

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

B.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sandy Spring, GA, Employer**

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**Docket No. 16-0730
Issued: October 7, 2016**

Appearances:

Joanne M. Wright, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 2, 2016 appellant, through her representative, timely appealed the October 15, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As the last merit decision in the case is dated February 14, 2014, which is more than 180 days prior to the filing of the instant appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction extends only to the October 15, 2015 nonmerit decision. The Board does not have jurisdiction over the merits of this case.³

¹ 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's 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.

² 5 U.S.C. § 8101 *et seq.*

³ Appellant timely requested oral argument; however, the Board exercised its discretion and denied her request pursuant to 20 C.F.R. § 501.5(a). *See Order Denying Request for Oral Argument*, Docket No. 16-0730 (issued June 24, 2016).

ISSUE

The issue is whether OWCP properly found that appellant's request for reconsideration was untimely filed and that she failed to demonstrate clear evidence of error with respect to the February 14, 2014 merit decision.

FACTUAL HISTORY

On February 5, 2013 appellant, then a 51-year-old city carrier, filed an occupational disease claim (Form CA-2) for injuries to her right elbow and bilateral shoulders. She served as an acting supervisor (204-B) for a six-month period ending in September 2012. Afterwards, appellant resumed her regular city carrier duties. She attributed her injury to a combination of duties she performed as both a supervisor and a city carrier.⁴ Appellant identified April 1, 2012 as the date she first realized her condition was employment related.

Appellant's upper extremity diagnoses included bilateral rotator cuff tears, shoulder osteoarthritis, and right lateral epicondylitis. On March 1, 2013 she underwent right shoulder arthroscopic surgery.⁵ According to her surgeon, Dr. James S. Kercher, appellant's bilateral rotator cuff injuries were "secondary to ... lifting at work."⁶ He noted that he was unable to find any documentation of an acute tear. In a March 28, 2013 report, Dr. Kercher explained that the shoulder injury appeared to be a rupture secondary to appellant's work-related activities, as she did not report any prior symptoms. Effective May 1, 2013, he released her to return to work in a part-time, light-duty capacity.

By decision dated May 1, 2013, OWCP denied appellant's claim finding that the medical evidence did not establish a causal relationship between her accepted occupational exposure and her diagnosed upper extremity conditions. It found that her surgeon failed to explain how her work activities either caused or contributed to her diagnosed conditions.

Appellant requested an oral hearing, before an OWCP hearing representative, which was held on October 30, 2013.

In a June 17, 2013 report, Dr. T. Scott Maughon, a Board-certified orthopedic surgeon with a specialty in sports medicine, noted that appellant sought a second opinion regarding left shoulder surgery. He was aware that she had undergone right shoulder surgery in March 2013. Dr. Maughon reported an April/May 2012 onset of bilateral shoulder complaints. He also noted that appellant was a mail carrier and her work injury occurred gradually over the year and was reportedly the result of repetition. Dr. Maughon examined her and reviewed a magnetic resonance imaging (MRI) scan that revealed a full-thickness tear at the left supraspinatus. He

⁴ Appellant indicated that her duties included preparing daily dispatches, loading, unloading and transporting mail, distributing mail to carriers' cases utilizing all-purpose containers and wire cages, and loading and delivering trays of letters, flats, and parcels of various size and weight. She also claimed that opening and closing the door of her work vehicle and setting the brake numerous times per day irritated her shoulder and arm.

⁵ Appellant anticipated undergoing left shoulder surgery in June or July 2013.

⁶ Dr. Kercher is a Board-certified orthopedic surgeon with a subspecialty in sports medicine.

diagnosed left shoulder tendinitis/tendinopathy, rotator cuff syndrome, and supraspinatus syndrome (ICD-9 726.10). Dr. Maughon discussed surgery with appellant and she reportedly agreed to return for a preoperative examination. As to the etiology of appellant's condition, he indicated that it was caused by repetitive motion. Dr. Maughon explained that there was no history of a macrotrauma as a mail carrier; however, her condition was not uncommon with lifting things above her head. He reiterated that appellant's problems were caused by her occupation.

In a December 19, 2013 decision, an OWCP hearing representative found that the medical evidence, including the opinions of Dr. Kercher and Dr. Maughon, was insufficient to establish causal relationship.

On January 24, 2014 appellant requested reconsideration and submitted a January 6, 2014 follow-up report by Dr. Maughon, who indicated that he had seen appellant on November 12, 2013 for bilateral shoulder pain. She returned for an evaluation of her left shoulder for rotator cuff repair. Dr. Maughon noted that a December 31, 2012 MRI scan confirmed the presence of a large, full-thickness rotator cuff tear. He recommended that appellant undergo left shoulder arthroscopy with rotator cuff repair. Dr. Maughon indicated that the rotator cuff tear was due to her job, which required her to lift 10- to 15-pound trays at shoulder level all day long. He further commented that this repetitive work was most likely the cause of appellant's injury.

By decision dated February 14, 2014, OWCP reviewed the merits of the claim, but denied modification.

On April 18, 2014 OWCP received an undated request for reconsideration.⁷ It also received an April 4, 2014 application for review (AB-1) form before the Board. Additionally, appellant submitted a March 28, 2014 note from Dr. Maughon, who attributed her left shoulder rotator cuff tear to work-related overuse.

