

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

L.L., Appellant)

and)

**U.S. POSTAL SERVICE, LOS ANGELES)
PROCESSING & DISTRIBUTION CENTER,)
Los Angeles, CA, Employer**)

**Docket No. 13-1624
Issued: December 5, 2013**

Appearances:

*Roman P. Mosqueda, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2013 appellant, through her attorney, filed a timely appeal from a January 8, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her untimely request for reconsideration. Because more than 180 days elapsed from the most recent merit decision dated October 7, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case 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 denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, counsel contends that the medical evidence submitted in support of appellant's request for reconsideration is sufficient to establish clear evidence of error on the part

¹ 5 U.S.C. § 8101 *et seq.*

of OWCP. He stated that the medical reports of the attending Board-certified orthopedic surgeon rebut the findings of OWCP's referral physician.

FACTUAL HISTORY

OWCP accepted that on June 17, 2008 appellant, then a 57-year-old modified-duty mail handler, sustained a lumbosacral strain when she reached for mail trays while sitting on a scooter at work. She stopped work on June 18, 2008. On February 3, 2009 appellant returned to modified-duty work at the employing establishment. On April 7, 2009 she was sent home because it no longer had any work available to her within her restrictions. OWCP placed appellant on the periodic rolls commencing April 11, 2009 and paid total disability compensation.

In a September 23, 2010 report, Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon and OWCP referral physician, provided a history of appellant's employment injuries, including the June 17, 2008 employment injury and medical and social background. He listed findings on physical, neurological and x-ray examination of the back and both lower extremities. Dr. Conaty advised that back surgery was not indicated. Appellant's current disability was causally related to her long-standing and preexisting obesity and lumbar conditions. Dr. Conaty further advised that the accepted lumbosacral strain resulted in a temporary aggravation of her preexisting condition for only two months, after which time all periods of disability were attributed to her preexisting condition. He determined that appellant could not perform her usual job or work eight hours a day. Dr. Conaty stated that she could initially work four hours a day, then six hours a day in three months and eventually eight hours a day in six months with restrictions. He concluded that appellant's potential for vocational rehabilitation and future reemployment was guarded and problematic, primarily secondary to her marked obesity and chronic pain which necessitated narcotics. In a supplemental report dated May 16, 2011, Dr. Conaty advised that her June 17, 2008 employment injury had resolved within six months of her injury. Appellant no longer had any total disability causally related to the accepted injury. Dr. Conaty concluded that her work restrictions remained unchanged from the restrictions provided in his September 23, 2010 report.

On May 24, 2011 OWCP requested that Dr. Michael L. Schiffman, an attending Board-certified orthopedic surgeon, review Dr. Conaty's findings. Dr. Schiffman did not respond within the allotted 30-day time period.

In a notice dated August 22, 2011, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Conaty's opinion. It afforded her 30 days to submit additional evidence and argument.

OWCP received reports dated June 6 and July 21, 2011 from Dr. Semon Min and Dr. Pablo S. Rodriguez, chiropractors, respectively and cosigned by Dr. Schiffman addressed appellant's lumbar conditions and disability.

In an August 25, 2011 report, Dr. Schiffman reviewed appellant's medical records and disagreed with Dr. Conaty's findings. He stated that she sustained a soft tissue injury superimposed on preexisting entities. Appellant's current lumbar condition, which included disc

