsideration request on November 17, 2015. As discussed above, OWCP's procedures provide that timeliness is determined by the date of receipt by OWCP. Appellant also indicates that her request was sent certified mail and she could provide the receipt if allowed. She also noted that her request was misfiled. However, as found above, regardless of whether it was misfiled, the request was untimely. The only issue presented on appeal was whether she had established clear evidence of error. For the reasons indicated, appellant did not establish clear evidence of error in this case.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹⁵ OWCP evaluates the degree of permanent impairment according to the standards set forth in the A.M.A., *Guides*. See *K.W.*, 59 ECAB 284 (2007).

¹⁶ See *K.D.*, Docket No. 15-0524 (issued August 3, 2015).

¹⁷ *Id.*; *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuck*, 57 ECAB 316 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).

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.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2018
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