

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Eau Clair, WI, Employer**

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**Docket No. 18-0385
Issued: September 4, 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 December 15, 2017 appellant filed a timely appeal from a November 1, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated May 16, 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 to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 21, 2014 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on February 20, 2014 while performing

¹ 5 U.S.C. § 8101 *et seq.*

continuous reaching and stretching in the course of her federal employment. OWCP accepted the conditions of right complete rotator cuff rupture and right sprain of shoulder, upper arm, and rotator cuff.²

Appellant stopped work in April 2014 when Dr. John Drawbert, a Board-certified orthopedic surgeon, performed surgical repair of a right rotator cuff tear. OWCP paid her wage-loss compensation and placed her on the periodic compensation rolls in June 2014.

Appellant returned to modified duty on July 31, 2014 and gradually increased her work hours. On October 30, 2014 OWCP accepted a recurrence of disability (Form CA-2a). Appellant returned to part-time modified duty in November 2014 and continued to receive intermittent wage-loss compensation.

Under OWCP File No. xxxxxx214, on January 28, 2015, OWCP accepted left rotator cuff tear and left impingement syndrome.

On February 27, 2015 Dr. Drawbert performed left rotator cuff repair and left carpal tunnel release. OWCP again placed appellant on the periodic compensation rolls. She returned to part-time modified duty on June 23, 2015, initially for two hours daily increasing to five hours a day in August 2015. Appellant stopped work on October 20, 2015. She filed claims for compensation (Form CA-7) for total disability for the period October 17 to November 13, 2015. OWCP continued to pay compensation for three hours daily. Appellant returned to modified duty for two hours daily.³

Under OWCP File No. xxxxxx214, by decision dated January 26, 2016, OWCP denied appellant's claim for compensation in excess of three hours daily on or after October 20, 2015. It found her claims for compensation were inconsistent with the medical evidence of record that indicated she could work five hours of limited duty daily. OWCP noted that it would reopen File No. xxxxxx111 for full adjudication with a written decision.⁴ Appellant continued to receive compensation for three hours daily under OWCP File No. xxxxxx214.

On February 16 and March 28, 2016 appellant requested reconsideration of the January 26, 2016 OWCP decision under File No. xxxxxx214. In reports dated February 1 and 25, April 1 and 19, and May 2, 2016, appellant's attending physician, Dr. Joseph T. Hebl, a family physician who practices occupational medicine, summarized her upper extremity and back conditions.⁵ On

² OWCP assigned File No. xxxxxx214. The record indicates that five of appellant's claims have been combined with the instant case, OWCP File No. xxxxxx214, designated as the master file. Subsidiary files are OWCP File Nos. xxxxxx606, xxxxxx111, xxxxxx331, and xxxxxx289.

³ The employing establishment indicated that she received continuation of pay from October 31 through December 27, 2015. The record does not indicate when appellant returned to two hours of daily modified duty.

⁴ Under OWCP File No. xxxxxx111, appellant filed a traumatic injury claim on October 12, 2015 alleging that she injured her neck lifting trays of mail on October 9, 2015.

⁵ Dr. Hebl began treating appellant in March 2014.

May 2, 2016 he advised that she could work only two hours of light work daily for five days a week due to bilateral shoulder conditions and bilateral carpal tunnel syndrome.

An offer of limited duty was extended by the employing establishment on December 2, 2015. This indicated that two hours of daily work were offered from 3:00 p.m. to 5:00 p.m. with duties of answering telephones, customer service, and administrative duties. Appellant signed the offer on December 4, 2015.

Under OWCP File No. xxxxxx214, by decision dated May 16, 2016, OWCP reviewed the merits of appellant's claim and denied modification of the decision dated January 26, 2016. It indicated that it had reviewed a report from Dr. Hebl dated February 1, 2016. OWCP noted that even though Dr. Hebl found that she could work for five hours a day due to her shoulder condition, he deemed her totally disabled because the neck and back prevented her from all work. It found that the evidence submitted was insufficient to support an increase in disability causally related to the work injury of February 20, 2014 without an intervening cause.

In a May 2, 2016 report, received by OWCP on May 16, 2016, Dr. Hebl summarized appellant's bilateral upper extremity conditions and described his treatment. He reiterated his findings and conclusions, including that appellant could only work two hours of light duty daily due to her upper extremity conditions.

On June 23, 2016, under OWCP File No. xxxxxx111, OWCP accepted cervical strain.⁶ Appellant thereafter filed claims for compensation (CA-7 forms) under OWCP File No. xxxxxx111. On July 28, 2016, under OWCP File No. xxxxxx289, OWCP accepted cervical and lumbar sprains.⁷

Under File No. xxxxxx111, by letter dated August 1, 2016, OWCP informed appellant of the medical evidence needed to support causal relationship to establish her claims for wage-loss compensation. In correspondence dated August 4 and 22, 2016, appellant informed OWCP that she was claiming compensation from November 4, 2015 forward. She noted that she had received intermittent compensation under File No. xxxxxx214. In undated correspondence, appellant indicated that she wanted to be compensated for 40 hours a week since all her injuries were employment related. She asked what additional information was needed. Appellant also submitted a number of medical reports from Dr. Hebl found in both OWCP File No. xxxxxx111 and in OWCP File No. xxxxxx289.

