

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

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<b>R.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0379</b>
	)	<b>Issued: November 7, 2019</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Long Beach, CA,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 18, 2017 appellant, through counsel, filed a timely appeal from a November 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than one year has elapsed from OWCP's last relevant merit decision, dated

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<sup>1</sup> 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.

<sup>2</sup> The November 6, 2017 non-merit decision pertained to appellant's claim for wage-loss compensation beginning on or about October 1, 2002. OWCP's most recent merit decision was its February 27, 2017 decision regarding entitlement to a schedule award for permanent impairment of the right upper extremity, which issue is not currently before the Board. It last addressed the issue of entitlement to wage-loss compensation in an October 27, 2008 merit decision.

October 27, 2008, to the filing of this appeal,<sup>3</sup> pursuant to the Federal Employees' Compensation Act<sup>4</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>5</sup>

### **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 June 26, 2002 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 25, 2002 she injured her right index finger when sweeping mail while in the performance of duty.<sup>6</sup> On the reverse side of the claim form, the employing establishment indicated that she continued to work following her alleged injury. OWCP assigned the claim File No. xxxxxx258. After initially denying the claim, on July 17, 2003 it accepted appellant's traumatic injury claim for right index finger strain.<sup>7</sup>

On December 18, 2006 appellant filed a claim for wage-loss compensation (Form CA-7) beginning October 2002 and continuing, due to her accepted right index finger strain under OWCP File No. xxxxxx258.

With respect to OWCP File No. xxxxxx258, appellant was treated by Dr. Daniel Chan, a Board-certified family practitioner, from June 4, 2004 to May 2, 2006, for right hand, right wrist, and right elbow pain. She reported sustaining an injury on June 25, 2002 while working on a machine at work. Dr. Chan noted that appellant reached maximum medical improvement (MMI) and was "permanent and stationary" on April 21, 2006.

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<sup>3</sup> For final adverse decisions of OWCP issued prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(d)(2) (2008).

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> The Board notes that following the November 6, 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.*

<sup>6</sup> Appellant indicated that her finger got caught in a machine, but she was able to quickly pull it out.

<sup>7</sup> Appellant subsequently filed three additional FECA claims for injuries that allegedly arose on or about March 2, 2004, January 1, 2005, and July 4, 2006. The first claim, assigned OWCP File No. xxxxxx093, was for an alleged work-related emotional condition, which OWCP denied. The second claim, assigned OWCP File No. xxxxxx419, was for alleged injuries to appellant's bilateral upper extremities, which OWCP similarly denied. The latter claim, assigned OWCP File No. xxxxxx408, was for a respiratory condition, which OWCP accepted for environmentally-induced cough. The case records associated with appellant's three above-referenced occupational disease claims are not currently before the Board.

In a letter dated April 10, 2007, OWCP requested that appellant submit additional information to support her claim for compensation beginning October 2002, including medical evidence establishing that her total disability was due to the accepted condition for the period claimed.

On May 8, 2007 appellant filed another claim for wage-loss compensation (Form CA-7) for the period October 2002 through December 18, 2006.

OWCP received additional treatment records from Dr. Chan dated May 3 and 14, 2007. Dr. Chan diagnosed bilateral wrist tendinitis, and noted a June 2002 history of sudden pull on right hand and index finger by a machine at work. He attributed appellant's left-side complaints to overcompensation with the left extremity as a consequence of her right upper extremity injury.

OWCP also received various medical reports which included the cervical and thoracic spine, respiratory complaints, and a right knee condition.

By decision dated May 23, 2007, OWCP denied appellant's claim for compensation for total disability for the period beginning October 2002 due to her accepted right index finger strain.

Appellant was reexamined by Dr. Chan on May 14, 2008 for a chronic pain condition. Dr. Chan continued appellant's restrictions noting that she could not work more than four hours a day.

On May 22, 2008 appellant requested reconsideration.

By decision dated October 27, 2008, OWCP denied modification of the decision dated May 23, 2007. It found that the medical evidence did not support that appellant's right index finger injury caused any of her other diagnosed upper extremity conditions. OWCP also found that the medical evidence did not support either total or partial disability beginning October 2002 due to her accepted right index finger strain.

