

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

_____)	
L.A., Appellant)	
)	
and)	Docket No. 21-0057
)	Issued: June 17, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Washington, DC, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 13, 2020 appellant filed a timely appeal from a June 12, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 14, 2019, 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.²

ISSUE

The issue is whether OWCP properly denied appellant's March 17, 2020 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.*

² The Board notes that, following the June 12, 2020 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.*

FACTUAL HISTORY

On October 24, 1996 appellant, then a 48-year old mail processor, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral carpal tunnel syndrome and left ulnar neuropathy causally related to factors of his federal employment due to repetitive motions including keying on a keyboard, sorting, filing, distributing mail, and loading/unloading mail since October 15, 1992. OWCP accepted the claim for left ulnar nerve lesion and bilateral carpal tunnel syndrome. The record reflects that OWCP paid appellant wage-loss compensation on the supplemental rolls as of October 24, 1994 and on the periodic rolls as of June 16, 2002.

On December 11, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated December 27, 2018, OWCP advised appellant that his case was accepted for bilateral carpal tunnel syndrome and a lesion of the left ulnar nerve, but no medical evidence was received in support of his schedule award claim. It requested appellant to submit a detailed narrative medical report from his treating physician, based upon a recent examination, which related a date of maximum medical improvement (MMI) and which provided a rating of permanent impairment with reference to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated March 14, 2019, OWCP denied appellant's claim for a schedule award as the medical evidence was not sufficient to establish that he had reached MMI and that he had sustained permanent impairment of a scheduled member or function of the body due to his accepted work injury.

OWCP thereafter received additional medical evidence. In a report dated May 23, 2019, Dr. Daniel R. Ignacio, a Board-certified physical medicine and rehabilitation specialist, diagnosed bilateral carpal tunnel syndrome and ulnar nerve lesion from an injury that occurred at work on October 15, 1992. He provided physical examination and range of motion (ROM) findings related to appellant's cervical spine, bilateral shoulders, left elbow, and left wrist.

On July 9, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. He submitted additional evidence with his request.

In a letter dated October 14, 2015, Dr. Rida N. Azer, an orthopedic surgeon, related that he performed surgical procedures for treatment of appellant's bilateral carpal tunnel syndrome and left ulnar nerve conditions. He noted that further diagnostic studies would be performed and thereafter appellant would be provided a permanent impairment rating under the A.M.A, *Guides*, by an impairment committee.

On September 27, 2017 Dr. Azer examined appellant and diagnosed bilateral carpal tunnel syndrome and a left ulnar nerve lesion, concluding that these conditions were caused by his work injury on October 15, 1992. He noted that appellant requested a permanent impairment rating; therefore, he would undergo further diagnostic studies. In a report dated October 13, 2017, Dr. Azer stated that appellant remained in *status quo* and that he must remain off work.

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated July 24, 2019, OWCP denied appellant's request for review of the written record by a representative of its Branch of Hearings and Review as it was not made within 30 days of the March 14, 2019 decision. It advised appellant that it had, in its discretion, considered his request and had determined that the issue could be addressed by a request for reconsideration.

Appellant submitted additional evidence to OWCP. In a letter dated July 10, 2019, Dr. Ignacio related appellant's physical examination findings including bilateral wrist and elbow ROM measurements. He listed appellant's diagnoses as chronic bilateral carpal tunnel syndrome, bilateral chronic wrist tenosynovitis, chronic epicondylitis of the left elbow with ulnar neuritis, bilateral complex regional pain syndrome of the upper limbs, and status post multiple surgeries of the bilateral wrists and left elbow. Dr. Ignacio related that he would continue to treat appellant conservatively. He concluded that appellant was totally and permanently disabled from work.

Appellant submitted a letter dated August 5, 2019 from Dr. Ignacio. Dr. Ignacio related that he had conducted an electromyogram (EMG) that day, which revealed slowing of the median nerve across appellant's wrists and slowing of the left ulnar nerve and stable conduction block.

In a report dated September 18, 2019, Dr. Ignacio stated that appellant suffered with intractable chronic and severe painful conditions, which were most likely incurable. He reported appellant's physical examination findings and indicated that appellant had severe left ulnar and brachial median neuritis with failed multiple surgeries and complex regional pain syndrome in his bilateral upper limbs. Dr. Ignacio noted that appellant would be referred for physical therapy.

On October 11, 2019 Dr. Ignacio related appellant's physical examination findings and noted that appellant required a new magnetic resonance imaging (MRI) scan of the left elbow and wrist. He also noted that appellant would benefit from physical therapy to prevent progressive pain, stiffness, spasm, weakness, and muscle atrophy.

