

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

N.R., Appellant)	
)	
and)	Docket No. 19-0591
)	Issued: August 14, 2019
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Fort Dix, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 21, 2019 appellant, through counsel, filed a timely appeal from a September 17, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated August 7, 2017, 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 over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 1, 2005 appellant, then a 35-year-old legal instruments examiner, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2005 she injured her knees when she fell on ice while in the performance of duty. OWCP accepted the claim for bilateral post-traumatic chondromalacia of the knees, lumbar sprain, thoracic sprain, and lumbar radiculopathy.

On October 1, 2016 appellant filed a claim for a schedule award (Form CA-7). Following development of the evidence, OWCP determined that a conflict in medical evidence existed and referred her to Dr. Roy Friedenthal, a Board-certified orthopedic surgeon, for an impartial medical examination.

Based on the report of Dr. Friedenthal, by decision dated January 25, 2008, OWCP granted appellant a schedule award for three percent permanent impairment of each lower extremity. On January 31, 2008 appellant requested an oral hearing. By decision dated July 30, 2008, an OWCP hearing representative affirmed the January 25, 2008 decision.

Appellant appealed to the Board. By decision dated August 24, 2009, the Board set aside OWCP's January 25 and July 30, 2008 decisions.⁴ The Board found that Dr. Friedenthal's opinion was not entitled to special weight as his findings were outside the statement of accepted facts.

OWCP referred appellant to Dr. William A. McNamara, a Board-certified orthopedic surgeon, for a new impartial medical examination. Based on Dr. McNamara's opinion, by decision dated October 22, 2012, it found that she had no more than the previously awarded three percent permanent impairment of each lower extremity.

On October 31, 2012 appellant, through counsel, requested an oral hearing. Following a preliminary review, on December 12, 2012, an OWCP hearing representative vacated the October 22, 2012 decision. He found that OWCP had improperly referred appellant to Dr. McNamara without first attempting to obtain clarification from Dr. Friedenthal. The hearing representative advised that Dr. McNamara's opinion should be excluded from the record.

OWCP referred appellant to Dr. Friedenthal for a new impartial medical examination.

³ Docket No. 09-0227 (issued August 23, 2009); Docket No. 16-1613 (issued February 7, 2017).

⁴ *Id.*

Based on Dr. Friedenthal's report, by decision dated August 27, 2013, OWCP granted appellant a schedule award for an additional three percent permanent impairment of each upper extremity.

On September 10, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

By decision dated March 20, 2014, an OWCP hearing representative vacated the August 27, 2013 decision. She found that OWCP had failed to inform Dr. Friedenthal that Dr. McNamara's report was excluded. The hearing representative determined that OWCP should refer appellant to a new impartial medical examiner (IME).

On April 10, 2015 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for an impartial medical examination.

By decision dated November 19, 2015, OWCP found that appellant was not entitled to a schedule award for an additional impairment of either lower extremity. It found that the special weight of the evidence, represented by Dr. Askin's report, established that she had no impairment as a result of her accepted employment injury.

On November 25, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. By decision dated April 29, 2016, an OWCP hearing representative affirmed the November 19, 2015 decision.

Appellant appealed to the Board. By decision dated February 7, 2017, the Board set aside the April 29, 2016 decision.⁵ The Board found that OWCP failed to demonstrate that it had followed its procedures in selecting Dr. Askin as the IME.

On June 5, 2017 OWCP referred appellant to Dr. Philip Bobrow, a Board-certified orthopedic surgeon, for an impartial medical examination.

On June 6, 2017 counsel advised OWCP that appellant's address had changed.

In a July 12, 2017 impairment evaluation, Dr. Bobrow diagnosed thoracolumbar strain by history, lumbar degenerative disc disease, status post bilateral knee contusions, and bilateral moderate nontraumatic osteoarthritis of the knees. He found that appellant had no "residual permanent disability as a result of the injury of March 2, 2005" based on his review of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).⁶

By decision dated August 7, 2017, OWCP denied appellant's request for an increased schedule award. It found that the opinion of Dr. Bobrow constituted the special weight of the evidence and established that she had no more than the previously awarded six percent permanent

⁵ See *supra* note 3.

