

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

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**J.L., Appellant**

**and**

**U.S. POSTAL SERVICE, SPRINGFIELD POST  
OFFICE, Springfield, NJ, Employer**

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**Docket No. 23-1110  
Issued: March 14, 2024**

*Appearances:*

*Thomas Muirhead, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 21, 2023 appellant, through counsel, filed a timely appeal from a June 22, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated February 8, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> 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. *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. *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.

<sup>2</sup> 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**

On November 17, 2010 appellant, then a 48-year-old part-time flexible (PTF) letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2010 she injured both knees when she was walking on grass delivering mail and slipped in a hole, causing her to fall while in the performance of duty. She stopped work on November 19, 2020. OWCP accepted the claim for bilateral tenosynovitis and bilateral tears of the medial menisci of the knees. It paid appellant wage-loss compensation on the supplemental rolls, effective December 31, 2020, and on the periodic rolls, effective, March 26, 2011.

On July 10, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.<sup>3</sup>

In a December 21, 2021 initial payment memorandum, OWCP noted that appellant was classified as an irregular employee with a rotating scheduling. As such, appellant's pay rate had to be tabulated from her prior year's earnings by multiplying the hourly wage by the average hours worked each week.

By decision dated February 8, 2022, OWCP granted appellant a schedule award for 31 percent permanent impairment of each lower extremity (the legs). The award ran for 178.56 weeks from August 1, 2018 through January 1, 2022. The decision noted the effective date of pay rate as November 16, 2010 and calculated her weekly pay as \$309.50.

On April 21, 2023 appellant, through counsel, requested reconsideration of the February 8, 2022 decision. Counsel argued that the compensation rate used for the schedule award was erroneous, explaining that appellant was out of work for much of 2010 due to a prior injury. He reported that OWCP had previously calculated her compensation rate at \$633.00 per week. Counsel noted that the pay rate calculation for a PTF employee would use income from the 52 weeks before they were injured, if they had worked substantially the entire year prior to the injury. However, as appellant was out of work for most of 2010 due to a prior injury, he argued that using the 52-week period to calculate her pay rate and compensation was completely unfair.

In a June 9, 2023 letter, counsel argued that appellant's pay rate was calculated incorrectly for the purposes of the February 8, 2022 schedule award, asserting that OWCP should have used her 2009 wages as she was off work for most of 2010 and received a significantly reduced income. He requested that OWCP collect the correct pay stubs in order to calculate her pay rate. In support of her claim, appellant submitted pay stubs showing earnings and wages in the years prior to her November 1, 2010 employment injury.

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<sup>3</sup> Appellant filed for retirement effective August 1, 2018.

By decision dated June 22, 2023, 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.<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

OWCP may not deny a request for reconsideration 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.<sup>8</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>12</sup> 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

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<sup>4</sup> 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *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).

<sup>10</sup> *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).

<sup>11</sup> *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

<sup>12</sup> *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

submitted with the request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>13</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence which on its face shows that OWCP made an error.<sup>15</sup> 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.<sup>16</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

### 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.

The last merit decision was issued on February 8, 2022. As the most recent request for reconsideration was not received by OWCP until April 21, 2023, more than the one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.<sup>18</sup>

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly determined her pay rate when calculating her schedule award for the right and left lower extremities. In support of her claim, appellant submitted pay stubs showing earnings and wages in the years prior to her November 1, 2010 employment injury.

Counsel for appellant contended that appellant's pay rate was calculated incorrectly for the purposes of the February 8, 2022 schedule award, asserting that OWCP should have used her 2009 wages as a basis for determining her pay rate because she was off work for most of 2010 and, as a PTF employee, receiving a significantly reduced income.

The evidence of record indicates that appellant was a PTF employee. The underlying issue is whether OWCP properly determined her pay rate as that of a PTF employee and properly calculated her pay rate in accordance with 5 U.S.C. § 8114(d).<sup>19</sup> The additional evidence

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<sup>13</sup> *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

<sup>14</sup> *See supra* note 6 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>15</sup> *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

<sup>16</sup> *Id.*

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

<sup>18</sup> 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>19</sup> *L.C.*, Docket No. 19-0320 (issued July 26, 2019).

submitted with the untimely request for reconsideration does not address employment status, only the hours appellant worked in the years prior to her injury. None of the arguments or evidence submitted manifest on its face that OWCP committed an error in calculating her pay rate or are of sufficient probative value to raise a substantial question as to the correctness of the pay rate used in OWCP's February 8, 2022 schedule award decision.<sup>20</sup> Thus, appellant has not demonstrated clear evidence of error.<sup>21</sup>

Accordingly, 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.

### **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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 22, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2024  
Washington, DC

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

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

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

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<sup>20</sup> *R.H.*, Docket No. 22-0547 (issued October 14, 2022). *See also L.G.*, Docket No. 20-1457 (issued August 4, 2021); *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

<sup>21</sup> *J.B.*, Docket No. 20-0630 (issued April 21, 2021).