DECISION AND ORDER

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

JURISDICTION

On February 4, 2021 appellant, through her representative, filed a timely appeal from a December 21, 2020 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, 2019, to the filing of this appeal, pursuant to the Federal Employees’ Compensation Act\(^2\) (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

\(^1\) 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. \textit{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. \textit{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.

\(^2\) 5 U.S.C. § 8101 \textit{et seq.}
ISSUE

The issue is whether OWCP properly denied appellant’s request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 26, 2012 appellant, then a 54-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a bilateral hand condition due to factors of her federal employment, including repetitive hand motions for four hours daily. She noted that she first became aware of her claimed condition and its relationship to factors of her federal employment on January 18, 2012. On October 14, 2013 OWCP accepted the claim for bilateral carpal tunnel syndrome. It paid appellant wage-loss compensation on the supplemental rolls, effective October 15, 2013, and on the periodic rolls, from November 17, 2013 through March 13, 2015.

On October 29, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a letter dated November 3, 2017, OWCP requested that appellant’s treating physician, Dr. Richard M. O’Keefe, a Board-certified orthopedic surgeon, provide a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides).* 3 OWCP afforded Dr. O’Keefe 30 days to respond. No response was received.

By decision dated February 7, 2018, OWCP denied appellant’s claim for a schedule award, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to her accepted bilateral carpal tunnel syndrome.

On February 8, 2019 appellant requested reconsideration.

In a report dated April 20, 2019, Dr. David J. Slutsky, a Board-certified orthopedic hand surgeon serving as an OWCP district medical adviser (DMA), opined that a permanent impairment rating for appellant’s accepted condition of bilateral carpal syndrome could not be completed due to the lack of information regarding appellant’s physical examination findings, diagnostic studies, and date of maximum medical improvement (MMI). He advised that additional information was required to determine an impairment rating.

By decision dated April 26, 2019, OWCP denied modification. It found that appellant failed to submit a report from a physician containing an impairment rating.

In a report dated November 20, 2019, Dr. O’Keefe noted that appellant was seen for bilateral wrist pain radiating into her hands. He detailed examination findings, which included no significant tenderness over the carpal tunnel, negative Phalen’s and median nerve compression.

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3 *A.M.A., Guides (6th ed. 2009).*
tests, mildly diminished strength and range of motion, no instability, light-touch sensation intact, skin warm without ulcerations, normal capillary refill, and no significant varicosities or swelling. A review of x-ray interpretations revealed early thumb carpal metacarpal (CMC) osteoarthritic changes with no abnormalities, loose bodies, or stress fracture. Dr. O’Keefe concluded that appellant showed evidence of early osteoarthritic bilateral thumb CMC changes and that she had not reached MMI.

Dr. O’Keefe, in a January 2, 2020 office note, detailed examination findings and diagnosed bilateral thumb CMC joint osteoarthritis.

In a May 4, 2020 report, Dr. Mark A. Seldes, a Board-certified family medicine physician, recounted that appellant was evaluated for permanent impairment of her accepted bilateral carpal tunnel syndrome. He noted appellant’s history of injury and medical treatment, including diagnostic studies. Dr. Seldes provided appellant’s physical examination findings and related that, pursuant to the A.M.A., Guides, appellant had nine percent permanent impairment of each upper extremity. In reaching this determination, he referenced Table 15-23 on page 549 of the A.M.A., Guides and applied a grade modifier for clinical studies (GMCS), a grade modifier for physical examination (GMPE), and a grade modifier for functional history (GMFH), as well as noting a QuickDASH score of 64 for both upper extremities.

Dr. Seldes, in a report dated October 13, 2020, related appellant’s physical examination findings and diagnosed bilateral carpal tunnel syndrome and status bilateral carpal tunnel wrist release.

On October 20, 2020 appellant requested reconsideration.

Appellant submitted a Form CA-7 dated December 10, 2020 again requesting a schedule award.

By decision dated December 21, 2020, OWCP denied appellant’s reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

**LEGAL PRECEDENT**

To be entitled to a merit review an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought. Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.

