

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

S.M., Appellant	)	
	)	
and	)	Docket No. 17-0474
	)	Issued: March 23, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
San Diego, CA, Employer	)	
	)	

*Appearances:*  
Jeff Fultz, for the appellant<sup>1</sup>  
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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On January 3, 2017 appellant, through her representative, filed a timely appeal from a November 7, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated October 22, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) because her October 24, 2016 request was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

On August 10, 2015 appellant, then a 48-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she injured her left leg and groin on or about July 15, 2015. She attributed her condition to standing and walking approximately seven hours per day. Appellant also noted that her carrier duties required her to get in and out of her vehicle about 60 to 80 times per day. Lastly, she noted that carrying a heavy mail satchel put pressure on her lower extremity. Appellant described her condition as a sharp pain in her left leg and groin, as well as a loss of flexibility in her leg. She did not stop work.

On August 27, 2015 OWCP advised appellant that she needed to submit a comprehensive narrative medical report from her attending physician, as the case record did not include a diagnosis of any condition associated with her employment. It afforded her 30 days to submit the requested medical evidence.

OWCP subsequently received an August 21, 2015 progress/treatment note from Dr. Jose A. Pelayo, a Board-certified internist, who diagnosed chest wall strain and hip/thigh strain. Dr. Pelayo noted that appellant complained of left chest pain and leg pain, which dated back at least four weeks. Appellant's symptoms reportedly worsened during the course of her workday, which included delivering mail and carrying a more than 30-pound bag, usually on her left shoulder. She did not recall any particular injury, but reported that her symptoms quickly worsened when performing her described employment duties. Dr. Pelayo indicated that appellant's symptoms were "highly likely due to/worsened by work activities." He referred her to occupational medicine for further evaluation, and excused appellant from work until August 30, 2015, which he later extended through September 13, 2015.

On September 18, 2015 Dr. Mary W. DuQuette, a Board-certified physiatrist, examined appellant and diagnosed chest wall strain, limb pain, and left groin pain. She advised appellant that it was "not clear ... that her complaints [were] work related." Dr. DuQuette further advised that she did not feel she could really comment on the left chest discomfort, which appellant described as being associated with the position of her mailbag. She referred appellant for additional diagnostic studies, and advised her to return once the studies were obtained.

OWCP also received October 1, 2015 magnetic resonance imaging (MRI) scans of the left hip and lumbar spine. Appellant's left hip MRI scan was negative for greater trochanteric bursitis, and there was no evidence of stress fracture or osteonecrosis. However, there was evidence of a nondisplaced split through the base of the anterior acetabular labrum, without focally-advanced cartilage loss, synovitis, or features of femoroacetabular impingement. Appellant's lumbar MRI scan revealed multi-segmental disc degeneration and spondylosis. At L3-4 there was a small left foraminal disc protrusion, without nerve root impingement or spinal stenosis. At L4-5, there was a small right paramedian disc protrusion, without nerve root impingement.

By decision dated October 22, 2015, OWCP denied appellant's occupational disease claim as the medical evidence of record failed to establish causal relationship between the diagnosed conditions and her accepted employment exposure.

OWCP subsequently received a September 18, 2015 note from Dr. DuQuette excusing appellant from work through November 19, 2015. Additionally, it received Dr. DuQuette's October 21, 2015 follow-up progress notes. Dr. DuQuette reviewed appellant's recent MRI scans and diagnosed limb pain, left groin pain, left-side L3-4 herniated nucleus pulposus, and left hip labral tear, degenerative.

On February 8, 2016 OWCP received a January 6, 2016 duty status report (Form CA-17), in addition to Dr. DuQuette's above-noted work excuse and October 21, 2015 progress notes.

On October 24, 2016 appellant requested reconsideration. Appellant indicated that she had attached additional medical evidence for OWCP to review in connection with its October 22, 2015 decision. However, no additional medical evidence was received.

By decision dated November 7, 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 FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>5</sup> OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."<sup>6</sup>

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<sup>3</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. The one-year period begins on the next day after the date of the original contested decision. When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, a Sunday or a legal holiday. 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.

<sup>6</sup> 20 C.F.R. § 10.607(b).

The request must establish on its face that such decision was erroneous.<sup>7</sup> Where a request is untimely filed and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

When a request is timely filed, a different standard of review applies. A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

### ANALYSIS

In its October 22, 2015 merit decision, OWCP denied appellant's occupational disease claim as the medical evidence of record failed to establish causal relationship between the diagnosed condition(s) and her accepted employment exposure. A timely request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>11</sup> Calendar-year 2016 was a leap year and therefore there were 29 days in February 2016. One year from the October 22, 2015 decision fell on Saturday, October 22, 2016. Because the last day of the filing period fell on a weekend, the period is extended to the next business day, which was Monday, October 24, 2016.<sup>12</sup> OWCP received appellant's request for reconsideration on October 24, 2016. Therefore, her request is considered timely and subject to the standard for reviewing timely requests for reconsideration under 20 C.F.R. § 10.606(b)(3). Accordingly, the November 7, 2016 nonmerit decision shall be set aside, and the case remanded for an appropriate final decision on appellant's timely request for reconsideration.

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<sup>7</sup> *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> *Id.* at § 10.606(b)(3).

<sup>10</sup> *Id.* at § 10.608(a), (b).

<sup>11</sup> See *supra* note 5.

<sup>12</sup> See *M.A.*, Docket No. 13-1783 (issued January 2, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.

**CONCLUSION**

The Board finds that appellant's October 24, 2016 request for reconsideration was timely filed and, therefore, subject to review under 20 C.F.R. § 10.606(b)(3).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.<sup>13</sup>

Issued: March 23, 2018  
Washington, DC

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

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

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<sup>13</sup> Colleen Duffy Kiko, Judge, participated in this decision, but was no longer a member of the Board effective December 11, 2017.