

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

S.H., Appellant)	
)	
and)	Docket No. 18-0561
)	Issued: February 4, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Atlanta, GA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 16, 2018¹ appellant filed a timely appeal from a July 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from the last relevant merit decision, dated June 15, 2016, to the filing of this appeal,

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 the July 19, 2017 decision, was Monday, January 15, 2018, which was a federal holiday. As such, appellant had until the close of the next business day (Tuesday, January 16, 2018) to timely file her appeal. 20 C.F.R. § 501.3(f)(2). Because using January 23, 2018, 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 January 16, 2018, rendering the appeal timely filed. 20 C.F.R. § 501.3(f)(1).

² Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated November 19, 2018, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-0561 (issued November 19, 2018).

pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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 September 25, 2014 appellant, then a 47-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that she injured her right upper extremity on September 19, 2014 while attempting to remove heavy trash while in the performance of duty. She stopped work on September 22, 2014 and received continuation of pay. On November 19, 2014 OWCP accepted the claim for right shoulder/upper arm sprain and paid appellant wage-loss compensation for temporary total disability for the period November 11, 2014 through February 1, 2015. Appellant returned to work on February 2, 2015. OWCP also paid compensation for intermittent wage loss for the period May 18 through September 8, 2015.

In April 2016, appellant filed several claims for compensation (Form CA-7) covering the period February 20 through April 1, 2016. She claimed compensation for wage loss due to attending various medical appointments, as well as temporary total disability from March 21 through April 1, 2016.

By decision dated June 15, 2016, OWCP awarded compensation for periods of intermittent wage loss to attend work-related medical appointments. However, it denied compensation for March 10, 2016 (2.87 hours), March 17, 2016 (4 hours), March 18, 2016 (8 hours), and temporary total disability for the period March 21 through April 1, 2016.

On January 23, 2017 OWCP expanded the acceptance of appellant's claim to include right shoulder region disorder of the bursae and tendons, other affections of the right shoulder region, left shoulder/upper arm strain (muscles, fascia, and tendons), and left shoulder joint derangement. It also paid wage-loss compensation for temporary total disability beginning June 24, 2016, and placed appellant on the periodic compensation rolls effective January 8, 2017.

On June 16, 2017 appellant requested reconsideration of OWCP's June 15, 2016 decision. She utilized the appeal request form that accompanied OWCP's decision. Appellant also submitted a handwritten letter dated June 14, 2017, which was received by OWCP on June 16, 2017. In her letter she noted that OWCP had incorrectly identified her treating physician

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the July 19, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

in its June 15, 2016 decision. Appellant also indicated that her claimed period of disability was March 17 through April 29, 2016.

OWCP also received May 31, 2017 progress notes from Dr. Kamal C. Kabakibou, a Board-certified anesthesiologist specializing in pain medicine. His assessment/diagnoses included cervical spondylosis, cervical disc degeneration, low back pain, constipation, and insomnia.

By decision dated July 19, 2017, OWCP denied appellant's request for reconsideration because 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.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷ 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.⁸ The request must demonstrate on its face that such decision was erroneous.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.¹¹ 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 demonstrate clear evidence of error.¹² 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

⁵ 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).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). A request for reconsideration must be “received” by OWCP within one year of OWCP decision for which review is sought. The one-year period begins on the next day after the date of the original contested decision. 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.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Id.*

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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.¹³

Where a request is untimely 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.¹⁴

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.

OWCP issued its decision denying appellant's claim for compensation on June 15, 2016. It received appellant's request for reconsideration on June 16, 2017, which was more than one year after OWCP's decision. Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in denying wage-loss compensation for March 10, 2016 (2.87 hours), March 17, 2016 (4 hours), March 18, 2016 (8 hours), and March 21 through April 1, 2016.¹⁵

In her reconsideration request, appellant noted that OWCP had incorrectly identified her treating physician. She also noted that she was claiming disability compensation for the period March 17 through April 29, 2016. Additionally, appellant submitted Dr. Kabakibou's May 31, 2017 progress notes. However, the progress notes do not address the claimed period of disability, nor do they pertain to appellant's accepted right and/or left shoulder conditions. Even the submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The Board finds that appellant's reconsideration request and the accompanying medical evidence fail to demonstrate clear evidence of error on the part of OWCP in denying wage-loss compensation for the above-noted periods. Appellant did not present evidence or argument regarding her attendance at medical appointments on the dates in question or that she was temporarily totally disabled from March 21 through April 1, 2016.

To demonstrate clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹⁷ The Board finds that the evidence submitted does not manifest on its face that OWCP committed an error in denying appellant's claim for wage-loss compensation. Appellant has not otherwise submitted evidence of sufficient probative value to

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.608(b).

¹⁵ *Id.* at § 10.607(b).

¹⁶ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹⁷ *Id.* at Chapter 2.1602.5a; see *Dean D. Beets*, *supra* note 10.

raise a substantial question as to the correctness of OWCP's June 15, 2016 decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2019
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