⁶ A.M.A., *Guides* (6th ed. 2009).

impairment of each lower extremity. OWCP sent the decision to appellant at her former address and to counsel at his correct address.

On July 9, 2018 counsel requested a copy of the case record. OWCP provided him with a copy on August 8, 2018.

On August 20, 2018 appellant, through counsel, requested reconsideration. In an August 18, 2018 statement, he requested that OWCP reopen the case under 5 U.S.C. § 8128(a). Counsel asserted that he had not received a copy of the August 7, 2017 decision and that it was not properly addressed to appellant. He further maintained that Dr. Bobrow failed to rate her impairment using the A.M.A., *Guides*.

By decision dated September 17, 2018, 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 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 or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease, or increase the compensation awarded or award compensation previously refused or discontinued.⁷

OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁹ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System).¹⁰ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹¹

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 limited review to determine whether the application demonstrates clear evidence of error.¹²

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607(a); *see also D.G.*, Docket No. 18-1038 (issued January 23, 2019).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

¹⁰ *Id.* at Chapter 2.1602.4(b) (February 2016).

¹¹ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

¹² *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

OWCP 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.¹³

To demonstrate 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.¹⁴

The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

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

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The underlying issue is appellant's entitlement to a schedule award, and thus the initial question is whether she has submitted an application for reconsideration or a request for an increased schedule award. If a claimant requests reconsideration of a schedule award decision and submits new and relevant evidence with respect to an increased permanent impairment, he or she may be entitled to a merit decision on the issue. However, if a claimant does not submit additional relevant evidence with respect to an increased schedule award, then OWCP may properly determine that he or she has filed an application for reconsideration of a schedule award decision.²⁰ In this case, appellant has not submitted additional relevant evidence

¹³ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

¹⁵ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, Docket No. 18-0496 (issued January 9, 2019).

¹⁶ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁷ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁸ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁹ *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

²⁰ *C.R.*, Docket No. 17-0226 (issued June 26, 2018).

with respect to an increased permanent impairment and; therefore, OWCP properly considered her submission as an application for reconsideration.²¹

An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.²² As appellant's request for reconsideration was not received by OWCP until August 20, 2018, more than one year after the issuance of its August 7, 2017 decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its August 7, 2017 decision.²³

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its August 7, 2017 decision. The evidence and argument she submitted failed to raise a substantial question concerning the correctness of OWCP's decision.²⁴ Counsel contended that Dr. Bobrow had failed to provide an impairment rating using the A.M.A., *Guides*. In his July 12, 2017 impairment evaluation, however, Dr. Bobrow indicated that he had reviewed the provisions of the A.M.A., *Guides* in reaching his conclusion. Counsel's allegation, consequently, is insufficient to raise a substantial question as to the correctness of OWCP's decision.²⁵

Counsel argued that OWCP improperly issued its August 7, 2017 as it was misaddressed to appellant. His contention, however, does not show that OWCP erred in denying her request for an increased schedule award. Additionally, appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

Counsel also asserted that he failed to receive a copy of the August 7, 2017 decision. The decision, however, was properly addressed to him and there is no indication in the record that it was returned as undeliverable. Under the mailbox rule, a document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee.²⁶

On appeal counsel asserts that neither he nor appellant received a copy of the August 7, 2017 decision and that OWCP failed to consider the arguments raised in his reconsideration request. As discussed, however, he has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying appellant's claim or provided

²¹ *Id.*

²² 20 C.F.R. § 10.607(a).

²³ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

²⁴ *See P.T.*, Docket No. 18-0494 (issued July 9, 2018).

²⁵ *Id.*

²⁶ *See H.B.*, Docket No. 19-0405 (issued June 26, 2019).

evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.²⁷

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁷ See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).