

On appeal, appellant asserts that additional conditions should be accepted, including an emotional condition and that the second opinion and impartial evaluations should be disregarded.

FACTUAL HISTORY

On July 9, 2009 appellant, then a 51-year-old part-time transportation security officer (screener), sustained employment-related sprains of the thoracic and lumbar regions of the back.³ The claim was adjudicated by OWCP under file number xxxxxx366. Appellant returned to modified duty for four hours a day on October 3, 2009 and to her regular part-time duty of five hours a day on November 1, 2009. On November 29, 2009 she sustained a second injury, accepted for aggravation of lumbar sprain. OWCP adjudicated the November claim under file number xxxxxx394. On January 12, 2010 it doubled the claim files, with number xxxxxx394 becoming the master file. Appellant returned to modified duty, four hours per day on February 23, 2010.

In June 2010, OWCP referred appellant to Dr. David S. Whitney, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 21, 2010 report, Dr. Whitney noted the history of employment injuries, her current complaints, his review of the medical record including lumbar x-rays and a December 18, 2009 magnetic resonance imaging (MRI) scan of the lumbar spine. He discussed appellant's findings on physical examination and advised that her back examination was normal both clinically and radiographically and that bilateral hip examination and neurological examination of both legs were normal. Dr. Whitney diagnosed low back strain of July 14, 2009 with a temporary exacerbation on December 3, 2009.⁴ He found that appellant's work-related conditions had resolved and she could return to work with no restrictions.

In an October 15, 2010 decision, OWCP terminated appellant's medical and wage-loss benefits, effective October 16, 2010, based on Dr. Whitney's report.

Appellant timely requested a hearing that was held on March 31, 2011. She submitted a December 18, 2009 MRI scan study of the lumbar spine that demonstrated mild spondylosis and a small disc protrusion at L4-5 with no neural compression. A December 10, 2010 lumbar MRI scan study noted that the small protrusion previously seen was not seen on the current examination. An April 19, 2011 MRI scan of the thoracic spine demonstrated a disc protrusion at T8-9. A November 18, 2010 electrodiagnostic study showed reduced amplitude of the bilateral peroneal and tibial nerves. In treatment notes and reports dated April 27, 2010 to April 25, 2011, Dr. Cheryl Hayes, a Board-certified physiatrist, described appellant's condition and care. In a report dated February 27, amended on March 15, 2011, Dr. Hayes advised that appellant had a pain impairment residual of the employment injuries. In a consultation report dated April 12, 2011, Dr. Brian Iuliano, a Board-certified neurosurgeon, diagnosed thoracolumbar strain and pain and L4-5 disc herniation with mild stenosis. He advised that appellant had significant chronic pain related to the employment injury.

³ Appellant's part-time schedule was 9:00 a.m. to 2:00 p.m. Monday through Friday for 25 hours per week.

⁴ December 3, 2009 was actually the day appellant filed the traumatic injury claim for the November 29, 2009 employment injury.

Barbara Dahl, Ph.D., a licensed clinical psychologist, provided evaluations dated April 19 and 20, 2011. She described the employment injuries,⁵ appellant's employment history and her complaints of radiating back pain. Dr. Dahl indicated that appellant was terminated by the employing establishment on April 13, 2011 because she could not perform essential functions of the job. Following psychological testing, she diagnosed major depressive disorder, recurrent, moderate; pain disorder associated with both psychological factors and a general medical condition; and anxiety disorder, not otherwise specified. Dr. Dahl concluded that, since appellant was functioning adequately and did not have pain issues prior to her employment injuries, on a more probable than not basis, her mental health issues were attributable to the work injuries.⁶

In a June 28, 2011 decision, a hearing representative found that OWCP met its burden to terminate appellant's benefits effective October 16, 2010 based on Dr. Whitney's opinion. He found that, based on newly submitted evidence, a conflict in medical opinion as to whether she continued to be disabled due to the 2009 employment injuries. On remand, OWCP was directed to refer appellant for an impartial evaluation and an opinion on whether the claim should be expanded to include other conditions.

