United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
and	)	**Docket No. 13-2136**
	)	**Issued: February 19, 2014**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Seattle, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 25, 2013 appellant filed a timely appeal from a January 3, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration.[1] Pursuant to the Federal Employees' Compensation Act[2] (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] The last merit decision in this case was the October 23, 2009 OWCP decision, which denied her occupational disease claim. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days has elapsed between the most recent merit decision dated October 23, 2009 to the filing of this appeal on April 25, 2013, the Board lacks jurisdiction to review the merits of this case.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On September 2, 2009 appellant, then a 57-year-old rating veterans' service (RVS) representative, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome and arthritis as a result of daily typing, carrying heavy files, fingering through records and pushing carts with heavy files at work.

By letter dated September 22, 2009, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional evidence to establish that she performed the work duties described and that she sustained a diagnosed condition as a result of her employment. OWCP sent a similar development letter to the employing establishment.

In a September 28, 2009 statement, the employing establishment described appellant's duties as a RVS representative as typing for one third of the workday, reviewing files and looking up reference materials online for another third of the workday and spending time in training sessions and meetings for the remaining third of the workday. It stated that all employees had an ergonomic chair and desk and carts to assist them with carrying files.

In a decision dated October 23, 2009, OWCP denied appellant's claim finding insufficient medical evidence to establish that she sustained a diagnosed medical condition as a result of factors of her employment.

In a letter dated October 27, 2009, appellant stated that she was responding to OWCP's September 22, 2009 letter. She related that she had pain and stiffness in her hands for many years and was diagnosed with arthritis of the hands in 1998 and carpal tunnel syndrome in 2002. Appellant stated that she had worked various sedentary jobs that required typing and use of hands to complete her work. Her current job involved typing, fingering through files for reviews, pushing carts of files and writing ratings daily. Appellant reported that her hands and wrist were very stiff and sore by the end of the day and sometimes they stayed sore for several days. She stated that she had these symptoms for several years but they had gotten worse with the typing and fingering of files daily. Appellant noted that she did not have any hobbies or outside activities where she used her hands except for an occasional e-mail or bill payment. She reported that she was also filing a claim for stress due to aggravation of fibromyalgia due to the stress of the job. Appellant stated that she had to schedule appointments to get the additional medical information and requested additional time to submit the medical evidence.

In an undated letter received on November 7, 2012, appellant requested reconsideration for claim No. xxxxxx752 and No. xxxxxx978. She alleged that she was also filing for permanent impairment and aggravation of her disabilities due to continued stress created by a hostile work environment and provided examples of what she believed constituted a hostile work environment. Regarding her occupational disease claim for carpal tunnel syndrome and arthritis,

appellant explained that her hands would swell and get very sore and numb while working with files and typing at work. She stated that she had no other outside activity of repetitive action of her hands and did not have any other hobbies or activities that required repetitive action of her hands. Appellant noted that she was attaching all medical documents and supporting evidence.

Appellant submitted various employee health progress notes dated from March 23, 2009 to April 19, 2012 addressing her medical treatment for memory loss, sleep problems, depression, other mental health concerns, fibromyalgia, neck pain, left ulnar neuropathy and right knee and lumbar osteoarthritis. Appellant related that she was under considerable stress at work and believed that this played a large role in her complaints.

In an August 30, 2010 report, Dr. Hee Yon Sohng, a Board-certified internist, noted that he treated appellant for chronic and severe arthritis of her hands, wrists and knees and for carpal tunnel syndrome in both hands. He related that appellant used wrist splints but still experienced numbness and coldness in both hands after prolonged typing. Dr. Yon Sohng opined that the physical demands of appellant's position as a veterans' service representative rater were exacerbating her medical conditions and advised that she avoid engaging in activities that were taxing on her hands and wrists, such as typing.

In September 17 and October 12, 2010 reports, Dr. Gai Li, a psychiatrist, stated that he had treated appellant since February 2007 for depression and anxiety and described the medical treatment she received. He reported that appellant's symptoms and neuropsychological test results may suggest that she was not suited for the position of veterans' service representative rater. Dr. Li also noted that because of her depression and anxiety disorder, appellant may be more vulnerable to stressful working environments. He explained that if appellant continued to work as a rater she be provided with modifications such as working in a quiet environment at home to reduce distractions and put her in a less stressful environment.

