

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Merrifield, VA, Employer**

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**Docket No. 14-405
Issued: May 15, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2013 appellant filed a timely appeal from a June 14, 2013 Office of Workers' Compensation Programs' (OWCP) decision which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days elapsed from the most recent OWCP merit decision, dated September 7, 2011, to the filing of this appeal on December 12, 2013, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On September 20, 2000 appellant, then a 53-year-old clerk, filed a Form CA-2, occupational disease claim alleging left wrist tendinitis and lumbar disc syndrome since September 1998 as a result of performing her clerk duties. OWCP accepted her claim for

de Quervain's disease of the left wrist and lumbar sprain/strain. Appellant did not stop work but returned to light duty.

From June 26, 1995 to March 19, 2003, appellant came under the treatment of Dr. H.S. Pabla, a Board-certified orthopedic surgeon, for low back and shoulder pain. In a June 26, 1995 report, Dr. Pabla noted findings on examination of the lumbar spine and right shoulder and diagnosed lower back pain and bilateral shoulder impingement syndrome. On March 19, 2003 he noted mild lumbar paravertebral muscle spasm with tenderness at L4-5 and L5-S1, intact motor and sensory examination, tenderness over the carpometacarpal joint on the left wrist and positive Phalen's test. Dr. Pabla diagnosed carpal tunnel syndrome, carpometacarpal arthritis and lower back syndrome. He opined that appellant's symptoms were causally related to her work.

On September 14, 2007 appellant was treated by Dr. Sashidhar S. Movva, a Board-certified neurologist, for worsening left leg, back and hand pain. She reported temporary relief from epidural injections and physical therapy. Dr. Movva recommended treatment modalities and advised that appellant may not be able to return to work due to persistent debilitating symptoms. He diagnosed lumbar radiculopathy and carpal tunnel syndrome and recommended physical therapy and epidural injections. On September 5, 2007 Dr. Dongzin Hur, Board-certified in pain medicine, noted appellant's symptoms and lumbar diagnoses. He stated that she was unable to work and recommended epidural injections. Dr. Hur subsequently requested OWCP to authorize the treatment.

On April 14, 2008 OWCP advised appellant that the evidence was not sufficient to authorize fluoroguide or foramen epidural injections. It asked that she provide a reasoned opinion from her physician regarding how her work caused the need for the requested procedure.

On April 25, 2008 Dr. Reza Ghorbani, a Board-certified orthopedist, administered a lumbar epidural injection. On May 21, 2008 appellant was treated by Dr. Sagar Nootheti, a Board-certified orthopedic surgeon, for low back pain radiating into the buttocks. Dr. Nootheti recommended epidural steroid injections due to disabling persistent symptoms since 1998.

In a decision dated May 13, 2009, OWCP denied authorization for lumbar epidural foramen injections on the grounds that the medical evidence was insufficient to establish the requested procedures were related to her accepted work injury.

Appellant requested reconsideration and submitted an October 5, 2007 report from Dr. Rajeev Batra, a Board-certified internist, who treated appellant for back pain radiating into her left leg and in her hands. Dr. Batra noted that appellant continued to have symptoms of back and hand pain and recommended that she retire. He diagnosed lumbar radiculopathy and carpal tunnel syndrome and recommended epidural injections and physical therapy. In an October 1, 2009 report, Dr. Nootheti noted that appellant worked as a clerk and her work duties involved lifting, pushing and pulling postal equipment with boxes. Appellant experienced low back pain radiating into the left leg and left wrist pain. Dr. Nootheti diagnosed spinal canal stenosis at L3-4 and L4-5, discogenic disc disease and left-sided radiculopathy causally related to her September 1, 1998 work accident. He advised that appellant's condition had not improved with epidurals, physical therapy and anti-inflammatories. In an October 23, 2009 report, Dr. Nootheti

noted appellant's continued complaints of lower lumbar spine pain radiating into the buttocks and diagnosed canal stenosis at L3-4 and L4-5, discogenic disc disease and left-sided radiculopathy. He opined that because appellant's lower lumbar spine pain radiated into the left lower extremity appellant required treatment including physical therapy, epidurals and facet blocks.

In a decision dated March 16, 2010, OWCP denied modification of the May 13, 2009 decision.

