

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rocky Point, NC, Employer**

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**Docket No. 19-0635
Issued: August 23, 2019**

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 January 28, 2019 appellant filed a timely appeal from an August 29, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision dated December 13, 2016 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 review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

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 September 3, 2016 appellant, then a 55-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed various bilateral upper extremity conditions, neck pain, and cervicalgia due to repetitive gripping, pulling, squeezing, and lifting mail for 19 years while in the performance of duty. She indicated that she first became aware of her disease and its relationship to factors of her federal employment on July 22, 2016. On the reverse side of the claim form the employing establishment noted that appellant was last exposed to the conditions alleged to have caused her disease or illness on May 17, 2016, that she stopped work on July 22, 2016, and had not yet returned.

In a report dated July 22, 2016, Dr. Joanne Allen, Board-certified in physical medicine and rehabilitation, reviewed electromyogram (EMG) and nerve conduction velocity (NCV) studies and diagnosed bilateral carpal tunnel syndrome, neck pain, paresthesias of bilateral upper extremities, and right shoulder impingement syndrome.

In a development letter dated September 12, 2016, OWCP acknowledged receipt of appellant's claim and informed her that additional evidence was necessary to establish her claim. It provided her a questionnaire for completion and afforded her 30 days to submit the necessary evidence.

By decision dated December 13, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish diagnosed medical conditions causally related to factors of her federal employment.

On July 3, 2018 appellant requested reconsideration of OWCP's December 13, 2016 decision. She submitted additional evidence with her request including billing statements from her health insurance company, diagnostic reports dated February 22, 2018, a case copy request dated April 27, 2018, operative reports noting surgery on May 7, 2018, an illegible return to work slip, and a referral for physical therapy dated May 22, 2018.

In a narrative report dated April 12, 2018, Dr. Andre Leonard, a Board-certified internist, related that appellant was first evaluated on January 27, 2015 after a fall at work in December 2014. He related her physical examination findings regarding her right shoulder and cervical spine relative to the December 2014 fall and noted that appellant had returned to work on May 17, 2016 with restrictions.

In a work capacity evaluation (Form OWCP-5c) and duty status report (Form CA-17) dated May 22, 2018, Dr. Leonard indicated that appellant underwent carpal tunnel surgery on May 7, 2018. He noted that she was unable to perform her regular duties as a rural carrier, and could only perform sedentary work. In an attending physician's report (Form CA-20) of the same

date, Dr. Leonard marked the box “yes” when asked whether appellant’s condition was caused or aggravated by an employment activity.

In a letter dated June 15, 2018, Dr. Leonard noted that appellant had been his patient since July 31, 2007, and that she suffered from sciatic pain, right shoulder pain, and left hand carpal tunnel pain. He related that she underwent carpal tunnel surgery on May 7, 2018 on her left wrist. Dr. Leonard further indicated that appellant’s work restrictions included no grasping, lifting, pulling greater than two pounds, climbing, and repetitive wrist movements.

By decision dated August 29, 2018, OWCP denied appellant’s reconsideration request, 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.³ This discretionary authority, however, is subject to certain restrictions.⁴ OWCP’s regulations⁵ 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.⁶ Timeliness is determined by the document receipt date, the received date in OWCP’s integrated Federal Employees’ Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

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.⁹ OWCP 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.¹⁰

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Fairley, Jr.*, 41 ECAB 104 (1989).

⁹ *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).

¹⁰ See *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision. The most recent merit decision was OWCP's December 13, 2016 decision, which denied appellant's occupational disease claim. OWCP received her request for reconsideration on July 3, 2018, which was outside the one-year time limit.

¹¹ *V.G.*, *supra* note 5; *see E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *S.T.*, *supra* note 8; *see C.V.*, *supra* note 9; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *S.T.*, *supra* note 8; *see E.P.*, *supra* note 11; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *V.G.*, *supra* note 5; *see C.V.*, *supra* note 9; *Leon J. Modrowski*, *supra* note 9; *Jesus D. Sanchez*, *supra* note 9.

¹⁵ *V.G.*, *supra* note 5; *see E.P.*, *supra* note 11; *Leona N. Travis*, *supra* note 13.

¹⁶ *Supra* note 11.

¹⁷ *D.G.*, *supra* note 10; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁸ *See C.V.*, *supra* note 9; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁹

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's December 13, 2018 merit decision or shift the weight of the evidence of record in her favor.

In support of her reconsideration request, appellant submitted billing statements from her health insurance company, a diagnostic report dated February 22, 2018, an April 12, 2018 narrative report from Dr. Leonard in which he related appellant's treatment for a fall at work in December 2014, a case copy request dated April 27, 2018, operative reports noting surgery on May 7, 2018, a referral for physical therapy dated May 22, 2018, and various form reports dated May 22, 2018 detailing appellant's work restrictions. She has not explained how this evidence raises a substantial question regarding the correctness of OWCP's initial decision denying her claim for bilateral carpal tunnel syndrome.²⁰ This evidence does not offer a rationalized medical opinion that OWCP's decision was incorrect and is not 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.²¹

OWCP also received a narrative report from Dr. Leonard dated June 15, 2018 in which he indicated that appellant underwent carpal tunnel surgery on May 7, 2018 and that she had restrictions regarding grasping, lifting, and pulling. Dr. Leonard also related that she suffered from sciatic pain, right shoulder pain, and left hand carpal tunnel pain. While this evidence contains new information, it does not demonstrate that OWCP's decision was in error at the time that it was issued.

Clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have required further development, is insufficient to demonstrate clear evidence of error.²²

Appellant has not demonstrated clear evidence of error. The Board finds that the evidence appellant submitted on reconsideration is insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred in its December 13, 2016 decision. Thus, OWCP properly denied her untimely request for reconsideration.

¹⁹ 20 C.F.R. § 10.607(b).

²⁰ See *P.B.*, Docket No. 18-0265 (issued September 5, 2018).

²¹ *T.S.*, Docket No. 19-0056 (issued July 1, 2019).

²² *F.A.*, Docket No. 19-0321 (issued July 5, 2019).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

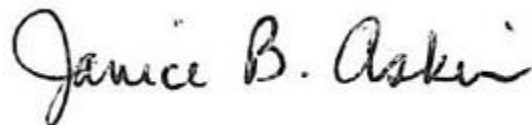
ORDER

IT IS HEREBY ORDERED THAT the August 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

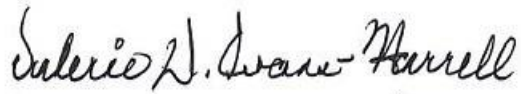
Issued: August 23, 2019
Washington, DC



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