In November 2011, OWCP referred appellant to Dr. Edward DeVita, a Board-certified neurologist, for an impartial evaluation. Dr. DeVita was provided a statement of accepted facts, the medical record and a set of questions. The conflict statement advised that a conflict had been created between the opinions of Dr. Whitney and Dr. Hayes regarding whether appellant had residuals of the accepted November 29, 2009 employment injury and whether she had additional back conditions as a result of this injury.

In a report dated January 9, 2012, Dr. DeVita stated that he had examined appellant on November 21, 2011. He noted both employment injuries and the accepted conditions and her complaint of bilateral hand pain, numbness and tingling; moderate-to-severe bilateral leg pain, numbness and tingling; right flank pain; severe back pain; and headaches. Dr. DeVita reviewed the conflict statement and medical record. He advised that neurologic examination was somewhat limited as appellant remained in a standing position due to complaints of pain. Sensory examination demonstrated nonanatomic dysesthesias throughout the entire upper and lower extremities. Gait was normal with no significant atrophy of the calves and sides and no sudomotor or vasomotor changes were noted. In answer to specific OWCP questions, Dr. DeVita advised that, from an objective point of view, appellant had no abnormalities, noting normal imaging studies for age. He concluded that, from an objective point of view, she was fully recovered from both injuries, without any physical limitations, but had not recovered subjectively, based on her complaints. Dr. DeVita found no objective basis for work restrictions.

In a February 21, 2012 decision, OWCP found that appellant did not establish continuing residuals of the accepted conditions related to the July 14 and November 29, 2009 employment injuries nor did she establish additional work-related conditions. The opinion of Dr. DeVita

⁵ Dr. Dahl indicated that appellant fell on November 29, 2009 whereas she stated that she tripped and stumbled but stayed upright.

⁶ Appellant also submitted a July 12, 2010 evaluation by a physical therapist.

found no objective abnormalities and advised that she had fully recovered from the employment injuries.

Appellant timely requested a hearing that was held on June 29, 2012. She discussed her two employment injuries and current complaints. Appellant maintained that, as the second opinion and impartial examinations were not thorough and were biased, they should be disregarded.

On July 2, 2012 OWCP reopened file number xxxxxx366 for medical care. Appellant submitted a July 11, 2012 treatment note from Suzette Bailey, a nurse practitioner; a July 17, 2012 MRI scan study of the lumbar spine that was interpreted as stable compared to the December 10, 2010 study; and a July 17, 2012 MRI scan study of the thoracic spine that demonstrated mild spondylotic changes with small central disc protrusions at T8-9 and T10-11.

By decision dated September 20, 2012, an OWCP hearing representative affirmed the February 21, 2012 decision.

In correspondence received by OWCP on September 24, 2013, appellant requested reconsideration. She contended that the medical evidence, especially the MRI scan studies, established that her injuries had not resolved and that the opinions of Dr. Whitney and Dr. DeVita should be discredited. Appellant also indicated that she had retired on disability and that her job injuries had been made worse by several motor vehicle accidents that had occurred since December 3, 2011. She further maintained that her psychiatric diagnoses were a consequence of the employment injuries. Appellant submitted an August 27, 2012 treatment note in which Dr. Iuliano noted that she, a pedestrian, was struck by a vehicle, landing on her back and had since had increased pain in the thoracic and lumbar region and new neck and right shoulder pain. Dr. Iuliano noted the July 2012 MRI scan study findings and prescribed physical therapy for her neck. An April 11, 2013 MRI scan study of the lumbar spine demonstrated a minimal disc protrusion at L5-S1 without neural compression and mild facet arthropathy. In an April 29, 2013 treatment note, Dr. Iuliano indicated that appellant was rear-ended by another vehicle on March 22, 2013 and had an increase in symptoms. He noted his review of new MRI scan studies and advised that the new accident exacerbated her old work injury. Dr. Iuliano advised that surgery could be considered in the cervical region and recommended epidural injections at L4-5. Appellant also submitted information entitled "Your Independent Medical Evaluation" that she found on the internet.⁷

In an October 17, 2013 decision, OWCP denied appellant's reconsideration request on the grounds that her request was untimely filed and that she failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a

⁷ Appellant indicated that this was from a website entitled badfaithinsurance.org.

benefit unless the application for review is filed within one year of the date of that decision.⁸ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁹ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth section 10.607 of OWCP regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.¹²

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which 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 which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The only decision before the Board is the October 17, 2013 nonmerit decision, in which OWCP denied appellant's request for reconsideration on the grounds that her request was untimely filed and failed to establish clear evidence of error. Appellant's reconsideration request

⁸ 20 C.F.R. § 10.607(b) (2011); see *Gladys Mercado*, 52 ECAB 255 (2001).