desiccation and end plate spurring as seen on a magnetic resonance imaging (MRI) scan were common findings considering her age, weight and employment history. Disc protrusions seen on a 2008 MRI scan study were not related to preexisting degenerative changes. Dr. Schiffman related that current findings of limited motion and muscle weakness and atrophy in the left lower extremity and disc protrusions at T12, L1, L2-3 and L3-4 were not related to preexisting degenerative changes, but were related to the 2008 industrial injury. He stated that it could not be determined whether appellant's spondylolisthesis occurred before or after the 2008 traumatic injury as no MRI scan studies were performed prior to her date of injury. Therefore, there was a possibility that the spondylolisthesis, if preexisting, either became unstable and symptomatic or occurred with the 2008 injury. Dr. Schiffman advised that the 2008 trauma led to the disc protrusions at T12, L1, L2-3 and L3-4. Appellant's functional limitations resulted from the same injury and required sedentary activities and work restrictions which accelerated her obesity and diabetes. Dr. Schiffman advised that her limited mobility and lumbar and left lower extremity conditions were not related to her degenerative disc disease. They were related to the pathology at T12, L1, L2-3 and L3-4 which resulted from the June 17, 2008 work injury. Dr. Schiffman advised that appellant was temporarily totally disabled and not capable of performing her regular duties as a consequence of the 2008 employment injury. He contended that Dr. Conaty's conclusion that appellant could not perform her regular duties contradicted his opinion that her disability ceased as of September 23, 2010. Dr. Schiffman advised that vocational rehabilitation was warranted since appellant's modified duties had not been accepted by the employing establishment. He recommended continued medical treatment and diagnostic testing for her work-related lumbar and left lower extremity injuries. Dr. Schiffman stated that the preexisting degenerative findings were insignificant when the history of the June 2008 industrial injury, MRI scan findings of disc protrusions, muscle atrophy, functional limitations and appellant's age, weight, 19-year employment history and previous industrial injuries were taken into consideration.

In an October 7, 2011 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the medical evidence submitted by her was insufficient to outweigh the weight of Dr. Conaty's opinion that she no longer had any residuals or disability causally related to her accepted injury.

In an appeal request form dated September 20, 2012 and received by OWCP on October 10, 2012, appellant requested reconsideration of the October 7, 2011 termination decision. In a brief dated October 1, 2012 and also received on October 10, 2012, counsel contended that Dr. Schiffman's August 25, 2011 report was sufficient to establish appellant's entitlement to continuing disability compensation.

Appellant submitted a duplicate copy of Dr. Schiffman's August 25, 2011 report. She also submitted reports cosigned by Dr. Min and Dr. Schiffman. In an October 13, 2011 report, the physicians noted appellant's complaints, reviewed a September 12, 2011 lumbar MRI scan and listed findings on physical examination. Appellant was diagnosed as having lumbar spine sprain/strain, multilevel degenerative disc disease, degenerative facet arthrosis at multiple levels, a three millimeter posterior disc protrusion at T12, L1, two to three millimeter posterior disc protrusion with mild foraminal narrowing at L2-3, marked bilateral degenerative facet arthrosis at L4-5 with minimal grade 1 anterior spondylolisthesis of L4 on L5 based on the September 12, 2011 MRI scan. Dr. Min and Dr. Schiffman advised that she remained totally disabled. In

reports dated July 23 and November 26, 2012, the physicians listed physical examination findings and reiterated their prior opinion that appellant was temporarily totally disabled.

OWCP received reports dated November 10, 2011 through April 19, 2012 and cosigned by Dr. Peter K. Dawson, a chiropractor, and Dr. Schiffman, who noted appellant's symptoms and listed findings on physical examination. Appellant was diagnosed as having the same lumbar conditions as listed in Dr. Schiffman's October 13, 2011 report. Dr. Dawson and Dr. Schiffman advised that she was temporarily totally disabled.

In reports dated February 22 and September 27, 2012, Dr. Schiffman noted appellant's complaints related to her back and bilateral lower extremities and listed physical examination findings. He reiterated his lumbar diagnoses and opinion that she was temporarily totally disabled. In a March 21, 2012 report, Dr. Schiffman advised that appellant's lumbar spine strain, disc protrusions and grade 1 spondylolisthesis at L4 on L5 were work related. He indicated with an affirmative mark that residuals of her injury had not resolved. Dr. Schiffman stated that appellant's expected recovery date was December 31, 2013. He again opined that she was temporarily totally disabled. Dr. Schiffman reiterated this opinion in a separate report dated March 21, 2012 and a report dated May 17, 2012.

Reports dated March 21, April 19 and May 17, 2012 contained an illegible signature and provided lumbar range of motion measurements.

On March 21, 2012 Dr. Dawson reported that appellant had disc desiccation and anterolisthesis at L4 on L5. He reiterated his opinion that she was temporarily totally disabled.