In a September 27, 2011 report, Dr. Lauren Beste, a Board-certified internist, stated that appellant suffered from Sjogren syndrome, carpal tunnel syndrome and fibromyalgia among other ailments. She noted that appellant was currently employed as a veterans' service representative rater, but requested reassignment to a position that did not involve extensive exertion, especially lifting, due to her carpal tunnel syndrome.

Appellant submitted an August 7, 2012 letter from the employing establishment acknowledging her complaint for harassment and hostile work environment and an October 16, 2012 notice of partial acceptance of her Equal Employment Opportunity (EEO) complaint.

By decision dated January 3, 2013, OWCP denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error. It determined that the most recent merit decision on record was the October 23, 2009 decision denying appellant's occupational disease claim. Because appellant filed for reconsideration on November 7, 2012, more than one year after the October 23, 2009 decision, her claim was untimely filed. OWCP further determined that the evidence submitted after the last merit decision was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[3] 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.[4] The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.[5]

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.[6] In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[7] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.[8]

To establish 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] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12]

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[3] 20 C.F.R. § 10.607(a).

[4] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

[6] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

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

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

[10] *Jimmy L. Day*, 48 ECAB 652 (1997).

[11] *Id.*

[12] *Annie L. Billingsley*, 50 ECAB 210 (1998).

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated January 3, 2013 which denied further merit review of appellant's case on the merits because the request for reconsideration was not timely filed and did not show clear evidence of error.

In its January 3, 2013 decision, OWCP found that appellant's request for reconsideration, received on November 7, 2012, was untimely filed and failed to present clear evidence of error. The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP issued its most recent merit decision in this case on October 23, 2009, and it received appellant's request for reconsideration on November 7, 2012. Thus, the request was outside the one-year time limit.[13] Accordingly, appellant must demonstrate clear evidence of error by OWCP in denying her occupational disease claim.

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's October 23, 2009 decision or shift the weight of the evidence of record in her favor. OWCP denied appellant's occupational disease claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a diagnosed medical condition as a result of factors of her employment.

Along with her request for reconsideration appellant submitted various medical reports not previously reviewed by OWCP. She provided employee health progress notes dated from March 23, 2009 to April 19, 2012 regarding her medical treatment for memory loss, sleep problems, depression, other mental health concerns, fibromyalgia, neck pain, left ulnar neuropathy, and right knee and lumbar osteoarthritis. In an August 30, 2010 report, Dr. Sohng treated appellant for chronic and severe arthritis of her hands, wrists, and knees and carpal tunnel syndrome. He opined that the physical demands of appellant's position as a veterans' service representative rater were exacerbating her medical conditions. In September 17 and October 12, 2010 reports, Dr. Li, related appellant's history for depression and anxiety and noted that appellant worked as a veterans' service representative rater. In a September 27, 2011 report, Dr. Beste stated that appellant suffered from Sjogren syndrome, carpal tunnel syndrome, and fibromyalgia among other ailments and noted that appellant was currently employed as a veterans' service representative rater. While these medical reports are generally supportive of appellant's occupational disease claim, they do not establish clear error on the part of OWCP.[14]

Appellant also submitted an August 7, 2012 letter from the employing establishment acknowledging her complaint for harassment and hostile work environment and an October 16, 2012 Notice of Partial Acceptance of her EEO complaint. This evidence, however, is not relevant to the medical issue of causal relationship and is insufficient to establish clear evidence

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

[14] *Supra* note 11.

of error. This evidence also fails to raise a substantial question concerning the correctness of OWCP's decision.

On appeal, appellant alleges that the employing establishment did not submit the medical evidence she gave them with her claim and that OWCP erred because it failed to ensure that the employing establishment followed the law by submitting the evidence in their possession. The Board has held that the regulatory language unequivocally sets a one-year time limitation for filing reconsideration requests and does not indicate that a late filing may be excused by extenuating circumstances such as dependence on others to navigate the workers' compensation process.[15] The Board further notes that in a letter dated September 22, 2009 OWCP requested additional medical evidence from appellant to establish that she sustained a diagnosed condition as a result of her work duties and advised appellant to submit such medical evidence to OWCP. Appellant, however, did not respond to OWCP's development letter until after the October 23, 2009 merit decision.

To establish clear evidence of error, it is not sufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's occupational disease claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's October 23, 2009 decision. Thus, the evidence is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

[15] *D.S.*, Docket No. 12-919 (issued August 23, 2012); *B.F.*, Docket No. 11-1181 (issued December 8, 2011). *See also* 20 C.F.R. § 10.607.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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