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹⁰ 20 C.F.R. § 10.607 (2011).

¹¹ See *Alberta Dukes*, 56 ECAB 247 (2005).

¹² *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁴ *Nancy Marciano*, 50 ECAB 110 (1998).

was received by OWCP on September 24, 2013. The Board finds that more than one year elapsed from the most recent OWCP merit decision dated September 20, 2012, to her request for reconsideration received on September 24, 2013. The request for reconsideration was untimely.¹⁵

The Board also finds that appellant failed to establish clear evidence of error. On reconsideration appellant alleged that the medical evidence established that her injuries had not resolved. The accepted conditions in this case are thoracic and lumbar strains. With appellant's reconsideration request, she submitted an April 11, 2013 MRI scan study of the lumbar spine. This study did not provide a cause of any diagnosed conditions and medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁶ In reports dated August 27, 2012 and April 29, 2013, Dr. Iuliano noted that appellant, a pedestrian, was struck by a vehicle and that she had a second accident when her vehicle was rear-ended. He described increased pain in the thoracic and lumbar region and new neck and right shoulder pain. Dr. Iuliano did not, however, indicate that the 2009 work injuries caused appellant's current condition. His reports are insufficient to establish clear evidence of error, as they are not positive, precise and explicit evidence manifesting on their face that OWCP committed error.¹⁷ Further, the term 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 denial was issued, would have created a conflict in medical opinion requiring further development, is not sufficient to establish clear evidence of error.¹⁸

Appellant also submitted information entitled "Your Independent Medical Evaluation" that she found on the internet. This does not constitute clear evidence of error. The Board has held excerpts from publications have little probative value in resolving medical questions unless a physician shows the applicability of the general medical principles discussed in the articles to the specific factual situation at issue in the case.¹⁹

With her request for reconsideration and on appeal to the Board, appellant maintained that the opinions of Dr. Whitney, an OWCP referral physician, and Dr. DeVita, who provided an impartial evaluation, should be discredited. She made similar arguments at the June 29, 2012 hearing. Appellant has not explained how rearguing this point raises a substantial question concerning the correctness of OWCP's decision.

The term "clear evidence of error" is intended to represent a difficult standard and the argument provided here is not the type of positive, precise and explicit evidence which

¹⁵ While appellant's request for reconsideration was dated September 19, 2013, it was not received by OWCP until September 24, 2013. OWCP's regulations provide that the reconsideration request must be received by OWCP within one year. 20 C.F.R. § 10.607(a) (2011).

¹⁶ *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁷ *Robert G. Burns*, *supra* note 12.

¹⁸ *See Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁹ *Roger G. Payne*, 55 ECAB 535 (2004).

manifested on its face that OWCP committed an error.²⁰ As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the September 20, 2012 OWCP decision, she has not established that OWCP committed error by its October 17, 2013 decision.²¹ The Board therefore finds that, in accordance with its internal guidelines and with the Board precedent, OWCP properly performed a limited review of the argument and evidence submitted by appellant with the September 24, 2013 reconsideration request to ascertain whether it demonstrated clear evidence of error in the September 20, 2012 decision and correctly determined that it did not and thus denied appellant's untimely request for a merit reconsideration on that basis.²²

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and that she failed to establish clear evidence of error. OWCP therefore properly denied a merit review of her claim.²³

²⁰ *Robert G. Burns, supra* note 12.

²¹ *Nancy Marcano, supra* note 14.

²² 20 C.F.R. § 10.607(b) (2011); *see D.G.*, 59 ECAB 455 (2008).

²³ The Board notes that appellant also asserted that her psychiatric diagnoses should be accepted. OWCP has not issued a decision regarding whether appellant sustained a consequential emotional condition. The Board's jurisdiction is limited to reviewing final decisions of OWCP. 20 C.F.R. § 501.2(c); *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2014
Washington, DC

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

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

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