On April 25, 2014 OWCP acknowledged receipt of appellant's AB-1 form and her request for reconsideration, both of which pertained to the February 14, 2014 merit decision denying modification. It advised that it would not take any further action on her recent submissions because it was unclear which type of review she wished to pursue. The April 25, 2014 letter further outlined the various avenues of review available under FECA and OWCP advised appellant that she could only pursue one avenue at a time. OWCP also returned her AB-1 form and the appeal request form it received on April 18, 2014.

On May 2, 2014 OWCP received another appeal request form seeking reconsideration of its February 14, 2014 decision. The form was signed and dated April 14, 2014, and it was accompanied by a copy of OWCP's April 25, 2014 correspondence. Appellant also resubmitted the previous copy of her AB-1 form. However, she did not specify which avenue of review she preferred.

On May 8, 2014 OWCP wrote to appellant acknowledging receipt of duplicate copies of her appeal request form and AB-1 form. It further noted: "Currently, [appellant's] case is being

⁷ Appellant utilized the appeal request form that accompanied OWCP's February 14, 2014 decision.

reviewed by [the Board]; therefore, [appellant's] case cannot be reviewed *via* the reconsideration process. No further action can be taken by this office. [Appellant] will hear directly from [the Board] regarding [her] appeal.”

In early January 2015, appellant contacted the Board to inquire about the status of her appeal. She learned that the Board had no record of an appeal having been filed. Appellant followed up with a January 13, 2015 letter, which the Board treated as a new appeal and assigned Docket No. 15-0920. However, the Board subsequently dismissed the appeal as untimely.⁸

On October 2, 2015 appellant's representative filed a request for reconsideration with OWCP. She argued that appellant was entitled to merit review based on her April 2014 request for reconsideration and the March 28, 2014 medical opinion that accompanied the request. Appellant's representative also alleged error on the part of OWCP in failing to timely forward the April 4, 2014 AB-1 form to the Board.

By decision dated October 15, 2015, OWCP denied appellant's October 2, 2015 request as untimely filed. It also found that the newly submitted medical evidence failed to demonstrate clear evidence of error with respect to the February 14, 2014 merit decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁹ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁰ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹¹ OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit

⁸ See *Order Dismissing Appeal*, Docket No. 15-0920 (issued May 1, 2015). The appeal, which the Board received on January 23, 2015, postdated OWCP's February 14, 2014 merit decision by more than 180 days. See 20 C.F.R. § 501.3(e), (g).

⁹ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607.

¹¹ *Id.* § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of the OWCP decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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). *Id.* at Chapter 2.1602.4b. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be “mailed” to OWCP within one year of OWCP decision for which review is sought. *Id.* at Chapter 2.1602.4e.

decision.”¹² The request must establish on its face that such decision was erroneous.¹³ Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁴

When a request is timely filed, a different standard of review applies. A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁵ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁶

ANALYSIS

The latest merit decision is dated February 14, 2014. In that decision, OWCP denied appellant’s occupational disease claim as she had failed to establish a causal relationship between her diagnosed upper extremity conditions and her accepted employment exposure. On April 18, 2014 it received a signed, but undated request for reconsideration. OWCP also received Dr. Maughon’s March 28, 2014 report, wherein he attributed appellant’s left shoulder rotator cuff tear to work-related overuse. Additionally, appellant submitted to OWCP an April 4, 2014 application for review (AB-1) form before the Board.

On April 25, 2014 OWCP returned both the AB-1 form and the undated request for reconsideration. It advised appellant that it would not take any further action on her recent submissions because it was unclear which type of review she was pursuing. In essence, OWCP explained that she would have to choose between reconsideration and an appeal before the Board because she could not pursue both avenues simultaneously.

In response, appellant resubmitted both forms to OWCP, which it received on May 2, 2014. The only noticeable difference from the prior submission was that she added the date April 14, 2014 to her previously undated request for reconsideration. Despite OWCP’s

¹² 20 C.F.R. § 10.607(b).

¹³ *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.608(b).

¹⁵ *Id.* at § 10.606(b)(3).

¹⁶ *Id.* at § 10.608(a), (b).

request for clarification, appellant did not specify whether she wished to pursue reconsideration before OWCP or an appeal before the Board.

On May 8, 2014 OWCP advised appellant that it could not take any further action with respect to her reconsideration request because her claim was currently being reviewed by the Board. It further advised that she would hear directly from the Board regarding her appeal. In January 2015, appellant learned from the Board that there was no record of her having previously filed an appeal with respect to OWCP's February 14, 2014 decision.

While a case is on appeal to the Board, OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal.¹⁷ There is no indication that appellant separately filed her April 4, 2014 AB-1 form with the Board, and there is no evidence that OWCP forwarded it to the Board.¹⁸ Although she never clarified which avenue of review she intended to pursue, OWCP's May 8, 2014 correspondence was nonetheless inaccurate and misleading. Contrary to OWCP's assertion, appellant's case was not "being reviewed by ECAB" at the time and because there was no pending appeal before the Board, OWCP was not precluded from considering her April 18, 2014 request for reconsideration, and the additional medical evidence received since the February 14, 2014 merit decision. Accordingly, the Board finds that she filed a timely request for reconsideration on May 2, 2014. As such, the clear evidence of error standard does not apply. Appellant is entitled to review of her request pursuant to 20 C.F.R. § 10.606(b)(3).

CONCLUSION

The case is not in posture for decision.

¹⁷ 20 C.F.R. § 10.626; *Id.* § 501.2(c)(3); *see, e.g., Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004).

¹⁸ OWCP's May 8, 2014 correspondence indicated that the "appeal form was sent to ECAB." However, the record does not support OWCP's statement regarding appellant's April 4, 2014 AB-1 form having been sent to the Board.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: October 7, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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