

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Savannah, GA, Employer**

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**Docket No. 13-1152
Issued: September 26, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On April 8, 2013 appellant filed a timely appeal from a nonmerit October 12, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.¹ The most recent merit decision of record is dated June 23, 2011. There is no merit decision within 180 days of April 8, 2013, the date appellant filed his appeal with the Board. Therefore, pursuant to the Federal Employees' Compensation Act² (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*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued on October 12, 2012, the 180-day computation begins on October 13, 2012. Since using April 12, 2013, the date the appeal was received by the Clerk of the Board, 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 April 8, 2013, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

On appeal, appellant asserts that OWCP erred by ignoring and manipulating information, delaying her claim and failing to accept an impairment rating using the Greenleaf system.

FACTUAL HISTORY

This is the fifth appeal before the Board in this case. In the first appeal, by decision and order issued June 1, 2004, the Board remanded the case to OWCP for further development of the medical evidence regarding calcific tendinitis of the left shoulder.³ In the second appeal, the Board issued an order on October 9, 2007 remanding the case to OWCP for doubling of appellant's claim under File No. xxxxxx828 accepted for bilateral carpal tunnel syndrome and bilateral tendinitis of the hands, with File No. xxxxxx325, accepted for bilateral calcific tendinitis of the shoulders and bilateral acromioclavicular arthritis.⁴ In the third appeal, the Board issued an order on September 14, 2009 remanding the case for reconstruction of the record.⁵ In the fourth appeal, the Board issued an order on February 25, 2011 remanding the case for proper consideration of the medical evidence.⁶ The law and facts of the case as set forth in the Board's prior actions are incorporated by reference.

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, bilateral tendinitis of the hands, bilateral calcific tendinitis of the shoulders and acromioclavicular arthritis. Following development of the medical evidence, by decision dated September 5, 2007, OWCP issued him a schedule award for two percent impairment of the right upper extremity. Following additional development, OWCP issued a February 21, 2008 decision granting appellant an additional schedule award for 8 percent impairment of the right arm, for a total of 10 percent and 9 percent impairment of the left arm.

By decision dated March 13, 2008, OWCP issued appellant a schedule award for an additional 2 percent impairment of the right upper extremity, for a total of 12 percent, and an additional 10 percent impairment of the left upper extremity, for a total of 19 percent. It based the increase on reports from Dr. John P. George, an attending Board-certified orthopedic surgeon, as reviewed by an OWCP medical adviser on March 3, 2008.

In March 24, 2008 letters, appellant requested reconsideration of the February 21 and March 13, 2008 schedule award decisions. She submitted a March 12, 2008 report from Dr. Douglas Hein, an attending Board-certified orthopedic surgeon. On April 10, 2008 an OWCP medical adviser reviewed Dr. Hein's report and opined that appellant was entitled to an

³ Docket No. 04-487 (issued June 1, 2004).

⁴ Docket No. 07-1194 (issued October 9, 2007).

⁵ Docket No. 09-160 (issued September 14, 2009).

⁶ Docket No. 10-1151 (issued February 25, 2011).

additional schedule award for four percent impairment of the right arm and nine percent impairment of the left arm.

By decision dated May 2, 2008, OWCP issued appellant a schedule award for 4 percent additional impairment of the right upper extremity, for a total of 16 percent, and an additional 9 percent impairment of the left upper extremity, for a total of 28 percent.

In June 20, August 18 and September 4, 2008 letters, appellant requested reconsideration. She asserted that OWCP's impairment ratings were inequitable and unjust. Appellant submitted a May 15, 2008 report from Dr. George changing a medication. By decision dated September 26, 2008, OWCP denied reconsideration on the grounds that the evidence submitted was not new or relevant and did not establish legal error by OWCP.

Thereafter, appellant submitted physical therapy notes, and a November 13, 2008 report from Dr. George diagnosing a complete left rotator cuff tear.

By decision dated November 22, 2010, OWCP denied appellant's claim for an additional schedule award on the grounds that the evidence submitted did not establish percentages of impairment greater than those previously awarded.

Appellant submitted prescription slips, physical therapy notes and reports from Dr. Hein dated from April 19, 2010 to April 6, 2011 noting continued upper extremity pain. Following the Board's February 25, 2011 order, by decision dated May 17, 2011, OWCP denied reconsideration on the grounds that the evidence submitted was irrelevant, did not establish error by OWCP or advance a new, relevant legal argument.

In an April 8, 2011 letter, appellant requested reconsideration of the November 22, 2010 merit decision denying her claim for an additional schedule award. She submitted medical reports dated August 11 and December 22, 2010 and February 16, 2011 from Dr. Spencer Wheeler, a Board-certified orthopedic surgeon, providing range-of-motion measurements for the left shoulder and prescribing medication.