On September 29, 2016 OWCP combined OWCP File Nos. xxxxxx111 and xxxxxx289, with the former becoming the master file.

Under File No. xxxxxx111, in October 2016, OWCP referred appellant to Dr. Patrick M. Healy, a Board-certified orthopedic surgeon, for a second opinion evaluation. The statement of accepted facts (SOAF) provided Dr. Healy included accepted conditions of cervical and lumbar

⁶ OWCP had initially denied the claim by decision dated March 9, 2016.

⁷ Under File No. xxxxxx289, appellant filed an occupational disease claim (Form CA-2) on April 1, 2016 alleging that her job duties caused neck and back conditions.

strain, bilateral rotator cuff tear, right shoulder sprain, left impingement syndrome, and bilateral carpal tunnel syndrome. OWCP asked Dr. Healy to provide an opinion on the specific disability period due to the accepted cervical sprain.

In an October 26, 2016 report, Dr. Healy noted his review of the record and described physical examination findings. He indicated that appellant continued to have residuals of the accepted cervical strain including persistent areas of low-grade spasm and persistent pain and weakness, and that she also had enough disability in her right shoulder that would prevent her return to a normal rural carrier route. Dr. Healy opined that it would be difficult to identify a specific period of disability.

On a work capacity evaluation (OWCP Form 5c) dated November 22, 2016, Dr. Hebl advised that due to ongoing neck and shoulder spasm, weakness, and decreased range of motion, appellant could only work restricted duty for up to three hours a day.

In a case doubling memorandum found in OWCP File No. xxxxxx111, on December 14, 2016, OWCP indicated that it had combined File Nos. xxxxxx214, xxxxxx111, xxxxxx606, and xxxxxx331, with File No. xxxxxx214 becoming the master file.⁸ It informed appellant of the case doubling in a letter dated December 14, 2016. A duplicate of the case doubling memorandum, dated July 17, 2017, is found in OWCP File No. xxxxxx214.

Appellant continued to submit additional medical evidence from Dr. Hebl, contained in OWCP File Nos. xxxxxx111 and xxxxxx289. OWCP File No. xxxxxx214 also contains medical evidence submitted subsequent to OWCP's May 16, 2016 merit decision.

On August 31, 2017, under OWCP File No. xxxxxx214, appellant requested reconsideration. She maintained that her claim should be compensated fully since her cases had been combined with additional accepted conditions.

New evidence submitted in support of her reconsideration request included work and off-work capability forms from Dr. Hebl dated October 21, 2015 to June 28, 2016. On October 27, 2015 Dr. Hebl advised that appellant could not work due to symptom flare-up caused by an October 9, 2015 employment injury. On October 27, 2015 he advised that appellant could return to light duty only for three hours daily, on November 4, 2015 he placed her off work again, and on December 17, 2015 he advised that she could return to light duty for two hours a day. Dr. Hebl continued these restrictions through June 28, 2016. On November 29, 2016 he indicated that appellant could work three hours daily. Appellant also submitted treatment notes from Dr. Hebl dated June 28, 2016 through September 27, 2017. In each of these reports he discussed appellant's condition and treatment up to that date.⁹

In the September 27, 2017 report, Dr. Hebl reported that beginning on October 9, 2015 appellant had worsening radiating cervical pain and stiffness which continued. He indicated that

⁸ The accepted conditions under the subsidiary files include bilateral carpal tunnel syndrome (OWCP File No. xxxxxx606), cervical strain (OWCP File No. xxxxxx111), backache (OWCP File No. xxxxxx331), and cervical and lumbar spine sprains (OWCP File No. xxxxxx289).

⁹ OWCP File Nos. xxxxxx111 and xxxxxx289 also contain evidence submitted on August 31, 2017.

beginning on December 29, 2016, after OWCP combined all her claims, he evaluated all appellant's work injuries, and that he continued to see appellant on a monthly basis. Dr. Hebl noted in reports dated February 27, March 27, April 24, May 24, June 22, July 21, August 23, and September 27, 2017 that she reported increased neck and shoulder pain and stiffness with further loss of range of motion, and that she was struggling to work three hours a day. Physical examination demonstrated spasm and multiple areas of trigger point tenderness of the neck; significant weakness and positive Tinel's and Phalen's signs at the right wrist; and tenderness and spasm in the upper and lower back with pain at extreme range of motion. Dr. Hebl's diagnoses included: chronic myofascial pain disorder of the cervical spine with cervicalgia; chronic myofascial pain disorder of the thoracic spine; right shoulder pain, weakness, and loss of range of motion, with clinical evidence of impingement syndrome, rule-out rotator cuff tear; bilateral hand paresthesias and dysesthesias with increased symptoms on the left; and worsening left shoulder pain, weakness, and loss of range of motion. He advised that all diagnosed conditions were causally and directly related to the repetitive activities of her job duties as a rural mail carrier. Dr. Hebl concluded that, due to worsening problems with her neck and shoulders, appellant could not work beyond three hours of light duty daily.

