

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

J.J., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS LOGISTICS BASE, Albany, GA,
Employer**

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**Docket No. 19-0984
Issued: October 18, 2019**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 1, 2019 appellant filed a timely appeal from a February 1, 2019 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP’s last merit decision, dated June 2, 2009, 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 over the merits of this case.

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.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 12, 1996 appellant, then a 43-year old painter, filed a traumatic injury claim (Form CA-1) alleging that on December 11, 1996 he turned a heavy object onto a wood pallet and injured his shoulder and elbow while in the performance of duty. OWCP assigned File No. xxxxxx024.² It accepted appellant's claim for right shoulder disorder of bursae and tendons, right medial epicondylitis, displacement of cervical intervertebral disc without myelopathy, anxiety, mechanical complication of internal orthopedic device implant and graft, and cervical spondylosis without myelopathy. OWCP authorized a cervical fusion surgery at C5-6.

In an illegibly signed impairment evaluation report dated April 6, 2009, a treating physician indicated that appellant had reached maximum medical improvement (MMI) on August 27, 2007. This report related that appellant had 11 percent permanent impairment of his upper extremity due to loss of function from sensory deficit, pain or discomfort, and 3 percent permanent impairment of his upper extremity due to loss of function from decreased strength. Nerve roots at C4-5 were implicated as the cause of the permanent impairment.

In a memorandum dated April 17, 2009, OWCP's district medical adviser (DMA) reviewed the medical evidence of record and determined that the rating of the previous treating physician was not supported by clinical evidence. He noted that, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ appellant had zero percent permanent impairment of the bilateral upper extremities, and related an MMI date of March 11, 2009.

On April 14, 2009 appellant filed a schedule award claim (Form CA-7).

In a development letter dated April 21, 2009, OWCP advised appellant of the deficiencies of his schedule award claim. It advised him of the type of medical evidence needed to establish his claim, and afforded him 30 days to submit the necessary evidence. No response was received.

By decision dated June 2, 2009, OWCP denied appellant's claim for a schedule award, finding that he had not submitted medical evidence sufficient to establish permanent impairment of a scheduled member or function of the body due to his accepted employment-related injury.

On June 22, 2009 appellant requested reconsideration of OWCP's June 2, 2009 decision.

By decision dated July 6, 2009, OWCP denied appellant's request for reconsideration, finding that his request was insufficient to warrant merit review.

On January 24, 2019 appellant again requested reconsideration of OWCP's June 2, 2009 decision. In support of his request, appellant submitted a letter dated September 9, 2018, from

² On February 5, 1997 appellant filed a traumatic injury claim (Form CA-1) alleging that on that date he turned over another heavy object and injured his back while in the performance of duty. OWCP assigned that claim File No. xxxxxx000 and accepted it for lumbar sprain. File Nos. xxxxxx024 and xxxxxx000 have been administratively combined, with File No. xxxxxx024 serving as the master file

³ A.M.A., *Guides* (6th ed. 2009).

Patrick Gay, a physical therapist, indicating that appellant had a whole person permanent impairment rating of 25 percent.

In a separate letter dated January 22, 2019, Dr. John D. Marshall, a family medicine specialist, related that he fully agreed with Mr. Gay's 25 percent whole person permanent impairment rating based on appellant's cervical surgery and residual symptoms. He also noted that appellant's December 11, 1996 employment-related right shoulder injury had reached MMI.

By decision dated February 1, 2019, OWCP denied appellant's request for reconsideration 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.⁴ 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.⁵ 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).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

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.⁸ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹

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

⁴ 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).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *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).

⁸ *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).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see also id.* at § 10.607(b); *supra* note 6 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.¹⁰

The Board has held, however, that a claimant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹¹

ANALYSIS

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.

In schedule award cases, in determining timeliness of a request for further review, a distinction is made between an application for an increased schedule award and a request for reconsideration of the denial of a schedule award. The Board has held that a claimant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment,¹² but when a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that he or she has filed a request for reconsideration of a schedule award decision.¹³ The Board finds that appellant did not submit relevant evidence with respect to establishing an increased permanent impairment and, thus, OWCP properly considered his submission as a request for reconsideration, not a request for an increased schedule award.

As the Board has found that appellant filed a reconsideration request, the next issue is whether it was timely filed. Appellant's January 24, 2019 request for reconsideration of OWCP's June 2, 2009 decision was not received within one year of the last merit decision on this issue. Therefore, the Board finds that the request was untimely filed.¹⁴ As his reconsideration request was untimely filed, appellant must demonstrate clear evidence of error on the part of OWCP in its June 2, 2009 decision.¹⁵

¹⁰ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *C.W.*, Docket No. 18-1110 (issued December 28, 2018); *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹² *Id.*

¹³ *L.D.*, Docket No. 17-1946 (issued August 23, 2018); *see also W.J.*, Docket No. 12-1746 (issued February 5, 2013).

¹⁴ *Supra* note 5.

¹⁵ *Supra* note 8.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its July 6, 2009 decision. With his request for reconsideration, appellant provided reports from Mr. Gay, a physical therapist,¹⁶ and Dr. Marshall, his treating physician, reflecting a whole body permanent impairment rating of 25 percent. However, there is no statutory basis for the payment of a schedule award for whole body impairment under FECA.¹⁷ Payment is authorized only for the permanent impairment of specified members, organs, or functions of the body.¹⁸ As the evidence appellant submitted did not address permanent impairment of a scheduled member of function of the body.

For these same reasons, the Board finds that this evidence does not demonstrate clear evidence of error because it did not show that OWCP committed an error in denying appellant's schedule award claim, nor raise a substantial question as to the correctness of OWCP's decision. To demonstrate clear evidence of error, it is insufficient 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.¹⁹ The evidence submitted on reconsideration does not manifest on its face that OWCP committed an error in denying appellant's claim for a schedule award. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, his untimely request for reconsideration is insufficient to demonstrate clear evidence of error.

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.

¹⁶ The Board has held, however, that certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA. *See J.L.*, Docket No. 17-1207 (issued December 8, 2017) (a physical therapist is not considered a physician under FECA); *see also K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

¹⁷ *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *see N.H.*, Docket No. 17-0696 (issued July 19, 2017).

¹⁸ *Id.*

¹⁹ *Supra* note 6 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367 (1997).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2019
Washington, DC

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

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

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