

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, then a 49-year-old nurse, filed a claim for benefits on April 18, 2007, alleging that she turned her left ankle, fell to the ground and injured her lower back, left ankle and both knees on March 31, 2007. She did not stop work but continued to work full time until February 21, 2008. OWCP accepted the claim for lumbar sprain, left ankle sprain and left knee contusion. The record indicates that appellant had concurrent conditions, which were not caused by the 2007 work event which included lumbar neuritis, lumbar intervertebral disc disorder, lumbar spondylosis, thoracolumbar strain, lumbar radiculopathy, bilateral knee surgery, arthroscopy of the left shoulder, arthritis and obesity.

On February 25, 2008 Dr. Keith D. Malone, a specialist in orthopedic surgery and appellant's treating physician, released her to return to work. Appellant did not return to work until September 2008, at which time she began working six hours a day.

In order to determine appellant's current condition, OWCP referred appellant to Dr. Sarveswar I. Naidu, a specialist in orthopedic surgery. In a report dated July 23, 2006, Dr. Naidu stated that after reviewing a recent magnetic resonance imaging (MRI) scan he believed that there was no basis for appellant's neurological complaints. He opined that her lumbar strain would have lasted for only a few months and that a recent lumbar injection was due to the underlying nonwork-related lumbar neuritis. Dr. Naidu stated that since there were no changes on the recent MRI scan, compared to the one performed in 2000, there was no organic basis for the weakness in her extremities. He further opined that an electromyogram (EMG) of the left leg did not show any changes in the peripheral nerve to justify any radiculopathy. Dr. Naidu concurred with the treating neurologist's opinion that there was significant weakness on the left side of the body which was nonorganic.

Based on his review of these reports, Dr. Naidu concluded that there was no evidence of connection of appellant's present problem with the March 30, 2007 employment injury. He opined that appellant could return to work for six hours a day until her condition further improved.

The record also contains a number of progress notes from Dr. George S. Stefanis, a Board-certified neurosurgeon, dating from April 10, 2008. In a note dated August 26, 2008, Dr. Stefanis stated that appellant's examination had not significantly changed, she expressed mild discomfort on examination in the center of her back, but otherwise she had no weakness and her reflexes were symmetrical bilaterally. He noted that she would like to go back to work and opined that he saw no reason why she should not return to work for six hours a day, without restrictions.

On October 15, 2008 OWCP issued a notice of proposed termination of compensation to appellant. It found that the weight of the medical evidence, as represented by Dr. Naidu's referral opinion, established that appellant had no work-related residuals stemming from her accepted conditions.

By decision dated February 13, 2009, OWCP terminated appellant's compensation for medical benefits, finding that Dr. Naidu's opinion represented the weight of the medical evidence.

By letter dated March 19, 2010, appellant requested reconsideration. She submitted numerous progress reports from February 2009 through March 2010 from Dr. Stefanis. In February 2009, Dr. Stefanis reported that appellant had fallen off a stool at work several days ago, landing on her back and hip, injuring her back and neck. In a report dated March 15, 2010, he stated that she continued to have pain in her back and left leg. On examination, Dr. Stefanis advised that appellant had no midline tenderness and stated that her motor examination was normal. He noted that she was working six hours a day.

By decision dated April 12, 2010, OWCP denied appellant's request for reconsideration without a merit review, finding the request untimely requested reconsideration and that she had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA² does not entitle an employee to a review of OWCP's decision as a matter of right.³ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

"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—

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ The Board has found that the imposition of

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by; (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) submitting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ OWCP procedures state that OWCP will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.⁸

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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 error on the part of OWCP.¹³ To show clear evidence of error, 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴ The Board makes an independent determination of whether an appellant has submitted 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.¹⁵

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on February 13, 2009. Appellant requested

⁶ See cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

reconsideration on March 19, 2010; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's March 19, 2010 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. The issue in this case was whether the February 13, 2009 termination was proper. Dr. Stefanis' progress reports document a new injury during the week of February 26, 2009, when appellant fell off a stool at work. Otherwise his reports merely state that appellant continued to experience back and left leg pain and noted that she was working for six hours a day. The medical reports of record at the time of the termination contained the same information regarding appellant's complaints. The medical evidence submitted by appellant does not address the pertinent issue of whether she had residuals of the accepted injury as of February 13, 2009. Appellant did not submit any new factual evidence with her request for reconsideration, which was 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 the OWCP's decision. Therefore, she has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated March 19, 2010. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on April 12, 2010.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board