

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

K.A., Appellant)	
)	
and)	Docket No. 15-1944
)	Issued: March 7, 2016
U.S. POSTAL SERVICE, POST OFFICE,)	
Oakland, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 28, 2015 appellant filed a timely appeal of a May 11, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from July 18, 2013, the date of the most recent merit decision, 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, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant contends that the medical evidence submitted in support of her request for reconsideration is sufficient to establish clear evidence of error on the part of OWCP and argues that the reports from her attending physicians are sufficient to rebut the opinion of OWCP's referral physician.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, then a 52-year-old distribution and window clerk, sustained postconcussion syndrome and a resolved neck sprain on April 10, 2009 as a result of being hit on the head by the top door of a shelf on a general purpose container. She stopped work on April 10, 2009 and received compensation benefits. Appellant returned to part-time modified duty for two hours per day on June 8, 2009, increased to working four hours per day on July 6, 2009, and then six hours per day on July 16, 2009 with restrictions. Thereafter, she continued to receive wage-loss compensation for periods in which she could not work.

OWCP referred appellant to Dr. Michael Bronshvag, a Board-certified neurologist, for a second opinion to determine the nature and extent her employment-related conditions. In a September 16, 2011 report, Dr. Bronshvag noted that a magnetic resonance imaging (MRI) scan was necessary to evaluate her condition. In a supplemental report dated October 22, 2011, he asserted that the MRI scan of her neck dated September 2011 was only minimally abnormal and a February 2011 MRI scan of the brain showed no brain difficulties, but extensive paranasal sinus disease. X-rays of the neck demonstrated mild degenerative disc disease at C4-7 and neuroforaminal narrowing. Dr. Bronshvag opined that appellant's ongoing head pain and headaches were caused by her paranasal sinusitis, which was not an employment-related condition. Examination findings of appellant's neck were benign. Dr. Bronshvag concluded that her employment-related conditions had resolved without residuals. He opined that appellant had reached maximum medical improvement and released her to regular duty without restrictions.

In a letter dated June 27, 2012, OWCP advised appellant that it proposed to terminate her compensation benefits based on the weight of the medical evidence, as represented by Dr. Bronshvag. It afforded her 30 days to submit additional evidence or argument in disagreement with the proposed action.

Appellant submitted additional medical evidence, including a July 19, 2012 psychological evaluation from Dr. Frank Lucchetti, a clinical psychologist, and a July 18, 2012 report from Dr. Susan Barnard, a Board-certified family practitioner. These reports both had found appellant able to return to full-duty work.

By decision dated September 6, 2012, OWCP terminated appellant's compensation benefits effective July 21, 2012. It found that the weight of the evidence was represented by Dr. Bronshvag.

On April 24, 2013 appellant requested reconsideration and submitted a December 16, 2012 report from Dr. Eric Crisostomo, a Board-certified internist, who opined that her postconcussive symptoms were causally related to her April 10, 2009 employment injury.

By decision dated July 18, 2013, OWCP denied modification of its September 6, 2012 termination decision.

In an appeal request form received by OWCP on April 17, 2015 appellant requested reconsideration and submitted a March 13, 2015 report from Dr. Mihwa Kim, an optometrist,

who diagnosed dizziness and headaches due to a shelf falling on appellant's head on April 10, 2009.²

On August 20, 2014 Dr. Nicole Andreatta, appellant's psychologist, diagnosed a traumatic brain injury due to the April 10, 2009 employment injury.

In a November 17, 2014 report, Dr. Christina Corey, a Board-certified otolaryngologist, diagnosed dizziness and headaches. She noted that appellant's symptoms began in 2009 when a shelf fell on her head. Dr. Corey reported that appellant was treated with water therapy, vestibular therapy for six months in 2011, and Botox therapy in the neck, but she continued to have constant headaches and dizziness.

