

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

---

M.H., Appellant )

and )

U.S. POSTAL SERVICE, CURSEEN-MORRIS )  
PROCESSING & DISTRIBUTION CENTER, )  
Washington, DC, Employer )

---

**Docket No. 21-0399**  
**Issued: September 20, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 28, 2021 appellant filed a timely appeal from a September 8, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated August 7, 2019, to the filing of this appeal,

---

<sup>1</sup> The Board notes that appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because a recent medical evaluation established that he has a greater impairment for which he initially received schedule award compensation. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits of the case. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### **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 29, 1993 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 28, 1993 he injured his lower back and both elbows when he lost his footing and fell down when descending porch steps while in the performance of duty. OWCP accepted his claim for sprain of lumbosacral joint (ligament), degeneration of the lumbosacral intervertebral disc, lumbosacral sprain, postoperative infection, and lumbar spondylosis with myelopathy. It paid appellant wage-loss compensation on the supplemental rolls beginning July 18, 1994 and placed him on the periodic rolls, effective November 3, 1995. On April 1, 1996 appellant returned to work as a computer instructor. OWCP continued to pay him wage-loss compensation on the periodic rolls for loss of wage-earning capacity.

On August 10, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an October 10, 2017 letter, Dr. Yetunde A. Shitta-Bey, a Board-certified internist, indicated that she had treated appellant for the conditions of degenerative lumbosacral disc disease with radicular symptoms, history of lumbar laminectomy, and presence of implanted neurostimulator, post-laminectomy syndrome, and history of rotator cuff repair, fibromyalgia, cerebral degeneration, hypertension, and bilateral pedal edema. She opined that appellant's ability to earn a living was significantly diminished due to his diagnosed conditions.

On January 16, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion examination in order to determine whether he had sustained a ratable permanent impairment due to his accepted September 28, 1993 employment injury in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>4</sup> and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). In a February 6, 2018 report, Dr. LiLallo noted his review of the SOAF and appellant's accepted conditions of

---

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the September 8, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

lumbosacral ligament sprain, postoperative infection, thoracic or lumbar spondylosis with myelopathy, and degeneration of lumbosacral intervertebral disc. Upon physical examination, he observed that appellant walked with what he referred to as “hiking sticks” with a short stride but reciprocal gait and no limp. Sensory examination of appellant’s lower extremities revealed decreased sensation throughout the L4 distribution from the knee area down to the medial aspect of his foot and in the L5 distribution from the thigh down to the dorsum of his foot. Dr. LiLallo noted that he detected no motor loss in either lower extremity. He reported that appellant had reached maximum medical improvement (MMI) as of February 6, 2018, the date of this examination. Dr. LiLallo utilized the diagnosis-based impairment (DBI) rating method to find that under Table 16-11, page 534, of the A.M.A., *Guides*, the class of diagnosis (CDX) for left severe sensory deficit, level 3, at L4 and L5 resulted in a class 1 impairment with a default value of three. He noted an adjustment factor of +3 and explained that the maximum adjustment was +2, which resulted in five percent left lower extremity permanent impairment at the L4 and L5 levels. Dr. LiLallo also indicated that under Table 16-12, page 534, appellant had level 3 severe sensory deficit on the right lower extremity at L4, L5, and S1, which fell under a CDX of class 1 impairment with a default value of three. He noted an adjustment factor +3, which resulted in five percent permanent impairment of the right lower extremity at all three levels. Dr. LiLallo concluded that appellant had five percent permanent impairment of each lower extremity.

In a February 20, 2018 report, Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), noted his disagreement with Dr. LiLallo’s February 6, 2018 impairment rating report because permanent impairment was not based on *The Guides Newsletter* for rating spinal nerve impairments. Utilizing the DBI method, he determined that pursuant to *The Guides Newsletter*, appellant had one percent right lower extremity permanent impairment due to L4 lumbar radiculopathy and one percent right lower extremity permanent impairment due to L5 lumbar radiculopathy, for a total of two percent right lower extremity permanent impairment. Regarding appellant’s left lower extremity, the DMA determined that appellant had one percent permanent impairment for mild pain/impaired sensation of the left L4, left L5, and left S1 lumbar radiculopathy, which resulted in a total of three percent left lower extremity permanent impairment. He noted that *The Guides Newsletter* did not allow for impairment ratings to be calculated on the range of motion (ROM) method for this diagnosis.

By decision dated April 24, 2018, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity and three percent permanent impairment of the left lower extremity. The award ran for 14.4 weeks from April 1 through July 10, 2018.

On November 9, 2018 appellant requested reconsideration.

In a September 27, 2018 note, Michael Smith, a nurse practitioner, noted appellant’s medical history for fibromyalgia, spondylosis, and spinal stenosis and opined that a massage chair was medically necessary for appellant to manage his pain.

Appellant submitted diagnostic testing reports, including an October 19, 2018 electromyography and nerve conduction velocity (EMG/NCV) and November 3, 2018 lumbar and cervical spine magnetic resonance imaging (MRI) scans.

In a November 19, 2018 decision, OWCP denied modification of its prior decision.

On April 12, 2019 appellant requested reconsideration. He asserted that his condition had worsened to the point that he was considered a fall risk and had to use a walker and transport wheelchair to move around his house. Appellant also described his issues with incontinence.

