

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

_____)	
H.B., Appellant)	
)	
and)	Docket No. 17-0414
)	Issued: March 7, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Rand, WV, Employer)	
_____)	

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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 8, 2016¹ appellant, filed a timely appeal from a June 15, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 18, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from June 15, 2016, the date of OWCP's last decision was December 12, 2016. Since using December 14, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 8, 2016, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

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 23, 2008 appellant, then a 67-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral carpal tunnel syndrome due to repetitive work in the performance of his federal job duties. He underwent an electromyogram (EMG) on December 17, 2008, which demonstrated abnormal median motor and sensory responses. In a February 27, 2009 decision, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral ulnar neuropathy. Appellant underwent right carpal tunnel release on March 25, 2011 and left carpal tunnel release on May 18, 2011. He returned to full duty in October 2011.

Appellant filed a schedule award claim (Form CA-7) on November 22, 2011. His attending physician, Dr. Frank J. Trupo, a Board-certified plastic surgeon, examined him on March 21, 2012 and found decreased sensation in the fingertips and soreness in the proximal palms of his hands. Appellant demonstrated significant visible arthritis changes in the small joints in his hands.

On February 19, 2013 OWCP referred appellant for a second opinion evaluation with Dr. Barry Alan Levin, an orthopedic surgeon, to determine the extent of his permanent impairment for schedule award purposes. Dr. Levin examined appellant on March 11, 2013 and found no muscle wasting, some grip strength weakness with dropping of objects. He noted that appellant had degenerative changes to his hands and reports of numbness. Dr. Levin found some decreased sensation and determined that appellant reached maximum medical improvement (MMI) on October 24, 2011. He determined that appellant had one percent permanent impairment bilaterally.

In an April 3, 2013 supplemental report, Dr. Levin opined that appellant had two percent upper extremity impairment to both arms. He completed an upper extremity impairment worksheet on March 28, 2013 and opined that appellant had two percent impairment of each upper extremity. Dr. Levin utilized Table 15-23, on page 449 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ to determine appellant's grade modifiers due to test findings, history, physical findings, and divided the sum of these three modifiers by three to reach an average of 1.33. He noted that the default impairment rating was two percent permanent impairment of the upper extremities. Dr. Levin also reported that appellant's *QuickDASH* (Disabilities of the Arm, Shoulder and Hand) score was mild or one.

³ A.M.A., *Guides* (6th ed. 2009).

OWCP's medical adviser reviewed Dr. Levin's report on May 17, 2013 and determined that in accordance with the A.M.A., *Guides*⁴ appellant had one percent impairment of each of his upper extremities due to his entrapment compression neuropathies. He averaged the grade modifiers for test findings, history, physical findings, and functional scale, to reach 1.2 and determined that appellant had one percent upper extremity permanent impairment.⁵

In a May 20, 2013 decision, OWCP granted appellant schedule awards for one percent permanent impairment of his bilateral upper extremities. Appellant requested an oral hearing from OWCP's Branch of Hearings and Review on June 19, 2013.

At the oral hearing, appellant testified regarding his understanding of the application of the A.M.A., *Guides* to peripheral nerve disorders. He asserted that, based on his reading of the worksheet, an additional integer, three, should be added to the average of his grade modifiers. Appellant alleged that his impairment ratings should be 4.33 rather than 2.

By decision dated March 18, 2015, OWCP's hearing representative set aside the May 20, 2013 decision and remanded appellant's claim for clarification from Dr. Levin.

OWCP requested a supplemental opinion from Dr. Levin on November 7, 2013. Dr. Levin responded on December 5, 2013 and opined that appellant had two percent permanent impairment of each upper arm based on grade modifiers of 1 for test findings, 1 for history, physical findings of 1, and a *QuickDASH* score of 1 resulting in the default grade of two percent.⁶

OWCP's medical adviser reviewed Dr. Levin's reports and requested additional information on December 17, 2013. OWCP requested an additional report on February 11, 2014. On March 25, 2014 Dr. Levin noted that appellant had minor sensory loss in the distribution of the median nerve, as well as atrophy with the distribution of the median nerve. He concluded that appellant had two percent permanent impairment of his upper extremities bilaterally.

By decision dated April 24, 2014, OWCP granted appellant a schedule award for an additional one percent permanent impairment of each arm. Appellant requested an oral hearing from OWCP's Branch of Hearings and Review on May 20, 2014.

Appellant testified at the oral hearing on August 13, 2014 and again alleged that on the schedule award worksheet the integer of three should be added to his impairment rating. He also argued that he was entitled to an additional schedule award due to his elbow condition.

⁴ For decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁵ This method does not correlate to that provided by the A.M.A., *Guides* which requires that the functional scale modifies the default impairment value up or down depending on whether the grade modifier assigned to the functional scale score is equal to, greater than, or less than the grade assigned the condition. A.M.A., *Guides* 448-49.

⁶ *Id.* at 449, Table 15-33.

