

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

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J.D., Appellant)	
)	
and)	Docket No. 22-0379
)	Issued: June 6, 2022
U.S. POSTAL SERVICE, ROSELAND POST)	
OFFICE, Chicago, IL, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 31, 2021 appellant filed a timely appeal from a July 6, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ The last merit decision in this case was a Board decision dated November 28, 2017, which became final after 30 days of issuance, and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's July 6, 2021 decision was January 2, 2022. Because using the January 10, 2022 date of receipt would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 31, 2021, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 20 C.F.R. § 501.6(d).

³ 5 U.S.C. § 8101 *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

This case has been previously before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 23, 2005 appellant, then a 48-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained neck, back, and right shoulder injuries due to factors of her federal employment including repetitive lifting and bending. She noted that she first became aware of her condition on March 28, 2005 and realized its relation to her federal employment on May 17, 2005. Appellant stopped work in May 2005 and did not return.

On August 14, 2006 OWCP accepted that appellant sustained a herniated C5-6 disc, lumbar strain, and right rotator cuff tear. As of September 9, 2008, it expanded the acceptance of the claim to include bilateral hip and thigh strains. On November 26, 2008 OWCP further expanded the acceptance of appellant's claim to include aggravation of osteoarthritis of both hips.

By decision dated February 3, 2009, OWCP granted appellant a schedule award for 10 percent permanent impairment of each lower extremity.⁵

On June 21, 2016 appellant requested reconsideration and submitted additional medical evidence.

By decision dated August 25, 2016, OWCP denied modification of its February 3, 2009 schedule award determination.⁶ Appellant subsequently appealed to the Board. By decision issued November 28, 2017,⁷ the Board affirmed OWCP's August 25, 2016 decision, finding that the

⁴ Docket No. 19-1757 (issued April 15, 2020); Docket No. 17-0767 (issued November 28, 2017); Docket No. 15-1879 (issued February 10, 2016); Docket No. 09-2007 (issued May 21, 2010), *petition for recon. denied*, Docket No. 09-2007 (issued September 28, 2010); Docket No. 98-1379 (issued May 23, 2000).

⁵ Appellant subsequently claimed an increased schedule award for lower extremity permanent impairment due to thoracic disc herniations OWCP developed the claim for consequential conditions. By decision dated July 28, 2014, it denied appellant's claim for consequential thoracic disc herniations at T8-9, T9-10, and T10-11. Following an oral hearing, by decision dated April 21, 2015, an OWCP hearing representative affirmed the July 28, 2014 decision. Appellant then appealed to the Board. By decision dated February 10, 2016, the Board affirmed OWCP's April 21, 2015 merit decision. Docket No. 15-1879 (issued February 10, 2016).

⁶ OWCP also denied modification of the hearing representative's April 21, 2015 denial of a consequential thoracic spine condition.

⁷ Docket No. 17-0767 (issued November 28, 2017).

medical evidence of record failed to establish greater than 10 percent permanent impairment of each lower extremity, or that she sustained a consequential thoracic spine condition.

On November 20, 2018 appellant requested reconsideration of OWCP's August 25, 2016 decision. She submitted statements dated from January 30 through November 19, 2018, alleging that OWCP erred by failing to list bilateral hip osteoarthritis as an accepted condition in an October 9, 2008 letter to Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, inquiring as to whether she had sustained a bilateral hip condition other than accepted strains/sprains. Appellant also submitted correspondence to and from OWCP regarding the status of her claim, printouts from a U.S. Postal Service website, and copies of documents previously of record.⁸

By decision dated February 20, 2019, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a) finding that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence.

Appellant appealed to the Board. During the pendency of the prior appeal, she submitted July 31 and September 12, 2019 prescriptions, and copies of documents previously of record.