On February 6, 2015 Dr. Joshua Kuluva, a Board-certified psychiatrist and neurologist, reported that appellant had been under his care since May 2014 and was seen in his office on December 21, 2014. He diagnosed postconcussion syndrome and noted that her symptoms persisted.

In a February 22, 2015 report, Dr. Crisostomo found that appellant suffered from chronic symptoms such as vertigo, neck pain, and headaches/migraines. He opined that these symptoms were caused by postconcussive syndrome that began due to an April 10, 2009 employment injury when a shelf at work fell on her head and neck. Dr. Crisostomo noted that since that date she had chronic intermittent vertigo and neck pain, as well as more frequent headaches, and migraine symptoms. He reported that appellant was evaluated and treated by various specialists for her symptoms, including neurologists, physical therapists, spine specialists, and chronic pain specialists. Dr. Crisostomo opined that she continued to suffer residuals of her employment-related conditions despite these treatments and required ongoing medical treatment for her symptoms.

By decision dated May 11, 2015, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which

² On January 3, 2015 appellant filed a claim for a recurrence (Form CA-2a) of total disability. By letter dated January 22, 2015, OWCP advised her that the claim was not able to be reviewed because her case was formally terminated for both medical and wage-loss compensation benefits in its September 6, 2012 decision.

³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

review is sought.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must be 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 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.¹²

To establish 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the OWCP decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations¹⁵ and procedures¹⁶ establish a one-year time

⁵ 20 C.F.R. § 10.607(a).

⁶ See *F.R.*, Docket No. 09-575 (issued January 4, 2010).

⁷ 20 C.F.R. § 10.607(b).

⁸ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁹ See *M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹⁰ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² See *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011); see *supra* note 13.

limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's July 18, 2013 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive her request until April 17, 2015, it was filed outside the one-year time period. As appellant's April 17, 2015 request for reconsideration was submitted more than one year after the July 18, 2013 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁷

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 May 11, 2015 decision or shift the weight of the evidence of record in her favor. OWCP terminated her disability compensation effective July 21, 2012 based on the medical opinion of Dr. Bronshvag, an OWCP referral physician, who opined that she no longer had any residuals or disability causally related to the accepted April 10, 2009 employment injury.

Dr. Crisostomo's February 22, 2015 report found that appellant suffered from chronic symptoms such as vertigo, neck pain, and headaches/migraines caused by the postconcussive syndrome that began due to the April 10, 2009 employment injury. He asserted that her work-related conditions had not resolved and required ongoing treatment. The term clear evidence of error is intended to represent a difficult standard. Even a detailed, well-rationalized medical report, which could have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.¹⁸ While the report of Dr. Crisostomo is generally supportive of appellant's continuing residuals and disability, it does not establish clear error in the May 11, 2015 decision.

Similarly, the reports from Drs. Kim, Andreatta, and Corey diagnosing a traumatic brain injury, dizziness, and headaches due to the April 10, 2009 employment injury are of limited probative value and insufficient to establish clear evidence of error. As discussed, clear evidence of error is a difficult standard. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁹ Thus, the Board finds that the reports of Drs. Kim, Andreatta, and Corey are insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's termination decision.

The February 6, 2015 report from Dr. Kuluva does not address how appellant's continuing total disability was caused by the April 10, 2009 employment injury. Evidence which is irrelevant to the issue which was decided by OWCP does not establish clear evidence of error.²⁰

¹⁷ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹⁹ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²⁰ *T.M.*, Docket No. 15-1571 (issued November 5, 2015).

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, she has not established clear evidence of error.²¹

On appeal, appellant contends that the medical evidence submitted in support of her claim is sufficient to establish clear evidence of error on the part of OWCP and argues that the reports from her attending physicians are sufficient to rebut the opinion of Dr. Bronshvag. As explained, the burden of proof is intended to be difficult when a request for reconsideration has been filed after the one-year filing period.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was not timely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ See *supra* note 13.