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4 20 C.F.R. § 10.607(a).
6 J.H., Docket No. 20-1097 (issued December 18, 2020); G.L., Docket No. 18-0852 (issued January 14, 2020).
OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.\(^7\) OWCP’s regulations and 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(a), if the claimant’s request demonstrates clear evidence of error on the part of OWCP.\(^8\)

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.\(^9\) It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.\(^10\) 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 evidence of error on the part of OWCP.\(^11\) The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.\(^12\)

In schedule award cases, a distinction is made between an application for a schedule award and a request for reconsideration of the denial of a schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration.\(^13\)

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.\(^14\) When a claimant has requested reconsideration and has submitted new and relevant evidence with

\(^7\) 20 C.F.R. § 10.607(b); J.H., id.; R.S., Docket No. 19-0180 (issued December 5, 2019).

\(^8\) Id.; supra note5 at Chapter 2.1602.5(a).

\(^9\) 20 C.F.R. § 10.607(b); B.W., Docket No. 19-0626 (issued March 4, 2020); Fidel E. Perez, 48 ECAB 663, 665 (1997).


\(^11\) B.W., supra note 9.

\(^12\) Id.; Cresenciano Martinez, 51 ECAB 322 (2000); Thankamma Matthews, 44 ECAB 765, 770 (1993).

\(^13\) J.H., supra note 6; L.D., Docket No. 17-1946 (issued August 23, 2018); C.M., Docket No. 17-0310 (issued February 15, 2017); J.F., Docket No. 13-0112 (issued November 6, 2013); see also B.K., 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate an application for reconsideration).

\(^14\) R.D., Docket No. 18-0579 (issued September 14, 2018); D.S., Docket No. 17-0407 (issued May 24, 2017).
respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.\textsuperscript{15}

\textit{ANALYSIS}

The Board finds that OWCP improperly denied appellant’s request for reconsideration by adjudicating her schedule award claim under the standard for untimely reconsideration requests.

On October 20, 2020 appellant requested reconsideration of OWCP’s April 26, 2019 decision, which denied appellant’s schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. Appellant submitted a May 4, 2020 permanent impairment rating evaluation from Dr. Seldes. Dr. Seldes reviewed appellant’s history of injury, reviewed diagnostic tests, and provided physical examination findings. He rated appellant’s permanent impairment due to her accepted bilateral carpal tunnel syndrome utilizing Table 15-23 of the sixth edition of the A.M.A., \textit{Guides}, and calculated that appellant had 9 percent permanent impairment of each upper extremity.

Appellant submitted new evidence, including a permanent impairment rating in support of her schedule award claim.\textsuperscript{16} 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.\textsuperscript{17} Herein, appellant submitted a May 4, 2020 impairment rating report, supporting permanent impairment of both upper extremities due to the accepted bilateral carpal tunnel syndrome.\textsuperscript{18} The record, therefore, establishes that she was not seeking reconsideration of OWCP’s decision, but was rather seeking a schedule award based on new medical evidence.\textsuperscript{19}

Thus, the Board finds that OWCP improperly denied appellant’s reconsideration request and failed to issue an appropriate decision regarding her claim for a schedule award. On remand OWCP shall review and develop the medical evidence as is necessary and thereafter issue a \textit{de novo} decision regarding her claim for a schedule award.\textsuperscript{20}

\textsuperscript{15} See C.W., Docket No. 18-1110 (issued December 28, 2018); Linda T. Brown, 51 ECAB 115 (1999); Paul R. Reedy, 45 ECAB 488 (1994); see also B.K., 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate a request for reconsideration).


\textsuperscript{17} \textit{Supra} note 15.

\textsuperscript{18} J.H., \textit{supra} note 6; W.H., Docket No 15-1167 (issued November 10, 2015).

\textsuperscript{19} J.H., \textit{supra} note 6; T.C., Docket No. 17-0800 (issued May 2, 2018); K.D., Docket No. 15-0524 (issued August 3, 2015).

CONCLUSION

The Board finds that OWCP improperly denied appellant’s request for reconsideration by adjudicating her schedule award claim under the standard for untimely reconsideration requests.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2020 decision of the Office of Workers’ Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 1, 2021
Washington, DC

Janice B. Askin, Judge
Employees’ Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees’ Compensation Appeals Board

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