By decision issued April 15, 2020,⁹ the Board affirmed OWCP's February 20, 2019 decision, finding that appellant's November 20, 2018 reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law, advance a new and relevant legal argument not previously considered, or provide relevant and pertinent new evidence regarding the underlying issues of permanent impairment or causal relationship.

On April 8, 2021 appellant requested reconsideration. She alleged that OWCP mishandled the development of her schedule award claims for bilateral hip impairment, bilateral carpal tunnel syndrome, and a thoracic condition. Appellant asserted that OWCP should have developed the bilateral hip condition together with another claim for a hernia with partial hysterectomy and endometrial ablation. She submitted a June 8, 2021 statement asserting that an October 9, 2008 memorandum of telephone call (Form CA-110) previously of record established that she had claimed a schedule award claim for bilateral hip impairment.

By decision dated July 6, 2021, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁸ On November 27, 2018 appellant sought an appeal from a purported June 1, 2018 OWCP decision. The Clerk of the Appellate Boards assigned the appeal Docket No. 19-0330. By order dated July 26, 2019, the Board dismissed the appeal as the case record did not contain an adverse OWCP decision issued within 180 days of November 27, 2018. The Board notes that the June 1, 2018 document referenced by appellant was an informational letter and not a final decision. Docket No. 19-0330 (issued July 26, 2019).

⁹ Docket No. 19-1757 (issued April 15, 2020).

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹⁰ 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.¹¹ 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).¹² Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹³

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.¹⁴ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁵

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁶ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁸ 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.¹⁹ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

¹⁰ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

¹¹ 20 C.F.R. § 10.607(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

¹³ *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).

¹⁴ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁵ *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 12 at Chapter 2.1602.5 (September 2020).

¹⁶ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁷ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁸ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.²⁰

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.²¹ The claimant must present evidence which on its face shows that OWCP made an error.²² 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.²³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁴

In schedule award cases, a distinction is made between a claim 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.²⁵

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.²⁶ When a claimant has requested reconsideration and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.²⁷

²⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

²¹ *See supra* note 12 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²² *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *R.G.*, Docket No. 21-0540 (issued November 9, 2021); *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

²³ *Id.*

²⁴ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁵ *L.J.*, Docket No. 21-0468 (issued December 1, 2021); *J.H.*, Docket No. 20-1097 (issued December 18, 2020); *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 a request for reconsideration).

²⁶ *L.J.*, *id.*; *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁷ *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).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed.

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.²⁸ As appellant's request for reconsideration was not received by OWCP until April 8, 2021, more than one year after the November 28, 2017 merit decision, it was untimely filed.²⁹ Consequently, she must demonstrate clear evidence of error by OWCP in its August 25, 2016 decision.

The Board further finds that appellant has not demonstrated clear evidence of error. In support of her April 8, 2021 request for reconsideration, appellant submitted April 5 and June 8, 2021 statements expressing dissatisfaction with OWCP's adjudication of her schedule award claim, as well as July 31 and September 12, 2019 prescription notes. As these documents are not relevant to the underlying issue of determining the appropriate percentage of permanent impairment of appellant's lower extremities, they do not raise a substantial question as to the correctness of OWCP's August 25, 2016 decision.³⁰

Appellant also submitted copies of OWCP correspondence previously of record. These documents are duplicative in nature and are therefore insufficient to shift the weight of the evidence in favor of the claimant.³¹

The Board thus finds that appellant's request for reconsideration does not demonstrate on its face that OWCP committed error in its August 25, 2016 schedule award decision.³²

CONCLUSION

The Board finds that 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.

²⁸ See *supra* note 11.

²⁹ According to OWCP's procedures, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. See *supra* note 12 at Chapter 2.1602.4a (September 2020).

³⁰ See *supra* notes 18 and 20.

³¹ A.S., Docket No. 18-1556 (issued September 17, 2019); see A.M., Docket No. 17-1434 (issued January 2, 2018); D.B., Docket No. 16-0539 (issued May 26, 2016).

³² See S.F., Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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