By decision dated November 1, 2017, OWCP denied appellant's reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP. It noted that appellant submitted medical reports dated October 21, 2015 to November 29, 2016 and indicated that they were insufficient to demonstrate clear evidence of error. OWCP advised that if appellant felt her disability after October 9, 2015 was the result of that employment injury, she should submit a claim for wage-loss compensation under File No. xxxxxx111.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.¹¹ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System.¹² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 of FECA.¹³

OWCP may not deny an application for review solely because the application was not timely filed. When an application for review is untimely filed, it must nevertheless undertake a

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹² Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

¹³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

limited review to determine whether the application demonstrates clear evidence of error.¹⁴ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.¹⁵

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

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

The Board finds that appellant has demonstrated clear evidence of error.

In its November 1, 2017 decision, OWCP properly determined that appellant's request for reconsideration of the May 16, 2016 merit decision under OWCP File No. xxxxxx214 was untimely filed. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.¹⁹ The last merit decision under that claim file was dated May 16, 2016. Because appellant's request for reconsideration was received on August 31, 2017, more than one year after the May 16, 2016 merit decision, issued under

¹⁴ See 20 C.F.R. § 607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁵ 20 C.F.R. § 607(b); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.5(a) (February 2016).

¹⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁸ See *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁹ 20 C.F.R. § 10.607(a).

OWCP File No. xxxxxx214, OWCP properly determined that this request was untimely filed.²⁰ Therefore, appellant must demonstrate clear evidence of error on the part of OWCP with regard to the May 16, 2017 decision.

Appellant has continued to receive three hours of wage-loss compensation benefits daily under OWCP File No. xxxxxx214. She, however, only worked two or three hours daily, leaving a deficit in pay/compensation of two or three hours. Appellant has continued to claim compensation for the additional hours under several of the combined OWCP files in this case.

On the day OWCP issued the last merit decision under OWCP File No. xxxxxx214, May 16, 2016, appellant submitted a May 2, 2016 report from Dr. Hebl. It is well established that when OWCP is adjudicating a claim, it is obligated to consider all evidence properly submitted by a claimant and received prior to the issuance of its final decision.²¹ When OWCP fails to properly consider relevant evidence submitted, it raises a substantial question as to the correctness of the decision and demonstrates clear evidence of error.²² As OWCP did not properly review this evidence, the Board finds that appellant demonstrated clear evidence of error in this case.²³

Following OWCP's May 16, 2016 merit decision, under OWCP File Nos. xxxxxx111 and xxxxxx289, it accepted cervical and lumbar strains. Appellant thereafter submitted a number of claims for compensation and additional medical evidence under OWCP File No. xxxxxx111. Even though OWCP File No. xxxxxx111 and other files were combined, there is no indication in the November 1, 2017 decision that OWCP considered those records, which were then part of the instant record, OWCP File No. xxxxxx214, to determine if they were sufficient to demonstrate clear evidence of error. As the Board found in the case of *M.W.*, OWCP shall review the evidence submitted and arguments raised in support of the request and determine whether such evidence is sufficient to demonstrate error in its prior decision and shall then issue a decision containing findings of fact and conclusions of law.²⁴ In the case at hand, OWCP only indicated that it had reviewed medical reports dated October 21, 2015 through November 29, 2016. It did not reference Dr. Hebl's September 27, 2017 report or evidence found in File Nos. xxxxxx111 and xxxxxx289, submitted prior to the request for reconsideration on August 31, 2017.

The Board finds that appellant demonstrated clear evidence of error. OWCP combined appellant's files. It should have determined if the evidence in any of the combined files demonstrated clear evidence of error. The decision dated November 1, 2017 is therefore reversed, and the case is remanded to OWCP. After such development deemed necessary, OWCP shall issue an appropriate decision.

²⁰ *Id.* at § 10.607(a).

²¹ *See J.H.*, Docket No. 15-0280 (issued November 18, 2015) (the Board found that OWCP is required to review all evidence submitted by a claimant and received by it prior to the issuance of its final decision, including evidence received on the date of the decision and a failure to do so demonstrates clear evidence of error).

²² *Id.*

²³ *A.D.*, Docket No. 16-1366 (issued April 6, 2017).

²⁴ Docket No. 18-0111 (issued May 9, 2018).

CONCLUSION

The Board finds that appellant demonstrated clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 4, 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