A June 11, 2012 report cosigned by Dr. Schiffman and Dr. Paul Lin, a Board-certified internist, noted appellant's back and bilateral lower extremity symptoms and listed findings on physical examination. The physicians diagnosed the same lumbar conditions as provided in Dr. Schiffman's prior reports.

In a January 8, 2013 decision, OWCP denied appellant's request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in its October 7, 2011 decision.²

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing

² The Board notes that OWCP received new evidence after issuance of its January 8, 2013 decision. The Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁵

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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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 *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 The Board makes an independent determination of whether a claimant 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.¹³

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on October 7, 2011. OWCP received appellant's request for reconsideration on October 10, 2012; thus, the request was outside the

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

one-year time limit.¹⁴ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁵

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 October 7, 2011 decision or shift the weight of the evidence of record in her favor. OWCP terminated her disability compensation effective October 7, 2011 based on the September 23, 2010 medical opinion of Dr. Conaty, an OWCP referral physician, who opined that she no longer had any residuals or disability causally related to the accepted June 17, 2008 employment injury.

Dr. Schiffman's March 21, 2012 report found that appellant had work-related lumbar spine strain, disc protrusions and grade 1 spondylolisthesis at L4 on L5. He indicated with an affirmative mark that residuals of her injury had not resolved. Dr. Schiffman concluded that appellant was temporarily totally disabled. In another report dated March 21, 2012 and reports dated February 22, May 17 and September 27, 2012, he reiterated his prior diagnoses and opinion regarding appellant's disability. Appellant resubmitted Dr. Schiffman's August 25, 2011 report which found that she had continuing residuals and total disability causally related to the accepted employment injury. A detailed, well-rationalized medical report which would 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.¹⁶ While the reports of Dr. Schiffman are generally supportive of appellant's continuing residuals and disability, they do not establish clear error on the part of OWCP in rendering its October 7, 2011 decision. These reports are insufficient as Dr. Schiffman did not provide adequate medical rationale explaining how the diagnosed conditions or resultant disability were caused by the accepted June 17, 2008 employment injury¹⁷ or raise a substantial question concerning the correctness of OWCP's decision. Further, Dr. Schiffman's August 25, 2011 report was previously in the record.

Similarly, the reports from Drs. Min, Dawson and Lin which were cosigned by Dr. Schiffman diagnosed appellant's lumbar conditions and found that she remained temporarily totally disabled are of limited probative value and insufficient to establish clear evidence. This evidence does not contain a rationalized opinion explaining how the diagnosed conditions or resultant disability were causally related to the accepted employment injury.¹⁸ The Board notes that while Dr. Lin's March 21, 2012 report, which was not cosigned by Dr. Schiffman, diagnosed appellant's lumbar conditions and again opined that she was temporarily totally disabled, he is not considered a physician under FECA with regards to this report as he did not diagnose a

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

¹⁵ *Supra* note 5; see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁷ *F.T.*, Docket No. 09-919 (issued December 7, 2009); *S.S.*, 59 ECAB 315 (2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006) (a medical opinion not fortified by medical rationale is of diminished probative value).

¹⁸ *Id.*

spinal subluxation as demonstrated by x-ray to exist. For the stated reasons, the Board finds that the reports of Drs. Min, Dawson, Merriman, Lin and Schiffman are not sufficient 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 March 21, April 19 and May 17, 2012 reports containing illegible signatures provided lumbar range of motion measurements and stated that appellant was temporarily totally disabled. This evidence lacks probative value as it cannot be determined that it is from a physician¹⁹ and failed to provide a reasoned opinion explaining how appellant's continuing total disability was caused by the accepted injury.²⁰

To establish clear evidence of error, it is not sufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in terminating appellant's compensation. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, counsel contended that Dr. Schiffman's reports were sufficient to rebut Dr. Conaty's medical opinion. As found, Dr. Schiffman's reports were not *prima facie* sufficient to shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of OWCP's decision to terminate her compensation as of October 7, 2011.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹⁹ *C.B.*, Docket No. 09-2027 (issued May 12, 2010) (a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2); reports lacking proper identification do not constitute probative medical evidence).

²⁰ See cases cited, *supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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