

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

D.S., Appellant

and

**FEDERAL JUDICIARY, U.S. DISTRICT
COURT -- EAST NY, Brooklyn, NY, Employer**

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**Docket No. 17-0407
Issued: May 24, 2017**

Appearances:
Appellant, pro se
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 December 5, 2016¹ appellant filed a timely appeal from a June 9, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between the last merit decision dated January 5, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from June 9, 2016, the date of OWCP's last decision, is December 6, 2016. Since using December 19, 2016, the date the appeal was received by the Clerk of the Appellate Boards 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 December 5, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

³ An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as the request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 27, 2014 appellant, then a 51-year-old career law clerk, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2014 she tripped and broke her right hand wrist bone. She stopped work on February 10, 2014 and returned to work on February 18, 2014. By decision dated April 23, 2014, OWCP accepted the claim for right wrist fracture.

On November 21, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated December 2, 2014, OWCP requested that appellant submit a report from her attending physician addressing her work-related condition, the date of maximum medical improvement (MMI), objective findings, subjective complaints, and an impairment rating rendered according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).⁴ Appellant was afforded 30 days to provide the requested information. She did not respond.

By decision dated January 5, 2015, OWCP denied appellant's claim for a schedule award as the evidence was insufficient to establish that she sustained permanent impairment of a scheduled member or function of the body.

By letter dated January 8, 2015, received January 26, 2015, appellant informed OWCP that she was requesting an extension of time to submit a report from her physician in support of her claim as she was unable to obtain an appointment with her physician until January 6, 2015.

In a January 6, 2015 medical report, Dr. Brian Mehling, a Board-certified orthopedic surgeon, reported that appellant sustained a right wrist fracture in February 2014. He provided examination findings and noted his review of diagnostic testing. Dr. Mehling opined that appellant had reached MMI on January 6, 2015. He noted significant decreased range of motion in all planes of the right wrist as well as supination and pronation. Dr. Mehling further found decreased strength, atrophy, and ankyloses of the right wrist with subjective complaints of pain and discomfort. He concluded that appellant had 50 percent permanent impairment of her right wrist.

By letter dated February 9, 2016, appellant reported that she had requested reconsideration of her claim in February 2015, but had not heard back from OWCP.

By letter dated March 7, 2016, appellant reported that she had not received any updates on her schedule award claim. She summarized telephone calls and letters previously sent to OWCP regarding the status of her claim, as well as reconsideration requests which she had

⁴ A.M.A., *Guides* (2009).

timely submitted. Appellant provided attachments documenting the prior letters and telephone calls made to OWCP.

By decision dated June 9, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP regulations provide that to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received by it within one year of the date of OWCP's decision for which review is sought.⁵

OWCP, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.⁶ In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹²

⁵ 20 C.F.R. § 10.607.

⁶ *See id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

ANALYSIS

The Board finds that this case is not in posture for decision because OWCP erroneously adjudicated appellant's request for reconsideration under the clear evidence of error standard.

When appellant initially filed her claim for a schedule award she did not submit any medical evidence in support of a schedule award. By letter dated January 8, 2015, appellant provided new evidence in the form of an impairment rating from her treating physician with regard to her schedule award claim. Dr. Mehling's January 6, 2015 medical report provided findings on physical examination and review of diagnostic testing. He reported that appellant had reached MMI and was entitled to an award for 50 percent permanent impairment of the right wrist.

In its June 9, 2016 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that her reconsideration request was received on March 18, 2016. The Board notes that appellant submitted new evidence from Dr. Mehling addressing impairment as of January 26, 2015, the date her January 8, 2015 letter was received. The Board has held that a claimant may request a schedule award or increased schedule award at any time based on evidence of new exposure or medical evidence showing the progression of an employment-related condition resulting in permanent impairment or increased impairment.¹³ Dr. Mehling opined that appellant had reached MMI and provided an impairment rating for the right wrist.

As in the case *Paul R. Reedy*, the June 9, 2016 decision treated appellant's claim as a request for reconsideration. The Board finds, however, that she was not seeking reconsideration of the previous schedule award determination. Rather, appellant submitted new evidence showing increased impairment of the right upper extremity.¹⁴ OWCP's procedures provide that if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request and OWCP should develop the issue of entitlement to an additional award.¹⁵

The Board thus finds that OWCP improperly denied appellant's request for reconsideration under the clear evidence of error standard and failed to issue an appropriate decision regarding appellant's claim for an increased schedule award.¹⁶ On remand OWCP should review and develop the medical evidence and issue a *de novo* decision regarding appellant's claim for a schedule award.

¹³ *Id.*

¹⁴ *J.F.*, Docket No. 13-112 (issued November 6, 2013).

¹⁵ The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (February 2016).

¹⁶ *E.T.*, Docket No. 13-1691 (issued September 25, 2013).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: May 24, 2017
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