

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

C.H., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
North Little Rock, AR, Employer)

Docket No. 16-0620
Issued: July 14, 2016

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 15, 2016 appellant, through counsel, filed a timely appeal from a December 29, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between May 10, 2013, the date of the most recent OWCP merit decision, and 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 appellant's claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on December 18, 1998 appellant, then a 46-year-old registered nurse, sustained cervical, left shoulder, and left upper arm sprains and aggravation of cervical degenerative disease due to lifting and repositioning a patient at work. Appellant stopped work on December 18, 1998. She had been working as a registered nurse since August 26, 1991 and was working at the grade 3/step 5 pay level at the time of the December 18, 1998 employment injury.

On March 21, 2004 appellant began working for the employing establishment as staff nurse. She continued working in this position and, in an August 29, 2012 decision, OWCP determined that her current position of staff nurse in which she was employed since March 21, 2004 fairly and reasonably represented her wage-earning capacity. OWCP reduced appellant's wage-loss compensation to zero noting that she had a loss of wage-earning capacity of zero percent because her actual earnings met or exceeded the current wages of the registered nurse job she held when injured on December 18, 1998. Its August 29, 2012 decision was based on an August 28, 2012 wage-earning capacity worksheet which included calculations under the *Shadrick* formula, which was derived from principles contained in the case, *Albert C. Shadrick*.²

Appellant requested a telephone hearing before an OWCP hearing representative and a hearing was held on February 12, 2013. During the hearing, counsel indicated that he disagreed with OWCP's calculation in line (3) of the *Shadrick* formula. He asserted that OWCP should have performed a retroactive loss of wage-earning capacity determination using appellant's actual wages as of March 2004.

In a May 10, 2013 decision, OWCP's hearing representative denied modification of OWCP's August 29, 2012 decision. She stated that there was no requirement to perform a retroactive loss of wage-earning capacity determination to March 2004 as OWCP was developing the case during this period to determine if appellant continued to have residuals of her December 18, 1998 work injury. The hearing representative concluded, "I find that [OWCP] should base the claimant's wage-earning capacity on her earnings contemporaneous with their decision." She indicated that OWCP made a minor error in its calculation of the *Shadrick* formula noting that it should have used appellant's pay rate on December 18, 1998 of \$1,050.61 on line (1) of the worksheet and not the pay rate on July 1, 2001 of \$1,018.15. The hearing representative found:

"Since the date disability began pay rate of December 18, 1998 is higher than the date of recurrence pay rate, this should be used by [OWCP] in the *Shadrick* formula to calculate the loss of wage-earning capacity. I agree that the current date-of-injury pay for July 29, 2012 is \$1,713.16 and the claimant's actual earnings on July 29, 2012 were \$1,744.27. Using the corrected number for the date disability began however indicates that the claimant still does not have a wage loss.... I find [that] [OWCP] correctly determined that there is no loss of wage-earning capacity."

² 5 ECAB 376 (1953).

In a September 24, 2014 decision, the Board affirmed the May 10, 2013 decision of OWCP finding that appellant had no loss of wage-earnings capacity because her actual wages as a staff nurse fairly and reasonably represented her wage-earning capacity.³ The Board found that OWCP properly applied the *Shadrick* formula to determine that appellant had zero percent loss of wage-earning capacity. It noted that OWCP used appellant's actual weekly earnings as a registered nurse, effective July 29, 2012, of \$1,744.27 in line (3) of the *Shadrick* formula. The Board noted that counsel, on behalf of appellant, asserted that OWCP should have performed a retroactive loss of wage-earning capacity calculation in line (3) based on her actual wages in March 2004. The Board found, however, that a retroactive loss of wage-earning determination was not appropriate. It noted that OWCP regulations provided, "The comparison of earnings and 'current' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. OWCP may use any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison."⁴ The Board indicated that its precedent provided that a retroactive loss of wage-earning capacity determination is not inappropriate when there is a pending claim for compensation⁵ and noted that appellant continued to receive medical benefits under FECA and OWCP proceeded to develop the medical evidence for a number of years in response to her claims for work-related disability for various periods. The Board concluded that, because OWCP's calculations showed that appellant was able to earn the current wages of the position she held when injured on December 18, 1998, OWCP properly found that she had no disability within the meaning of FECA.⁶

