

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

N.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Austin, TX, Employer)

Docket No. 15-1299
Issued: November 24, 2015

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 21, 2015 appellant filed a timely appeal from an April 2, 2015 nonmerit decision of the Office Workers' Compensation Programs (OWCP). As more than 180 days elapsed since OWCP's most recent merit decision dated January 2, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On October 18, 2012 appellant, then a 42-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) asserting that on January 19, 2012 while working on a delivery bar code sorter (DBCS) machine for several hours she experienced arm and elbow pain.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted her claim for left elbow and forearm sprain and sprain of the neck. It authorized continuation of pay from January 20 to March 4, 2012.

Appellant came under the treatment of Dr. Helo Chen, an osteopath, on November 16, 2012 for a left elbow and neck injury. She reported that on January 19, 2012 she was operating a DBCS machine when she felt a sharp pain and swelling in her left elbow and neck. Dr. Chen noted that an electromyogram (EMG) dated June 4, 2012 revealed no abnormalities of the upper extremities. He diagnosed left elbow sprain, left elbow internal derangement, and cervical sprain. Dr. Chen returned appellant to work modified duty.

Appellant submitted several claims for compensation (Form CA-7), for intermittent total disability for the period March 11 to July 27, 2012.

In a decision dated June 5, 2013, OWCP denied appellant's claims for compensation for the period March 11 to July 27, 2012 as the medical evidence of record failed to establish disability for work due to the employment injury of January 19, 2012.

On June 13, 2013 appellant requested reconsideration and submitted additional medical evidence.

In a decision dated September 4, 2013, OWCP vacated the decision dated June 5, 2013. It granted appellant's claim for compensation for 469.50 hours for the period March 11 to July 27, 2012. Appellant subsequently filed additional claims for compensation (Form CA-7) for the period commencing September 15, 2013.

Appellant submitted physical therapy notes from October 1 to December 27, 2013. She was treated by Dr. Chen on November 28, 2013 for a left elbow and neck condition that was the result of lifting trays of mail onto a DBCS machine. Dr. Chen noted that a magnetic resonance imaging (MRI) scan dated November 29, 2013 revealed a symmetrical bulging of the C4-5, C5-6, and C6-7 disc without lateralizing focal disc herniation, spinal stenosis, or neural compression. He noted that due to the extent of appellant's condition she was physically disabled from September 15 to October 9, 2013. Dr. Chen noted that she continued to have ongoing physical disabilities related to the progressive degeneration of her left elbow and neck that originated from the work-related injury. He opined that appellant's condition has continuously degenerated due to the residual effects of her injuries and he took her off work. Dr. Chen noted that the medical evidence supported that she was totally disabled from September 15 to October 9, 2013 due to her work-related injury on January 19, 2012.

In a decision dated January 2, 2014, OWCP denied appellant's claim for compensation for the period commencing September 15, 2013.

Appellant submitted physical therapy notes from December 30, 2013 to November 14, 2014. She was treated by Dr. Bennett J. Ezekiel, a Board-certified orthopedist, from April 8, 2014 to February 19, 2015, for elbow pain which began after a work injury where she lifted mail trays. Dr. Ezekiel diagnosed elbow sprain, injury to the ulnar nerve, and cervical strain. He recommended a compound cream and a left ulnar nerve block. Dr. Ezekiel noted that appellant underwent nerve blocks on April 8, May 15 and 29 and July 10, 2015 and reported only temporary relief in her symptoms. Appellant was treated by Dr. Chen from May 7 to

December 10, 2014 for work-related conditions to her left elbow, forearm, and cervical spine. She reported working as a clerk and developing left elbow, forearm, and cervical spine conditions as a result of operating a DBCS machine and lifting trays of mail onto the machine. Dr. Chen diagnosed left elbow, forearm, and neck sprain. He opined that appellant sustained consequential injuries causally related to the January 19, 2012 work injury of cervical disc degeneration and cervical disc displacement and formally requested an upgrade of her accepted conditions to include cervical disc degeneration, cervical disc displacement, left lateral epicondylitis, and left cubital tunnel syndrome. Dr. Chen opined that the effects of the work injury persist and have prevented her from returning to work full time. In reports dated July 29 to December 10, 2014, he noted that appellant was disabled from September 15, 2013 to January 23, 2014 due to the progressive degeneration of her left elbow and neck that originated from her work injury. Dr. Chen opined that the medical evidence supported incapacitation from September 15 to October 9, 2013 was due to the work-related injury of January 19, 2012.

In a decision dated October 2, 2014, OWCP denied appellant's claim for a consequential cervical disc degeneration, cervical disc displacement, left lateral epicondylitis, and left cubital tunnel syndrome.

