

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

F.A., Appellant	)	
	)	
and	)	Docket No. 19-0321
	)	Issued: July 5, 2019
U.S. POSTAL SERVICE, MAIL RECOVERY	)	
CENTER, Atlanta, GA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 26, 2018 appellant filed a timely appeal from a June 27, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated April 26, 2017 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the June 27, 2018 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.*

## 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 December 8, 2015 appellant, then a 60-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained neck, right shoulder, wrist, and arm conditions due to repetitively throwing parcels and packages, reaching above the shoulder, pushing, twisting, pulling, bending, and prolonged standing, while in the performance of duty. She did not stop work. OWCP accepted the claim for C3-4 and C6-7 cervical disc displacement and right shoulder bursitis.

On August 26, 2016 appellant accepted a modified mail recovery clerk position.

On March 15, 2017 OWCP received claims for compensation (Form CA-7) requesting wage-loss compensation for the periods February 4 to 17, 2017 and February 24 to March 3, 2017.

In a development letter dated March 16, 2017, OWCP advised appellant that her claim was "not payable in its entirety at this time." It authorized payment of four hours of wage-loss compensation for February 17, 2017, four hours for February 24, 2017, and four hours for March 7, 2017. OWCP informed appellant as to the evidence required to support her claim for compensation for the unpaid periods of time claimed and afforded her 30 days to provide additional medical evidence.

In response to OWCP's request appellant submitted a clinic note indicating that she was seen on February 27, 2017 by Mary Charlot, advanced registered nurse practitioner. Ms. Charlot noted that appellant was disabled from work at that time, but could return to work on March 6, 2017.

By decision dated April 26, 2017, OWCP authorized payment of four hours of wage-loss compensation for February 27, 2017, but denied appellant's claim for compensation for 36 hours of wage loss for the period February 27 to March 3, 2017. It found that she failed to submit any medical evidence signed by a licensed physician explaining how her disability for this period of time was due to her accepted employment conditions.

On July 26, 2017 OWCP received a Form CA-7 claiming wage-loss compensation for the period February 27 to March 3, 2017.

By letter dated August 1, 2017, OWCP informed appellant that a decision had previously been issued denying her claim for 36 hours of wage-loss compensation for the period February 27 to March 3, 2017. It informed her that no further action would be taken on her claim for the aforementioned period and advised that she may follow the appeal rights that accompanied the April 26, 2017 decision if she disagreed with that decision.

On June 19, 2018 OWCP received appellant's request for reconsideration of the April 26, 2017 decision.

In support of her request for reconsideration appellant submitted a November 20, 2017 report from Dr. Jay Bender, a Board-certified orthopedic surgeon. Dr. Bender related that from February 27 through March 3, 2017 she had experienced an acute exacerbation causing total disability. He explained that in the days leading up to February 27, 2017 appellant's repetitive employment duties exacerbated her preexisting conditions and that she was diagnosed with a right shoulder torn rotator cuff and right carpal tunnel syndrome.

By decision dated June 27, 2018, OWCP denied appellant's June 19, 2018 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>3</sup> 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.<sup>4</sup> Timeliness is determined by the document receipt date (*i.e.*, the received date in OWCP's integrated Federal Employees' Compensation System).<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</sup>

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>7</sup> Its procedures state 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, if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>8</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a

---

<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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 5 at Chapter 2.1602.5 (February 2016).

<sup>9</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to 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 not only be of sufficient probative value to create a conflict in medical opinion or show 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 decision.<sup>11</sup>

### 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's regulations<sup>12</sup> and procedures<sup>13</sup> establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>14</sup> The most recent merit decision was OWCP's April 26, 2017 decision which found that the evidence of record was insufficient to establish that appellant was totally disabled for the period alleged. As her request for reconsideration was not received by OWCP until June 19, 2018, more than one year after the April 26, 2017 decision, it was untimely filed.<sup>15</sup> Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied total disability compensation for the period alleged.

On reconsideration appellant submitted Dr. Bender's November 20, 2017 report. Dr. Bender explained that in the days leading up to February 27, 2017 she experienced an exacerbation of her preexisting condition causing total disability. He also diagnosed additional medical conditions. The Board finds that this evidence does not raise a substantial question as to the correctness of OWCP's last merit decision. Clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have required further development, is

---

<sup>11</sup> *Supra* note 9.

<sup>12</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

<sup>13</sup> *Supra* note 5 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>14</sup> *J.W.*, *supra* note 9; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>15</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

insufficient to demonstrate clear evidence of error.<sup>16</sup> As such, the Board finds that appellant has not demonstrated clear evidence of error.<sup>17</sup>

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.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

---

<sup>16</sup> *S.C.*, *supra* note 10.

<sup>17</sup> *Id.*; *see also Nancy Marcano*, 50 ECAB 110 (1998).