Appellant was again examined by Dr. Chan on April 28, 2015 who noted that she reached MMI with regard to her right index finger and did not require any additional treatment.

In a letter dated May 17, 2017, OWCP provided appellant with copies of the decisions dated May 23, 2007 and October 27, 2008, which denied her claim for total disability for the period beginning October 2002.

On June 10, 2017 appellant requested an oral hearing before an OWCP hearing representative. She noted that she was appealing the May 17, 2017 decision.

In a letter dated July 10, 2017, OWCP informed appellant that the correspondence dated May 17, 2017 was informational in nature and not a final decision. It indicated that two decisions dated May 23, 2007 and October 27, 2008 were enclosed with that correspondence. OWCP further indicated that because the May 17, 2017 letter was not a decision the case was not in posture for a hearing.

On August 10, 2017 appellant requested reconsideration of the decisions dated May 23, 2007 and October 27, 2008. She indicated that she was going through stress due to her injury and was incapacitated. Appellant stated that because she was taking so much medication her husband would drive her to doctors' appointments. She provided psychiatric treatment records dated July 16, 2004, March 3 and 14, 2006, and April 10, 2007. Appellant asserted that the evidence submitted supported that she was incapacitated, thereby precluding her from pursuing her reconsideration.

By decision dated November 6, 2017, OWCP denied appellant's August 10, 2017 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>8</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>9</sup> 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.<sup>10</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>11</sup>

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.<sup>12</sup> If an application demonstrates clear evidence of error, it will reopen the case for merit review.<sup>13</sup>

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

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<sup>8</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>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>11</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>12</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>13</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 10 at Chapter 2.1602.5.

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>14</sup>

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.<sup>15</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>16</sup>

### ANALYSIS

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.

OWCP's regulations<sup>17</sup> and procedures<sup>18</sup> 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 issue(s).<sup>19</sup> The most recent merit decision regarding appellant's entitlement to wage-loss compensation was OWCP's October 27, 2008 decision. As her request for reconsideration was not received by OWCP until August 10, 2017, more than one year after the October 27, 2008 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 denying her claim for wage-loss compensation beginning October 2002.

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.

OWCP previously denied appellant's claim for wage-loss compensation beginning October 2002 because the medical evidence failed to establish that her accepted right index finger injury either caused or contributed to any of her other diagnosed upper extremity conditions. It also found the relevant medical evidence insufficient to establish that the accepted right index finger strain was either totally or partially disabling during the claimed period. In her August 10, 2017 request for reconsideration, appellant submitted medical evidence regarding her unrelated

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

<sup>15</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 10 at Chapter 2.1602.5(a).

<sup>16</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>17</sup> 20 C.F.R. § 10.607(a); *see J.W.*, *supra* note 14; *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>18</sup> *Supra* note 10 at Chapter 2.1602.4; *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>19</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

psychiatric condition, but nothing with respect to any ongoing disability due to her accepted right index finger strain.

In an April 28, 2015 report, Dr. Chan noted that appellant reached MMI with regard to her right index finger. He further noted that she did not presently need any treatment that would produce a cure for her work-related condition. Dr. Chan did not specifically comment on whether appellant's accepted condition precluded her from performing her prior duties as a mail processing clerk. As such, this evidence does not address the relevant issue.<sup>20</sup> The Board notes that clear evidence of error is intended to represent a difficult standard. 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.<sup>21</sup> The Board finds that this evidence does not rise to the level of clear evidence of error. Moreover, while appellant disagreed with OWCP's decision denying her claim for compensation, this does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's most recent merit decision denying appellant's claim for compensation for total disability for the period beginning October 2002. Consequently, OWCP properly found that appellant's August 10, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On appeal counsel asserted that there was an unresolved conflict of medical opinion and that OWCP failed to adjudicate the claim in accordance with proper causation standard. As noted above, the Board does not have jurisdiction over the merits of the claim and appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

### **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.

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<sup>20</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

<sup>21</sup> *D.G.*, 59 ECAB 455 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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