In an October 5, 2015 letter received by OWCP on that date, appellant, through counsel, requested reconsideration of OWCP's May 10, 2013 loss of wage-earning capacity decision. Counsel argued that Board precedent provided that if an employee's current rate of pay for the job held when injured or his current actual earnings changes over time then a new *Shadrick* calculation would have to be made to reflect a change in the amount of compensation due to the employee. He asserted that OWCP must apply a separate *Shadrick* formula to determine compensation for each period from March 22, 2004 to April 12, 2007 whenever either appellant's actual earnings changed or the rate of pay changed for the job she held when injured. Counsel indicated that appellant must be paid for lost wages from March 22, 2004 to April 12, 2007 or a new formal loss of wage-earning capacity decision with appeal rights must be issued.

In a December 29, 2015 decision, OWCP denied appellant's request for further review of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's request for reconsideration was untimely because it was not received by OWCP until October 5, 2015, more than one year after the last merit decision, *i.e.*, the Board's September 24, 2014 decision. It further found that appellant's

³ Docket No. 13-1369 (issued September 24, 2014).

⁴ See 20 C.F.R. § 10.403(d).

⁵ See *K.E.*, Docket 10-1211 (issued April 14, 2011); *G.M.*, Docket No. 08-44 (issued December 3, 2008); *Juan A. DeJesus*, 54 ECAB 721 (2003); *William M Bailey*, 51 ECAB 197 (1999).

⁶ OWCP's regulations define "disability" as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(f).

argument on reconsideration did not demonstrate clear evidence of error in OWCP's May 10, 2013 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease, or increase the compensation awarded; or award compensation previously refused or discontinued.⁷

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁸ However, according to OWCP 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.⁹

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹⁰

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹³ For example, the submission of 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

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

¹⁰ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

not clear evidence of error.¹⁴ Consideration of an untimely reconsideration request entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁵ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought. 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.¹⁷ As appellant's request for reconsideration was not received by OWCP until October 5, 2015, more than one year after the last merit decision, *i.e.*, the Board's September 24, 2014 decision, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in its May 10, 2013 decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its May 10, 2013 decision. In an October 5, 2015 letter received by OWCP on that date, appellant, through counsel, requested reconsideration of OWCP's May 10, 2013 loss of wage-earning capacity decision. Counsel argued that OWCP was required to perform a retroactive loss of wage-earning capacity determination by applying a separate *Shadrick* formula to determine compensation for each period from March 22, 2004 to April 12, 2007 whenever either appellant's actual earnings changed or the rate of pay changed for the job she held when injured.

However, this argument does not raise a substantial question as to the correctness of OWCP's decision. The Board directly addressed this argument in its September 24, 2014 decision. It noted that a retroactive loss of wage-earning capacity determination is not inappropriate when there is a pending claim for compensation¹⁸ and indicated that appellant continued to receive medical benefits under FECA and OWCP proceeded to develop the medical evidence for a number of years in response to her claims for work-related disability for various periods.¹⁹ The Board concluded that, therefore, performing a retroactive loss of wage-earning capacity determination is not inappropriate in the present case.

¹⁴ *D.G.*, 59 ECAB 455 (2008).

¹⁵ *Id.*

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *See supra* notes 8 and 9.

¹⁸ *See supra* note 5.

¹⁹ The Board further noted that the comparison of earnings and "current" pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. OWCP may use any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison. *See supra* note 4.

The Board notes that clear evidence of error is intended to represent a difficult standard. For the reasons noted above, the argument submitted by appellant in connection with her untimely reconsideration request does not raise a substantial question concerning the correctness of OWCP's May 10, 2013 decision and OWCP properly determined that appellant failed to demonstrate clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2016
Washington, DC

Christopher J. Godfrey, 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