On June 6, 2010 appellant requested reconsideration. She asserted that she provided sufficient evidence to establish that her herniated discs were work related and requested that her medical expenses be covered. Appellant submitted a copy of her Form CA-2 and reports from Dr. Pabla previously of record. A November 11, 2003 lumbar spine MRI scan revealed worsening of discogenic disease at L4-5, small central subligamentous herniated nucleus pulposus and central spinal stenosis at L4-5.

In a decision dated September 17, 2010, OWCP denied modification of the decision dated March 16, 2010.

On August 19, 2011 appellant requested reconsideration. She asserted that the diagnosed spinal stenosis and disc bulges were causally related to performing repetitive duties as a clerk and that causal relationship was established through the reports from her physician and the MRI scan studies. Appellant submitted a February 7, 2011 report from Dr. Nootheti who treated appellant for persistent lower lumbar spine pain radiating into the left leg. Dr. Nootheti noted that the MRI scan reports confirmed spinal stenosis at L3-4 and L5-S1 with discogenic disc disease. He opined that appellant's current symptoms were causally related to the accident of September 1, 1998 and recommended her case be reopened for medical treatment for these conditions.

In a decision dated September 7, 2011, OWCP denied modification of the decision dated September 17, 2010.

In a letter and appeal request form dated September 3, 2012, received on September 13, 2012, appellant requested reconsideration. She asserted that the previously submitted evidence was not properly considered. Appellant contended that her lumbar sprain/strain and de Quervain's disease of the left wrist worsened. She referenced the reports of Drs. Nootheti, Pabla and Batra, who opined that her current symptoms of lower lumbar pain radiating into her leg were causally related to her employment injury of September 1, 1998. Appellant requested that her case be reopened as her accepted work-related injury has worsened. In statements dated January 25 and May 28, 2013, she requested a status of her reconsideration request. Appellant indicated that she has significant problems and was unable to function. She submitted a March 19, 2003 report from Dr. Pabla, a September 14, 2007 report from Dr. Movva, an October 5, 2007 report from Dr. Batra and an October 1, 2009 report from Dr. Nootheti, all previously of record.

By decision dated June 14, 2013, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”¹

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.² However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.³

To show clear evidence of error, 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 *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.⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁷ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁸

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(a).

³ *Id.* at 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues. As appellant's September 3, 2012 request for reconsideration, received on September 13, 2012, was not received within one year after the most recent merit decision of September 7, 2011 it was untimely.¹⁰ Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. Appellant's September 3, 2012 letter asserted that the previously submitted evidence was not properly considered. She asserted that her ongoing accepted conditions of lumbar sprain/strain and de Quervain's disease of the left wrist have worsened. Appellant referenced reports from Drs. Nootheti, Pabla and Batra who opined that her current symptoms of lower lumbar pain radiating into her leg were causally related to her employment accident of September 1, 1998. She requested that her case be reopened as her accepted work-related injury has worsened. In statements dated January 25 and May 28, 2013, appellant indicated that she had significant problems and was unable to function. While she addressed her disagreement with OWCP's denial of epidural injections for her back condition, her general allegations do not raise a substantial question as to the correctness of OWCP's decision. OWCP properly found that appellant's statements of September 3, 2012 and January 25 and May 28, 2013 did not establish clear evidence of error.

The Board notes that the underlying issue is medical in nature and that on reconsideration appellant submitted additional medical evidence. Appellant submitted a March 19, 2003 report from Dr. Pabla, a September 14, 2007 report from Dr. Movva, an October 5, 2007 report from Dr. Batra and an October 1, 2009 report from Dr. Nootheti, all previously of record. OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in denying her claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, these reports are insufficient to discharge appellant's burden of proof.

The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the

⁹ 20 C.F.R. § 10.607(a).

¹⁰ In computing the time for requesting reconsideration, the date of the event from which the designated period of time begins to run shall not be included when computing the time period. However, the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. One year from September 7, 2011 is September 7, 2012. The time for requesting reconsideration of OWCP's September 7, 2011 decision began to run on September 8, 2011, and thus would have expired on September 7, 2012. As appellant's request for reconsideration was not received until September 13, 2012, it was not timely. See *Debra McDavid*, 57 ECAB 149 (2005); *John B. Montoya*, 43 ECAB 1148 (1992).

denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹

Thus, appellant has not established clear evidence of error by OWCP in its June 14, 2013 decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated September 3, 2012 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2014
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *D.G.*, 59 ECAB 455 (2008).