

FACTUAL HISTORY

On June 5, 2003 appellant, then a 52-year-old cash clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome (CTS) as a result of her repetitive employment duties. OWCP accepted the claim for bilateral CTS. Appellant stopped work on April 13, 2005 and received wage-loss compensation. She underwent left carpal tunnel release on July 11, 2005 and right traverse carpal ligament on November 1, 2005. Appellant retired on March 9, 2006.

On March 1, 2006 appellant filed a claim for a schedule award (Form CA-7).

By decision dated April 10, 2006, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity. The date of maximum medical improvement (MMI) was noted as February 23, 2006.

On August 16, 2011 appellant filed a claim for an increased schedule award (Form CA-7).

By decision dated May 7, 2012, OWCP granted appellant an additional schedule award for four percent permanent impairment of each upper extremity. The date of MMI was again noted as February 23, 2006.

On October 7, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

On February 12, 2015 appellant was referred to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of permanent impairment. In his February 12, 2015 report, Dr. Doman reported that MMI had been reached. He opined that appellant sustained five percent permanent impairment of the right upper extremity with respect to the median nerve and one percent permanent impairment of the left upper extremity. Dr. Doman reported that appellant was not entitled to an additional award beyond the nine percent previously received for permanent impairment of each upper extremity.

In reports dated March 23 and 26, 2015, Dr. James Dyer, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed Dr. Doman's report and concurred with his impairment rating for five percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity. He further stipulated that appellant was not entitled to more than the nine percent permanent impairment previously awarded for each upper extremity.

By decision dated April 1, 2015, OWCP found that appellant failed to establish permanent impairment of the right and left upper extremity greater than the nine percent previously awarded for each extremity. It found that the current medical evidence established that she was entitled to five percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity. As she had previously received nine percent for each upper extremity, appellant was not entitled to an increased schedule award.

On May 26, 2016 OWCP received appellant's request for reconsideration of the April 1, 2015 OWCP decision.

In an April 15, 2016 medical report, Dr. Robert Dinsmore, Board-certified in internal medicine, reported that appellant had a long standing history of CTS and was last evaluated in May 2014. He noted that she underwent bilateral carpal tunnel release in 2006 which helped for three to four years, but since then her symptoms worsened. Dr. Dinsmore related that appellant was now having the same symptoms that she had experienced prior to her surgeries. He performed a repeat electromyography (EMG) study which revealed normal findings for the sensory portion of the nerve conduction velocity (NCV), although appellant was unable to tolerate the EMG. Dr. Dinsmore noted that surgery may or may not alleviate her symptoms and reported that she had likely reached MMI from a surgical standpoint.

By decision dated June 6, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.³

In a letter received on July 25, 2017, appellant requested reconsideration of the June 6, 2016 decision for a schedule award. In support of her request, she submitted a June 3, 2016 medical report from Dr. Dinsmore documenting treatment for her bilateral CTS. Dr. Dinsmore noted that she had likely achieved MMI from a surgical standpoint and that her condition had not changed from the year before.

By decision dated August 15, 2017, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁶ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the "received date" in the Integrated Federal Employees' Compensation System (iFECS)).⁷ The Board has found that the imposition of this

³ On July 27, 2016 appellant filed another claim for a schedule award (Form CA-7).

⁴ 5 U.S.C. § 8128(a).

⁵ See *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016); *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁸

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ OWCP's procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ The Board must make an independent determination of whether a claimant has demonstrated 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.¹⁷

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing 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 an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition,

⁸ *Supra* note 5.

⁹ *See supra* note 7 at Chapter 2.1602.5 (February 2016).

¹⁰ *Id.*

¹¹ *Supra* note 5.

¹² *See M.P.*, *supra* note 5; *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 6.

¹⁴ *See M.P.*, *supra* note 5.

¹⁵ *Id.*; *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *See M.B.*, Docket No. 17-1505 (issued January 9, 2018); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁷ *See H.B.*, Docket No. 17-0414 (issued march 7, 2018); *Nancy Marcano*, 50 ECAB 110 (1998).

without new exposure, resulting in greater permanent impairment.¹⁸ As the Board explained in *Linda T. Brown*,¹⁹ a claimant may seek an additional schedule award if the evidence establishes that she sustained an impairment causally related to the employment injury. 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 an 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 not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

When the underlying compensation issue is a schedule award, an initial question is whether the claimant is requesting reconsideration or claiming an increased schedule award. In this case, contrary to *Linda T. Brown*,²⁰ appellant did not allege a worsening of her permanent impairment due to additional employment exposures, but instead attempted to show error in the prior schedule award decision. As she submitted evidence disagreeing with her prior schedule award decision, the Board finds that OWCP properly considered her submission as an application for reconsideration of the April 1, 2015 decision rather than a request for an additional schedule award.²¹

In its August 15, 2017 decision, OWCP determined that appellant failed to file a timely application for review. An application for reconsideration must be received within one year of the date of OWCP's merit decision.²² OWCP issued its most recent merit decision, denying appellant's schedule award claim, on April 1, 2015. The one-year time limitation for reconsideration began to run on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²³ Therefore, appellant had one year from April 1, 2015 to submit a timely request for reconsideration. Appellant's request for reconsideration was received on July 25, 2017

¹⁸ 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).

¹⁹ *Id.*

²⁰ See *Linda T. Brown*, *supra* note 18.

²¹ See *D.A.*, Docket No. 16-1715 (issued May 15, 2017).

²² 20 C.F.R. § 10.607.

²³ *Supra* note 18.

more than one year after the date of the last merit decision of record on April 1, 2015. As appellant's request for reconsideration was untimely and not received within one year of the April 1, 2015 merit decision, she must demonstrate clear evidence of error by OWCP in denying her claim.²⁴

The only medical evidence submitted was Dr. Dinsmore's June 3, 2016 report which noted bilateral CTS findings and that she had likely reached MMI from a surgical standpoint and that her condition had not changed from the year before. This report was substantially similar to Dr. Dinsmore's April 15, 2016 report, which was reviewed by OWCP in its June 6, 2016 decision. Appellant did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying her schedule award claim.²⁵ It is not apparent how submission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision.²⁶ The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to demonstrate clear evidence of error.²⁷ The Board finds that this evidence, however, is insufficient to establish that OWCP erred in its denial of appellant's claim.²⁸

Appellant did not submit the type of positive, precise, and explicit evidence that manifests on its face that OWCP committed an error.²⁹ Thus, she did not demonstrate clear evidence of error in the denial of her schedule award claim.³⁰

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed failed to demonstrate clear evidence of error.

²⁴ *P.R.*, Docket No. 14-0300 (issued May 12, 2014).

²⁵ *G.B.*, Docket No. 13-1557 (issued October 29, 2013).

²⁶ *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

²⁷ *Supra* note 7.

²⁸ *See M.C.*, Docket No. 16-1135 (issued September 11, 2017); *see also W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²⁹ *See A.S.*, Docket No. 16-0902 (issued September 28, 2016); *J.T.*, Docket No. 10-0313 (issued February 24, 2010).

³⁰ *See A.S., id.; B.B.*, Docket No. 08-0232 (issued August 7, 2008).

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 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