

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

C.J., Appellant

and

**FEDERAL JUDICIARY, DC SUPERIOR
COURT, Washington, DC, Employer**

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**Docket No. 12-1570
Issued: January 16, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2012 appellant filed a timely appeal from the March 9, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Since more than 180 days have elapsed since the most recent merit decision of January 6, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2 and 501.3.³

¹ Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant to confirm a continuing desire for an oral argument in Washington, DC. No written confirmation was received; thus the Board has decided the appeal on the record.

² 5 U.S.C. §§ 8101-8193.

³ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration on the merits as her request was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On October 20, 2006 appellant, then a 45-year-old deputy clerk, filed a traumatic injury claim stating that on October 19, 2006, while putting file jackets on top shelf, the file jackets fell on her head causing her to lose balance and hit her back against the steel shelf. OWCP accepted a contusion of the lumbar region of the back and paid benefits. Appellant returned to work with restrictions.

Appellant subsequently claimed a recurrence of disability beginning August 22, 2007. In order to determine the extent of her disability, OWCP referred her to Dr. Robert A. Smith, a Board-certified orthopedic surgeon for a second opinion. In a January 21, 2008 report, Dr. Smith opined that appellant's neck condition was not related to her work-related claim. He stated that there was no evidence of exacerbation or precipitation of appellant's preexisting degenerative disease related to the October 19, 2006 work injury. Dr. Smith also found no evidence of ongoing residuals and opined that appellant required no further treatment and could return to regular-duty work. By decision dated March 24, 2008, OWCP terminated appellant's medical and wage-loss benefits effective March 24, 2008. However, on April 8, 2008 an OWCP representative vacated OWCP's March 24, 2008 decision as the argument from appellant's attorney was received before the issuance of the final decision but was not viewable in the imaged case record until after the decision was released. Following further development, OWCP declared a conflict in medical opinion and referred appellant to Dr. Hamid Quraishi, a Board-certified orthopedic surgeon, for an impartial medical opinion on the issue of what conditions and disability were related to the accepted work injury. In a June 26, 2008 report, Dr. Quraishi opined that the worsening symptoms beginning on August 22, 2007 did not require her to be off work from July 3, 2007 through January 10, 2008 and they were not related to the original work injury. No further treatment was recommended.

Appellant subsequently filed claims for wage-loss compensation for the periods August 1, 2007 through January 10, 2008. By decision dated October 22, 2009, OWCP denied appellant's claim for compensation for the period August 1, 2007 through January 10, 2008 and for the period commencing May 31, 2007.

On October 15, 2010 appellant requested reconsideration of OWCP's October 22, 2009 decision and submitted additional evidence in support of her contention that she was entitled to compensation from August 1, 2007 through January 10, 2008. By decision dated January 6, 2011, OWCP denied modification of its October 22, 2009 decision. It found appellant did not provide well-rationalized detailed narrative medical documentation to establish the relationship between any ongoing condition and disability and the original injury of October 19, 2006 for the period August 1, 2007 through January 10, 2008 and the period of disability commencing after May 31, 2007.

In an April 22, 2011 report, an OWCP medical adviser indicated that appellant's preexisting cervical degenerative disc disease had been permanently aggravated by her fall and back contusion which had progressed to the point where surgery was indicated. The medical adviser found that the requested procedures C3 through C6 anterior cervical discectomy and arthrodesis with plating to decompress the spinal cord nerve roots was appropriate and related to the October 19, 2006 work injury.

On December 16, 2011 appellant requested reconsideration and submitted statements dated May 26 and December 16, 2011. She also submitted magnetic resonance imaging (MRI) scan findings from January 19, 2010 and January 28, 2011, an October 19, 2010 x-ray and authorization requests. Other evidence included 2010 and 2011 progress reports from Dr. Faheem A. Sanahu, a Board-certified neurosurgeon, concerning her neck, arm and shoulder pain and an August 4, 2011 report from Dr. Mark Klein, a Board-certified neurosurgeon, concerning her cervical spondylosis.

By decision dated March 9, 2012, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.⁶

ANALYSIS

In its March 9, 2012 decision, OWCP denied appellant's December 16, 2011 request for reconsideration finding that it was untimely filed and failed to present clear evidence of error. The Board finds that OWCP improperly determined that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

On January 6, 2011 OWCP issued a decision denying modification of its October 22, 2009 decision. Accordingly, appellant had one year from January 6, 2011 to make a timely

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997); *Leon D. Faidley, Jr.*, *supra* note 5 at 111 (1989).

request for reconsideration.⁷ OWCP determined that the request for reconsideration submitted on December 16, 2011 was not within the one-year time limitation. However, the December 16, 2011 request for reconsideration is within one year of the last merit decision of January 6, 2011. Her December 16, 2011 request for reconsideration is therefore timely.

Appellant timely filed a request for reconsideration in this case. The Board finds that OWCP, therefore, improperly denied her reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(2).⁸ Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.⁹

CONCLUSION

The Board finds that OWCP improperly found that appellant's request for reconsideration of OWCP's January 6, 2011 decision was untimely filed.

⁷ See *supra* note 6. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.

⁸ 20 C.F.R. § 10.606(b)(2) of OWCP's regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

⁹ In light of the disposition of this case, the Board will not address appellant's arguments on appeal.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 9, 2012 is set aside and remanded for action consistent with this decision.

Issued: January 16, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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