In an appeal request form dated January 7, 2014 and received on March 18, 2015, appellant requested reconsideration of the January 2, 2014 decision. In an accompanying November 12, 2014 letter, she noted that her OWCP claim was in an open status and therefore her claims for compensation should be paid.

Appellant submitted physical therapy notes from November 17, 2012 to April 3, 2015. An EMG dated August 18, 2014 revealed mild evidence of cervical radiculopathy at C5, C6 nerve root level prominently on the right, no evidence to suggest entrapment neuropathy or myopathy. An October 13, 2014 MRI scan of the cervical spine revealed disc desiccation at all levels, disc space narrowing with osteophytes at C4-5, C5-6, and C6-7, and central canal and foramen at all levels.

Appellant submitted a December 10, 2014 report from Dr. Chen who treated her for work-related conditions to her left elbow, forearm, and cervical spine. She reported a history of injury. Dr. Chen diagnosed left elbow, forearm, and neck sprain. He opined that appellant's sustained consequential injuries relating to the January 19, 2012 work injury. Dr. Chen diagnosed cervical disc disease, cervical disc displacement, lateral epicondylitis, and cubital tunnel syndrome and opined that these conditions were causally related to the January 19, 2012 work injury. In a duty status report dated October 9, 2014 to January 15, 2015, he diagnosed sprain of left elbow and neck and advised that appellant was totally disabled. In a duty status report dated February 16, 2015, Dr. Chen noted that she could return to work on February 16, 2015 part time, three hours a day with restrictions.

Appellant submitted nurses notes dated December 30, 2014 to February 25, 2015, who noted treatment for right-sided neck and left elbow pain secondary to a work injury on January 19, 2012.

Appellant was treated by Dr. Ezekiel on February 17, 2015. Dr. Ezekiel noted that she could return to work on February 20, 2015. In reports dated February 5 and 19, 2015, he noted performing a right C4, C5, and C6 medial branch block. Dr. Ezekiel diagnosed cervical strain.

By decision dated April 2, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to 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.”²

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.³ 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.⁴

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by OWCP of the

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* at 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ As appellant's request for reconsideration was not received by OWCP until March 18, 2015, more than one year after issuance of the January 2, 2014 merit decision, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in its January 2, 2014 decision.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. With her reconsideration request, appellant provided a November 12, 2014 letter in which she noted that her claim was in an open status and that her claims for wage-loss compensation should be paid. While she noted her disagreement with OWCP's decision denying her claim for compensation, this does raise a substantial question as to the correctness of OWCP's decision. This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error.

Appellant submitted a December 10, 2014 report from Dr. Chen who treated her for work-related injury to her left elbow, forearm, and cervical spine conditions. Dr. Chen attributed her condition to her operating a DBCS machine and lifting trays of mail onto the machine. He opined that appellant sustained consequential injuries causally related to the January 19, 2012 work-related injury and opined that the effects of the work injury persisted and prevented her from returning to work full time. Dr. Chen also provided other reports noting appellant's work status and restrictions. This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. Even though Dr. Chen noted appellant's symptoms, diagnoses, and work status, he did not sufficiently address whether her current disability beginning September 15, 2013 was causally related to the accepted injuries.

Appellant also provided 2015 treatment records from Dr. Ezekiel who noted her treatment and status. However, Dr. Ezekiel did not clearly address whether her disability beginning September 15, 2013 was causally related to the work injuries of January 19, 2012. Furthermore, even if these reports offered reasoned support for causal relationship, it would be insufficient to establish clear evidence of error.

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

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁰ 20 C.F.R. § 10.607(a).

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

Appellant submitted an EMG study dated August 18, 2014 and MRI scan report of the cervical spine dated October 13, 2014. However, these reports are insufficient to establish clear evidence of error as they do not address whether she had any disability after September 15, 2013 causally related to the January 19, 2012 work injury.

Appellant submitted physical therapy and nurse's notes. The Board has held that treatment notes signed by nurse or physical therapists are not considered medical evidence as these providers are not considered physicians under FECA.¹² Therefore, this evidence is not probative on regarding the underlying medical issue and is insufficient to establish clear evidence of error on the part of OWCP.

Consequently, appellant has not established clear evidence of error by OWCP in its January 2, 2014 decision.

On appeal, appellant reiterated assertions that she made before OWCP indicating that she disagreed with OWCP's decision denying her claim for compensation. She asserted that she submitted sufficient evidence to support that her diagnosed condition was causally related to the accepted work-related events. However, as noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.

¹¹ *D.G.*, 59 ECAB 455 (2008).

¹² *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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