Appellant submitted progress notes dated January 9 through March 25, 2019 from Dr. James E. Rice, a Board-certified general surgeon. In the initial January 9, 2019 note, Dr. Rice recounted appellant's complaints of right leg and foot numbness and pain. He reviewed appellant's history and noted physical examination findings of tenderness on palpation of the cervical and lumbar spines and no decreased response of the right leg and foot. Dr. Rice assessed lower back pain, lumbar disc degeneration, cervical spondylosis, postlaminectomy syndrome, cervical and lumbar spine stenosis and sciatica.

OWCP also received hospital records and an operative report dated March 12, 2019, regarding a procedure for a spinal cord stimulator.

In an April 3, 2019 progress note and letter, Dr. Rice noted appellant's history of a work-related back injury, which had progressively worsened. He opined that appellant was at MMI for his back issues and that he was not a candidate for further surgery. Dr. Rice referenced Table 17-4, page 570, of the A.M.A., *Guides* and determined that appellant had 30 percent whole person permanent impairment for class 4 impairment due to appellant's back injury. He also utilized Table 13-13, page 337, of the A.M.A., *Guides* and calculated that appellant had 20 percent permanent impairment for class 3 impairment due to his neurogenic bowels dysfunction and bowel incontinence. Dr. Rice concluded that appellant had a total whole person permanent impairment of 55 percent.

In a July 16, 2019 report, Dr. Harris, serving as the DMA, noted his disagreement with Dr. Rice's impairment rating based on Table 17-4 for mechanical low back pain and for bowel/bladder incontinence. He explained that FECA did not provide for the calculation of an impairment rating based on bowel and bladder incontinence. Regarding appellant's work-related lumbar injuries, the DMA noted that appellant had no neurologic deficits for lumbar radiculopathy in either lower extremity. He referenced *The Guides Newsletter* for rating spinal nerve impairments and calculated that appellant had zero percent permanent impairment of each lower extremity.

By decision dated August 7, 2019, OWCP denied modification of its prior decision.

On August 23, 2020 appellant requested reconsideration.

Appellant resubmitted Dr. Rice's April 3, 2019 impairment rating report. He also submitted a December 3, 2019 procedure note for an anorectal manometry, which demonstrated abnormal results, and a June 24, 2020 epidural steroid injection procedure note from Dr. Rice.

In a June 3, 2020 letter, Dr. Anthony M. Daniels, a Board-certified internist and gastroenterologist, indicated that appellant had been seen in his clinic since May 2019 for bowel problems stemming from a 1993 work-related back injury. He indicated that appellant had subsequent surgeries on his spine and suffered from constipation and stool incontinence.

Dr. Daniels noted that appellant had an abnormal anorectal manometry in December 2019, which demonstrated decreased rectal sensory perception and increased pelvic floor activity. He opined that it was not likely that appellant would regain functioning due to his neurologic injuries and back surgery.

In a September 8, 2020 decision, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).<sup>6</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>7</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.<sup>8</sup> OWCP's regulations and 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(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP.<sup>9</sup>

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.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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 evidence of error on the part of OWCP.<sup>12</sup> The Board makes an independent determination of whether a claimant has

---

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

<sup>7</sup> *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

<sup>8</sup> 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

<sup>9</sup> *Id.*; *supra* note 6 at Chapter 2.1602.5(a).

<sup>10</sup> 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>11</sup> *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>12</sup> *B.W.*, *supra* note 10.

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.<sup>13</sup>

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>15</sup>

### 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 properly determined that appellant's request for reconsideration was untimely filed. It received his request for reconsideration on August 23, 2020, more than one year after the last merit decision dated August 7, 2019.<sup>16</sup> Since the reconsideration request was untimely, appellant has the burden of proof to demonstrate clear evidence of error.<sup>17</sup>

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP.

On reconsideration appellant submitted Dr. Rice's April 3, 2019 impairment rating report, which was previously of record. This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and is insufficient to discharge his burden of proof.<sup>18</sup>

Appellant also submitted a June 3, 2020 letter from Dr. Rice regarding appellant's bowel and bladder issues stemming from his 1993 work-related back injury. As FECA does not provide for the calculation of an impairment rating based upon these conditions, this evidence is not relevant to appellant's schedule award claim and does not support that the August 7, 2019 merit decision was incorrect at the time it was issued.<sup>19</sup> Similarly, the December 3, 2019 and June 24, 2020 procedure notes are also not relevant to the schedule award claim and do not raise a substantial question as to whether the August 7, 2019 decision was in error.<sup>20</sup> These medical

---

<sup>13</sup> *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>14</sup> *Supra* note 6 at Chapter 2.1602.5(b).

<sup>15</sup> *G.B.*, *supra* note 11; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

<sup>16</sup> *Supra* note 6.

<sup>17</sup> *Supra* note 9.

<sup>18</sup> *See E.T.*, Docket No. 20-1651 (issued May 6, 2021); *D.L.*, Docket No. 18-1112 (issued January 17, 2020).

<sup>19</sup> *See E.R.*, Docket No. 19-1553 (issued April 22, 2021).

<sup>20</sup> *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

reports do not contain a permanent impairment rating regarding appellant's September 28, 1993 employment injury. Evidence that is not pertinent to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.<sup>21</sup>

Consequently, OWCP properly found that appellant's August 23, 2020 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

**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 September 8, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

---

<sup>21</sup> *D.B.*, Docket No 20-0466 (issued December 17, 2020); *S.E.*, Docket No. 16-1258 (issued December 5, 2016); *B.F.*, Docket No. 11-1181 (issued December 8, 2011).