

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

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| L.H., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1415 |
| |) | Issued: February 19, 2020 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Mogadore, OH, Employer |) | |
| _____ |) | |

Appearances:
Appellant, pro se
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 June 18, 2019 appellant filed a timely appeal from a December 20, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 9, 2017, 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 consider 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.

FACTUAL HISTORY

On August 3, 2010 appellant, then a 57-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome due to factors of

¹ 5 U.S.C. § 8101 *et seq.*

her federal employment. She noted that she first realized her condition and its relation to her federal employment on February 29, 2008. On the reverse side of the claim form, the employing establishment indicated that appellant retired from federal service on August 8, 2008. OWCP accepted her claim for bilateral carpal tunnel syndrome on August 24, 2010.

Appellant submitted medical reports from Dr. Gary Pennington, a Board-certified plastic surgeon. Dr. Pennington noted that she underwent a right endoscopic carpal tunnel release on August 1, 2016 and a left endoscopic carpal tunnel release on October 10, 2016 to treat her accepted condition. The October 10, 2016 report noted that appellant would follow-up in 12 weeks in order to document her maximum medical improvement (MMI).

On April 5, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated April 10, 2017, OWCP advised appellant of the deficiencies in her schedule award claim. It requested that she submit an impairment evaluation from her treating physician addressing whether she had attained MMI with an impairment rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*). OWCP afforded appellant 30 days to respond.

In a letter dated May 30, 2017, appellant advised OWCP that her treating physician was unable or unwilling to perform an impairment evaluation and she asked if OWCP would refer her for a second opinion evaluation.

On August 25, 2017 OWCP referred appellant to Dr. Gerard Papp, a Board-certified orthopedic surgeon, for a second-opinion examination in order to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.³ In a report dated September 21, 2017, Dr. Papp determined that there was no evidence of permanent impairment in relation to her bilateral carpal tunnel syndrome. He opined that appellant had reached MMI in her right wrist on August 1, 2017 and would reach MMI in her left wrist by October 10, 2017. On examination, Dr. Papp noted pain in the hypothenar eminence of the hands, and indicated that this was unrelated to her original diagnosis. He further noted that appellant had experienced no pain over the past week in her left or right hands and that she presented with full range of motion in her wrists, good finger flexion and extension.

On November 1, 2017 Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Papp's September 21, 2017 report, the medical evidence of record, and a statement of accepted facts. He found that the date of MMI for the right upper extremity was August 1, 2017, as Dr. Papp indicated. Regarding the left upper extremity, Dr. Harris found that, based on documentation of appellant's subjective complaints, objective findings and clinical course for the left upper extremity, the date of MMI was the date of Dr. Papp's evaluation, September 21, 2017. The DMA provided that she had zero percent impairment in both the left and right upper extremity under the diagnosis-based impairment method in the A.M.A.,

² A.M.A., *Guides* (6th ed. 2009).

³ *Id.*

Guides and that the A.M.A., *Guides* do not allow for impairment ratings to be calculated on ROM method for this diagnosis.

By decision dated November 9, 2017, OWCP denied appellant's claim for a schedule award, noting that she had not met her burden of proof to establish permanent impairment of a scheduled member or function of the body.

On November 8, 2018 appellant requested reconsideration of OWCP's November 9, 2017 decision. In an attached statement, she provided that the DMA reviewed Dr. Papp's September 21, 2017 report before she was made aware of his evaluation. Had appellant been aware of the "discrepancies and deficiencies" in Dr. Papp's evaluation before it was sent to the DMA, she would have requested a new evaluation before Dr. Harris' review of the record. Appellant contended that Dr. Papp sped through the evaluation in less than 30 minutes, did not take proper note of her responses to the sensation and resistance testing, did not test her ability to grip, which she described as decreased, and ignored her concern over "occasional zingers, or stabs of pain," which emanated from her wrists. She also argued that Dr. Papp's evaluation included incorrect statements regarding a three-year lapse in appointments with Dr. Nina Njus, even though she had provided documentation proving that she had not missed any appointments.

By decision dated December 20, 2018, OWCP denied appellant's request for reconsideration of its November 9, 2017 decision 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.⁵ OWCP's regulations⁶ 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.⁷ Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

⁴ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Id.* at § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

⁷ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.¹⁰ Its procedures provide 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 demonstrates "clear evidence of error" on the part of OWCP.¹¹

In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹² To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷

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 establish 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's decision.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁹

¹⁰ *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹² *V.G.*, *supra* note 6; *see E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *S.T.*, *supra* note 9; *see C.V.*, *supra* note 10; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *S.T.*, *supra* note 9; *see E.P.*, *supra* note 12; *Pasquale C. D' Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *V.G.*, *supra* note 6; *see C.V.*, *supra* note 10; *Leon J. Modrowski*, *supra* note 10; *Jesus D. Sanchez*, *supra* note 10.

¹⁶ *V.G.*, *supra* note 6; *see E.P.*, *supra* note 12; *Leona N. Travis*, *supra* note 14.

¹⁷ *Supra* note 12.

¹⁸ *D.G.*, *supra* note 11; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁹ *L.B.*, Docket No. 19-0635 (issued August 23, 2019).

The Board has held, however, that a claimant may request a schedule award or increased schedule award at any time based on the evidence of new exposure or medical evidence showing progress of an employment-related condition resulting in a permanent impairment or increased impairment.²⁰

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.

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. As noted above, 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,²¹ 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.²² The Board finds that appellant did not submit relevant evidence with respect to establishing an increased permanent impairment and, thus, OWCP properly considered her 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 November 13, 2018 request for reconsideration of OWCP's November 9, 2017 merit 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.²³ As her reconsideration request was untimely filed, appellant must demonstrate clear evidence of error on the part of OWCP in its November 9, 2017 merit decision.²⁴

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its November 9, 2017 merit decision. In a statement submitted along with her request for reconsideration, appellant argued that Dr. Papp's September 21, 2017 report was deficient because the evaluation lasted less than 30 minutes, he did not take proper note of her responses to the sensation and resistance testing, did not test her ability to grip, and ignored her concerns over pain which emanated from her wrists. However, she did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its

²⁰ *C.W.*, Docket No. 18-0703 (issued December 28, 2018); *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²¹ *Id.*

²² *W.J.*, Docket No. 12-1746 (issued February 5, 2013).

²³ *Supra* note 6.

²⁴ *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).

November 9, 2017 decision when it denied her schedule award claim.²⁵ Appellant did not submit additional medical evidence in connection with her reconsideration request containing a rating of permanent impairment. Further, her argument regarding Dr. Papp's September 21, 2017 report did not raise a substantial question concerning the correctness of OWCP's November 9, 2017 decision. The question of appellant's entitlement to schedule award compensation would generally be resolved through the submission of medical evidence and her mere assertion that she was entitled to schedule award compensation would not tend to show error by OWCP in its November 9, 2017 decision.²⁶ As stated previously, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁷ The term clear evidence of error is intended to represent a difficult standard.²⁸ 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 relative to a schedule award to raise a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that her untimely request for reconsideration 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.

²⁵ See *L.L.*, Docket No. 17-0040 (issued January 24, 2017); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

²⁶ *L.L.*, *id.*

²⁷ *Supra* note 16.

²⁸ *Supra* note 8 at Chapter 2.1602.4 (February 2016); see *Veletta C. Coleman*, 48 ECAB 367 (1997).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2020
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