In an MRI scan report dated October 11, 2019, Dr. Samir Chheda, a Board-certified diagnostic radiologist, found a moderate enlargement of the median nerve within the carpal tunnel of the right wrist. In an MRI scan report dated November 6, 2019, he related that appellant had very small left elbow joint effusion.

On February 10, 2020 Dr. Vaul Phillips, a physical medicine and rehabilitation specialist, diagnosed appellant with bilateral carpal tunnel syndrome, chronic tenosynovitis of the bilateral wrists, chronic epicondylitis of the left elbow with ulnar neuritis, complex regional pain syndrome of the bilateral upper limbs, and status post multiple bilateral wrist and left elbow surgeries. He noted appellant's physical examination findings, including ROM measurements of the left elbow bilateral wrists, and noted that appellant would be referred for a permanent impairment evaluation.

On March 17, 2020 appellant requested reconsideration of the March 14, 2019 decision. He submitted additional evidence with his request.

In a report dated February 8, 2006, Dr. William Dorn, an orthopedic surgeon, reported a diagnosis of recurrent carpal tunnel syndrome and noted that appellant had elected to undergo surgery.

On March 15, 2013 Dr. Azer reported that appellant had increasing pain, numbness, and weakness in both hands. He related that appellant had undergone surgical procedures on the right and left carpal tunnel and left ulnar nerve; however, he required further diagnostic studies as he was developing bilateral median nerve palsy.

A hospital record dated June 4, 2013 from Dr. Azer noted that appellant had undergone exploration of the left median nerve, right forearm, wrist and hand, division of the volar carpal ligament and decompression of the left carpal tunnel, tenosynovectomy flexor tendons of the left wrist and hand, and rerouting of the left ulnar nerve and tendon transfer between subcutaneous and deep flexors at the elbow.

In a progress report dated June 16, 2014, Dr. Azer provided appellant's continuing symptoms. In a July 23, 2014 report, he related that appellant had increasing, pain, numbness, and weakness in his right wrist and hand due to a work injury, which occurred on October 15, 1992.

By decision dated June 12, 2020, 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. 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, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁸ Its procedures provide that it 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 request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁹ In this

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 *L.M.*, Docket No. 20-0203 (issued March 10, 2021); *G.G.*, Docket No. 18-1074 (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).

regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ 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 substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate 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 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant's March 17, 2020 request for reconsideration was untimely filed.¹³

OWCP's regulations¹⁴ and procedures¹⁵ 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 issues.¹⁶ The most recent merit decision was OWCP's March 14, 2019 decision. As appellant's request for reconsideration was received on March 17, 2020, more than one year after the March 14, 2019

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

¹³ Initially, the Board finds that OWCP properly considered appellant's March 17, 2020 correspondence as a request for reconsideration and not as a claim for an increased schedule award as no impairment evaluation applying the sixth edition of the A.M.A., *Guides* was submitted. *See D.L.*, 20-0512 (issued November 30, 2020); *K.W.*, Docket No. 19-0553 (issued November 8, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

¹⁴ 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁵ *Supra* note 6 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ 20 C.F.R. § 10.607(b); *see A.M.*, Docket No. 20-0143 (issued October 28, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in its March 14, 2019 decision.¹⁷

The Board further finds, however, that this case is not in posture for decision as to whether appellant's March 17, 2020 reconsideration request demonstrated clear evidence of error.

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.¹⁸ Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁹ OWCP's regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.²⁰ As well, its procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²¹

In denying appellant's March 17, 2020 reconsideration request, OWCP failed to analyze the evidence or argument as to whether it was sufficient to demonstrate clear evidence of error. It received numerous medical reports following the March 14, 2019 merit decision denying appellant's schedule award. The June 12, 2020 decision, however, simply found that appellant had not demonstrated clear evidence of error because he had not provided medical evidence to support a permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. It provided no discussion relative to the medical evidence submitted.²²

The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether he had demonstrated clear evidence that OWCP's last merit decision was incorrect.²³ The Board will, therefore, set aside OWCP's June 12, 2020 decision and remand the case for findings of fact and

¹⁷ *Id.* at § 10.607(b); *see M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

¹⁸ *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

¹⁹ 5 U.S.C. § 8124(a).

²⁰ 20 C.F.R. § 10.126.

²¹ *See id.*

²² *See Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

²³ 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (February 2016).

a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that OWCP properly determined that appellant's March 17, 2020 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 17, 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