In a March 18, 2015 decision, OWCP's hearing representative noted appellant's argument that he was entitled to "plus three" on his impairment rating based on the worksheet. He found that, based on Dr. Levin's reports, appellant had no more than two percent permanent impairment of each upper extremity due to his accepted employment injury.

On March 21, 2016 appellant requested reconsideration. He again argued that the "plus three" equation was not applied properly to his permanent impairment rating. Appellant reviewed the formula for calculating impairment and asserted that, once the grade modifiers were added, an addition "plus three" should be added to the formula. In support of his request for reconsideration, he resubmitted the April 18, 2014 report from OWCP's medical adviser as well as Dr. Levin's March 25, 2014 report, and the March 18, 2015 decision from the OWCP hearing representative. Appellant also resubmitted the permanent impairment worksheet which indicated that the average of the grade modifiers was reached by dividing the sum of grade modifiers for test results, history, and physical examination by three, not by adding three.

Through a letter dated March 22, 2016 and received by OWCP on March 30, 2016, appellant requested reconsideration of OWCP's March 18, 2015 decision. He alleged that the faxed request for reconsideration was rejected by OWCP from the Post Office Box address included on the appeals form.

By decision dated June 15, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁹ 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)).¹⁰ 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).¹¹

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁹ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹⁰ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011). *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

¹¹ *Supra* note 8 at 769; *Jesus D. Sanchez*, *supra* note 9 at 967.

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.¹² OWCP's procedures state 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.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ To show 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.¹⁹ The Board must make 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.²⁰

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-

¹² *Supra* note 8 at 770.

¹³ *See supra* note 10 at Chapter 2.1602.5 (February 2016).

¹⁴ *Supra* note 8.

¹⁵ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁶ *Jesus D. Sanchez*, *supra* note 9 at 968.

¹⁷ *Supra* note 15.

¹⁸ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²⁰ *Nancy Marciano*, 50 ECAB 110 (1998).

related condition, without new exposure, resulting in greater permanent impairment.²¹ As the Board explained in *Linda T. Brown*,²² 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 denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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.²³ OWCP issued a merit schedule award decision on March 18, 2015. Appellant submitted a request for reconsideration that was received on March 21, 2016. In support of his request for reconsideration of the schedule award decision, he reargued that the "plus three" equation was not applied properly to his permanent impairment rating. Appellant reviewed the formula for calculating impairment and asserted that, once the grade modifiers were added, an additional "plus three" should be added to the formula. He also resubmitted the April 18, 2014 report from OWCP's medical adviser as well as Dr. Levin's March 25, 2014 report, and the March 18, 2015 decision from OWCP's hearing representative. In this case, contrary to *Linda T. Brown*,²⁴ appellant did not allege a worsening of his permanent impairment due to additional employment exposures, but instead attempted to show error in the prior schedule award decision. As he submitted evidence disagreeing with his prior schedule award decision, the Board finds that OWCP properly considered his submission as an application for reconsideration of the March 18, 2015 decision rather than a request for an additional schedule award.²⁵

²¹ 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).

²² *Id.* In *Brown*, OWCP issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that it reconsider in 1997, submitting a current report with an opinion that she had 25 percent permanent impairment to the arms and legs. OWCP found that she submitted an untimely request for reconsideration that did not demonstrate clear evidence of error. The Board remanded the case for a merit decision.

²³ See *D.A.*, Docket No. 16-1715 (issued May 15, 2017); *W.J.*, Docket No. 12-1746 (issued February 5, 2013); *Linda T. Brown*, *supra* note 21.

²⁴ *Id.*

²⁵ *D.A., id.*; *J.M.*, Docket No. 16-0669 (issued October 24, 2016); *E.M.*, Docket No. 15-1545 (issued October 28, 2015).

Appellant had one year from March 18, 2015 to submit a timely request for reconsideration to OWCP. As noted above, a request for reconsideration is considered to be received by OWCP based on the document receipt date of the reconsideration request, which is the “received date” in iFECS. As appellant’s request for reconsideration was received by OWCP on March 21, 2016, more than one year after the March 18, 2015 merit decision, the Board finds that it was untimely filed in accordance with OWCP’s procedures.

Although appellant’s request for reconsideration was untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.²⁶ 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.²⁷

Appellant did not submit any medical evidence supporting his claim of additional permanent impairment beyond the two percent bilaterally he already received. He merely resubmitted the medical evidence which OWCP relied upon to reach his permanent impairment rating. This medical evidence does not demonstrate clear evidence of error on the part of OWCP.

Appellant has also repeatedly argued that he was entitled to an additional three percent impairment based on the worksheet completed by Dr. Levin. The Board notes that appellant is incorrectly interpreting the averaging of three numbers by dividing the sum of the grade modifiers by three, as the addition of an additional integer of three. This argument is not valid in law or fact and does not demonstrate clear evidence of error on the part of OWCP.

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.

²⁶ *Supra* note 8 at 770.

²⁷ 20 C.F.R. § 10.607(b); *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.²⁸

Issued: March 7, 2018
Washington, DC

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

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

²⁸ Colleen Duffy Kiko, Judge, participated in the preparation of the decision but was no longer a member of the Board after December 11, 2017.