

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

L.W., Appellant)	
)	
and)	Docket No. 19-1367
)	Issued: December 19, 2019
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Bedford, OH, Employer)	
)	

Appearances:
Appellant, pro se
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 June 10, 2019 appellant filed a timely appeal from January 9 and May 7, 2019 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since OWCP's last merit decision, dated February 26, 2018, 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 this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's November 1, 2018 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP properly denied appellant's April 24, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 5, 2016 appellant, then a 60-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on that date while in the performance of duty. In an employee statement dated November 5, 2016, she noted that, while throwing “Amazon parcels,” which were in a high stack with heavy parcels on top, the stack shifted and fell. Appellant reportedly was not hit by the falling stack, but experienced right shoulder pain when she pushed the stack to avoid being hit by it.

Appellant submitted a supervisor statement dated November 5, 2016 from P.A. who corroborated her account of the events on that date. In addition she submitted initial treatment notes from various providers.

In a November 22, 2016 letter, the employing establishment challenged appellant’s claim, contending that she had failed to submit a rationalized medical opinion from a physician establishing a valid medical diagnosis causally related to the November 5, 2016 incident.

OWCP, in a development letter dated January 17, 2017, informed appellant of the deficiencies of her claim, and requested additional medical evidence, including a well-rationalized medical report from a physician, which provided an opinion as to how the reported work incident caused or aggravated her claimed injury. It also emphasized that pain is not a valid diagnosis, but rather a symptom. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP thereafter received medical notes by Dr. Farrow indicating that appellant had neck and shoulder pain caused or aggravated by the reported November 5, 2016 employment incident and that she could resume light work with restrictions.

By decision dated February 21, 2017, OWCP accepted that the November 5, 2016 employment incident occurred as alleged. It denied the claim, however, finding that the evidence of record failed to establish a medical diagnosis in connection with the accepted November 5, 2016 employment again explaining that pain is a symptom and not a diagnosis of a medical condition. OWCP found that appellant had not satisfied the medical component of fact of injury and, therefore, had not met the requirements to establish an injury as defined by FECA.

OWCP subsequently received additional medical evidence by Dr. Farrow indicating that appellant had right shoulder pain due to the November 5, 2016 employment incident and discussing her physical therapy, work capacity, and work restrictions.

On March 22, 2017 appellant requested a review of the written record by a representative of OWCP’s Branch of Hearings and Review regarding the February 21, 2017 decision.

OWCP continued to receive medical evidence, including progress notes dated January 10 and April 27, 2017 from Dr. Frederick P. Wilson, an attending osteopath specializing in orthopedic surgery. Dr. Wilson noted a history of the accepted November 5, 2016 employment incident. He reported examination findings and provided assessments of somatic dysfunction of the cervical, thoracic, and rib cage regions, and cervicalgia.

By decision dated June 27, 2017, an OWCP hearing representative affirmed the February 21, 2017 decision, finding that the medical evidence of record did not contain a rationalized medical opinion establishing that appellant's right shoulder strain was causally related to the accepted November 5, 2016 employment incident.

OWCP received additional progress notes dated February 14, May 25, and July 24, 2017 from Dr. Wilson. Dr. Wilson again noted appellant's history of injury and his prior assessments of somatic dysfunction of the cervical, thoracic, and rib cage regions, and cervicgia. He also provided assessments of right rotator cuff tendinitis and cervical degenerative disc disease.

In a letter received by OWCP on December 26, 2017, appellant requested reconsideration of the June 27, 2017 decision. Appellant submitted a medical report by Dr. Farrow who indicated that she had a right shoulder strain directly related to her November 5, 2016 on-the-job injury.

OWCP, by decision dated February 26, 2018, denied modification of the June 27, 2017 decision, finding that the medical evidence submitted did not provide medical rationale needed to establish causal relationship between appellant's diagnosed right shoulder and cervical conditions and her accepted employment incident of November 5, 2016.

OWCP subsequently received duplicate copies of Dr. Wilson's January 10 and April 27, 2017 progress notes.

On November 1, 2018 appellant requested reconsideration of the February 26, 2018 decision.

By decision dated January 9, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a), finding that the evidence submitted was repetitious and duplicative.

On April 24, 2019 appellant requested reconsideration of the February 21, 2017 decision. She did not submit additional evidence with her request.

OWCP, by decision dated May 7, 2019, denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error. It noted that she had not submitted any evidence to demonstrate clear evidence of error in either its original decision of February 21, 2017, or its last merit decision of February 26, 2018.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain

² 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).

limitations in exercising its authority.³ 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.⁴

A timely request 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.⁵ When a timely request 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's November 1, 2018 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁷

In her timely application for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP.⁸ Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁹

The underlying issue in this case is whether appellant sustained a right shoulder injury causally related to the accepted November 5, 2016 employment incident. That is a medical issue which must be addressed by relevant medical evidence not previously considered.¹⁰ Appellant submitted Dr. Wilson's January 10 and April 27, 2017 progress notes. However, this evidence is duplicative of evidence previously submitted and considered by OWCP in its earlier merit decisions dated June 27, 2017 and February 26, 2018. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis

³ 20 C.F.R. § 10.607.

⁴ *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. 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.

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(a), (b).

⁷ *See R.S.*, Docket No. 19-0312 (issued June 18, 2019); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

⁸ *See R.S., id.*; *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

⁹ *Id.*

¹⁰ *See A.M.*, Docket No. 18-1033 (issued January 8, 2019); *see also Bobbie F. Cowart*, 55 ECAB 746 (2004).

for reopening a case.¹¹ Because appellant's request for reconsideration did not include relevant and pertinent new evidence not previously considered she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹²

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in iFECS.¹⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁷ If an application demonstrates clear evidence of error, it will reopen the case for merit review.¹⁸

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

¹¹ See *A.G.*, Docket No. 19-0113 (issued July 12, 2019); *L.R.*, Docket No. 18-0400 (issued August 24, 2018); *T.B.*, Docket No. 18-0033 (issued May 23, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹² 20 C.F.R. § 10.606(b)(3)(iii); see *M.C.*, Docket No. 18-0841 (issued September 13, 2019); *D.P.*, Docket No. 17-0290 (issued May 14, 2018).

¹³ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁴ *Supra* note 7.

¹⁵ *Supra* note 4.

¹⁶ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁷ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁸ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016).

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 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

OWCP's 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.²⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's April 24, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations²² and procedures²³ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁴ The most recent merit decision was OWCP's February 26, 2018 decision which denied modification of its prior denial of appellant's traumatic injury claim. As her request for reconsideration was not received by OWCP until April 24, 2019, more than one year after the February 26, 2018 decision, the Board finds that it was untimely filed. Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied her traumatic injury claim.

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. Appellant did not submit any evidence in support of her reconsideration of the merits of her claim, therefore, she did not demonstrate clear evidence on the part of OWCP in issuing the February 26, 2018 decision.²⁵ Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

²⁰ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

²¹ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²² 20 C.F.R. § 10.607(a); *see J.W.*, *supra* note 19; *Alberta Dukes*, 56 ECAB 247 (2005).

²³ *Supra* note 4 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²⁴ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

²⁵ *S.J.*, Docket No. 17-1835 (issued December 19, 2018); *C.Z.*, Docket No. 08-2309 (issued June 10, 2009).

CONCLUSION

The Board finds that OWCP properly denied appellant's November 1, 2018 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The Board further finds that OWCP properly denied appellant's April 24, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 7 and January 9, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 19, 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