

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

D.C., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
MEDICAL COMMAND STATION,)
San Diego, CA, Employer)

**Docket No. 12-628
Issued: July 16, 2012**

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 January 20, 2012 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) January 5, 2012 decision which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year elapsed from the last merit decision dated April 11, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim 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 did not establish clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 35-year-old supervisory financial technician, filed a claim for benefits on March 13, 2008 alleging injury to her low back on March 12, 2008 when she tripped and fell to the ground.

By letter dated April 2, 2010, OWCP advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. It asked her to submit a comprehensive medical report from a treating physician describing any medical condition with an opinion as to whether her claimed condition was causally related to her federal employment. OWCP requested that appellant submit the additional evidence within 30 days. She did not respond.

By decision dated May 7, 2010, OWCP denied appellant's claim, finding that she failed to submit sufficient medical evidence to support a lower back injury in the performance of duty on March 12, 2010.

On May 17, 2010 appellant requested a review of the written record.

Appellant submitted several medical slips, physical therapy reports and notes regarding her treatment for lower back complaints. She also submitted a March 16, 2010 questionnaire and a March 16, 2010 report documenting that she received a steroid injection to alleviate back pain.

On February 22, 2010 appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine which noted that she had lumbar radiculopathy, loss of disc height, a desiccated L4-5 disc and a broad-based disc bulge at L4-5 with a right lateral protrusion that impinged on the exiting L4 nerve root. The MRI scan also showed mild facet osteoarthritic changes at L4-5 and L5-S1, bilaterally. The other discs demonstrated normal height and hydration. Appellant's lumbar spine showed normal alignment with no fracture or marrow edema and no other significant disc changes identified.

By decision dated September 28, 2010, an OWCP hearing representative affirmed the May 7, 2010 decision.

By letter dated October 17, 2011, appellant requested reconsideration. She submitted an October 12, 2010 report from Dr. Rosa M. Navarro, Board-certified in anesthesiology and pain management. Dr. Navarro related that appellant presented with a history of two herniated discs, with low back pain that radiated to the right lower extremity. Appellant stated that the pain started after falling at work in March 2008. Her diagnosis was radiculitis and sciatica. Dr. Navarro noted that appellant had asked her to write a letter stating that the injury she had was due to her work accident, but "I told her that I could not do that, but that she should ask her primary care physician to write that letter, if he is in agreement with her statement."

In a report dated September 19, 2011, received by OWCP on October 17, 2011, Dr. Douglas Dobecki, Board-certified in anesthesiology, stated that he had treated appellant for lumbar disc degeneration and lumbar disc herniation. He opined that her injuries were the result of her fall at work on March 14, 2008. Dr. Dobecki advised that the trip and fall injury occurred when appellant tripped over the leg of a chair and landed on her lumbar spine and tailbone.

In an October 21, 2011 report, Dr. Kevin C. Considine, an osteopath, asserted that the March 12, 2008 work incident resulted in appellant experiencing sustained chronic back pain and right sciatica. He indicated that the injury occurred when she tripped over the legs of the chair and fell to the ground. Dr. Considine stated that appellant was pregnant on the date the injury occurred and she initially thought her low back pain was attributable to her pregnancy. By the time he examined her on January 8, 2009, however, she did not focus on this incident and he believed that it was more of a chronic back injury. Appellant stated, however, that her symptoms started during that period of time. Dr. Considine advised that he had treated her back condition conservatively with medication, pain management, physical therapy and osteopathic manipulative therapy; however, she had no improvement. He stated that an MRI scan of appellant's lumbosacral spine showed an L4-5 rod-based direct disc bulge, with focal right lateral disc protrusion causing impingement on the exiting L4 nerve roots. Dr. Considine advised that, since he began treating her in January 2009, she experienced chronic back pain.

By decision dated January 5, 2012, OWCP denied appellant's request for reconsideration without a merit review. It found she had not timely requested reconsideration and failed to submit factual or medical evidence sufficient to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA² does not entitle an employee to a review of an OWCP 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, OWCP 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 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

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) advancing 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).

⁶ *See* cases cited *supra* note 2.

In those cases where a request for reconsideration is not timely filed, the Board had held that OWCP must 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 it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the 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 it 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 on September 28, 2010. Appellant requested reconsideration on October 17, 2011. Her request was untimely as it was outside the one-year time limit.

The Board finds that appellant's October 17, 2011 request for reconsideration failed to establish clear evidence of error. The evidence she submitted is not sufficient to establish clear error in the denial of her claim. OWCP received an October 12, 2010 report from Dr. Navarro,

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 *Faidley*, *supra* note 3.

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

who stated that she could not provide an opinion that appellant's current back conditions were related to the March 2008 work incident. Appellant also submitted reports from Dr. Dobecki and Dr. Considine, both of whom treated her for lumbar disc degeneration and a herniated lumbar disc. Dr. Dobecki generally opined that appellant's injuries were the result of her fall at work on March 14, 2008. Dr. Considine also advised that the March 12, 2008 work incident resulted in her experiencing sustained chronic back pain and resultant right sciatica. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ These reports, based upon evaluations in 2011, are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant sustained a lower back injury on March 12, 2008 in the performance of duty, causally related to her employment. Neither report is 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. These reports state a conclusion regarding causal relationship, but do not adequately explain why the incident in 2008 caused an injury, given appellant's medical and work history. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

The evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of OWCP in denying merit review. The Board finds that OWCP did not abuse its discretion in denying further 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 October 17, 2011.

¹⁶ See *D.E.*, 59 ECAB 438 (2008).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2012 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: July 16, 2012
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