By decision dated June 23, 2011, OWCP denied modification on the grounds that the additional evidence submitted did not establish a greater percentage of impairment than that previously awarded.

In a July 25, 2011 letter, appellant requested reconsideration. She asserted that OWCP did not fully consider her physicians' opinions when rating her upper extremity impairments. Appellant submitted copies of her letters previously of record, a statement from a private individual who was not a physician, chart notes from Dr. George dated from January 13, 2005 to August 15, 2007, reports from Dr. Hein dated from December 5, 2007 to July 27, 2011, a December 6, 2004 surgical report, September 29, 2011 reports from Dr. Wheeler and an undated Greenleaf Evaluation System Configuration chart and an e-mail from the president of the Greenleaf company.

By decision dated September 2, 2011, OWCP denied reconsideration on the grounds that the evidence submitted as cumulative and repetitious. It found that the new evidence was not relevant to the schedule award issue in the claim and did not demonstrate that OWCP committed legal error or advance a new, relevant legal argument.

In August 6 and 18, 2012 letters, appellant requested reconsideration. She asserted that she was entitled to 27 percent impairment of the left hand using the Greenleaf rating system, and that she had not reached maximum medical improvement when rated on March 3, 2008. Appellant submitted a September 8, 2011 electrodiagnostic report showing moderate right and mild left carpal tunnel syndrome, office notes from Dr. Hein dated from July 27, 2011 to July 2, 2012 noting continued bilateral hand symptoms, prescription slips, work absence slips, physical therapy notes, chart notes from Dr. Wheeler dated August 24, 2011 to August 29, 2012 noting continued bilateral upper extremity symptoms, telephone call logs and copies of OWCP correspondence previously of record.

By decision dated October 12, 2012, OWCP denied appellant's August 6, 2012 request for reconsideration on the grounds that her request was not timely filed and failed to present clear evidence of error. It found that her August 6 and 18, 2012 letters were dated and received more than one year after the June 23, 2011 decision, the final merit decision in the claim.

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹⁰ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).¹¹

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹² OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.¹³

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁹ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹⁰ 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 8, *Jesus D. Sanchez*, *supra* note 9.

¹² *Supra* note 8.

¹³ 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by OWCP.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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 by OWCP.¹⁸ The Board must make an independent determination of whether a claimant has submitted 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.¹⁹

ANALYSIS

In its October 12, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on June 23, 2011. Appellant requested reconsideration on August 6, 2012, more than one year from the issuance of the June 23, 2011 merit decision. OWCP denied the request by October 12, 2012 decision on the grounds that it was not timely filed and failed to present clear evidence of error.

As the reconsideration request was not timely filed, it must now be determined whether the request demonstrated clear evidence of error in OWCP's June 23, 2011 decision. The Board finds that the additional evidence submitted does not demonstrate clear evidence of error.

In her August 6 and 18, 2012 letters, appellant asserted that she did not reach maximum medical improvement as of March 3, 2008 and was entitled to 27 percent impairment of the left hand using the Greenleaf rating system, an evaluating methodology not recognized by OWCP.²⁰ Therefore, these arguments are not relevant to the claim and are insufficient to raise substantial question concerning the correctness of OWCP's decision. Dr. Hein's and Dr. Wheeler's reports, the electrodiagnostic test results, prescription slips, physical therapy notes and call logs also do not address the percentage of upper extremity impairment. They are therefore irrelevant to the critical issue in the claim and do not establish clear evidence of error.²¹ Appellant also submitted

¹⁴ *Thankamma Mathews*, *supra* note 8.

¹⁵ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *Jesus D. Sanchez*, *supra* note 9.

¹⁷ *Supra* note 15.

¹⁸ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Gregory Griffin*, *supra* note 10.

²⁰ For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption. *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). See 20 C.F.R. § 10.404.

²¹ *Supra* note 15.

copies of correspondence previously of record. The Board has held that evidence that repeats or duplicates evidence previously submitted is insufficient to shift the weight of the evidence in favor of the claimant.²²

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's June 23, 2011 merit decision. Consequently, OWCP properly denied his reconsideration request as his request does not establish clear evidence of error.

On appeal, appellant asserts that OWCP erred by ignoring and manipulating information, delaying her claim, and failing to accept an impairment rating using the Greenleaf system. The Board notes that there is no evidence of misconduct by OWCP in the processing of appellant's claims.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2012 is affirmed.

Issued: September 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

²² *D.E.*, 59 ECAB 438 (2008).