

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

I.C., Appellant)
and) Docket No. 14-170
U.S. POSTAL SERVICE, TEXTILE FINANCE) Issued: June 3, 2014
POST OFFICE, Los Angeles, CA, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 30, 2013 appellant, through her attorney, filed a timely appeal from August 12 and September 25, 2013 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between the last merit decision dated February 22, 2012 and 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, in its August 12 and September 25, 2013 decisions, properly denied appellant's requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 1, 2011 appellant, then a 52-year-old sales associate clerk, filed an occupational disease claim alleging that she sustained an injury to her neck, shoulder, arms and hands as a result of repetitive work duties. She did not stop work.

By decision dated June 3, 2011, OWCP denied appellant's claim after finding that she had not submitted factual evidence sufficient to show that she experienced repetitive work duties as alleged.

On November 19, 2011 appellant requested reconsideration.² In a decision dated February 22, 2012, OWCP modified its June 3, 2011 decision to reflect that she had established the occurrence of the work factors identified as causing her condition. It mailed a copy of the decision to appellant's authorized representative.

By letter dated November 12, 2012, counsel stated, "I am submitting documentation to support the above-numbered claim. Upon receipt, please review the file and provide the status." He enclosed a November 5, 2012 medical report from Dr. Antoine G. Khoury, a chiropractor.³

On April 15, 2013 OWCP received a January 8, 2013 report from Dr. Frederic G. Nicola, a Board-certified orthopedic surgeon, who diagnosed cervical degenerative disc disease with radiculopathy and lumbosacral degenerative disc disease. Dr. Nicola stated, "Based upon the review of medical records, history and physical examination, [appellant] has sustained a permanent aggravation of her cervical and lumbar degenerative joint disease, which qualifies as an injury under [OWCP]."

By letter dated May 14, 2013, counsel related that on March 19, 2013 he had forwarded a January 8, 2013 report from Dr. Nicola. He asserted that OWCP had also received the January 8, 2013 report within one year of its prior denial. Counsel requested that OWCP determine whether the report was "sufficient for reconsideration."

In a letter dated June 5, 2013, counsel asserted that he had requested reconsideration before OWCP on December 5, 2012. On July 25, 2013 OWCP informed him that it did not have a request for reconsideration. By letter dated August 1, 2013, counsel related that he had submitted medical evidence from Dr. Nicola in April 2013 and noted that OWCP had also received a January 8, 2013 medical report from Dr. Nicola. Citing S.C.,⁴ he argued that a request for reconsideration did not need to be on any certain form and that OWCP had an obligation to develop new medical evidence received.

² Appellant designated counsel as her representative on January 9, 2012.

³ Dr. Khoury diagnosed cephalgia, cervical radiculopathy, carpal tunnel syndrome, thoracic and lumbosacral sprain and strain, a cervical discogenic condition, degenerative disc disease and stenosis, a disc herniation at L4-5 and degenerative disc disease of the lumbosacral spine. He advised that it was "reasonable that [appellant] sustained injury to her neck, back and both wrists in the course of employment at the [employing establishment] from January 1979 through the present time."

⁴ Docket No. 13-738 (issued July 8, 2013).

By decision dated August 12, 2013, OWCP denied appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error. It indicated that it had received her request for reconsideration, submitted by her attorney, on May 16, 2013, more than one year from the last merit decision. OWCP found that the evidence was insufficient to establish clear evidence of error.

On September 6, 2013 appellant, through her attorney, requested reconsideration. He argued that in *S.C.*,⁵ the Board found that "the filing of additional information constituted a request for reconsideration." Counsel also maintained that OWCP found that appellant had established fact of injury in its February 22, 2012 decision but denied the claim based on causal relationship. He contended that the January 8, 2013 report from Dr. Nicola was sufficient to establish causal relationship. Counsel asserted that appellant did not disagree with the February 22, 2012 decision and thus the prior procedure was to submit additional evidence rather than to request reconsideration. He enclosed the case of *S.C.*, in support of his contention.

By decision dated September 25, 2013, OWCP denied appellant's request for reconsideration after finding that the request was untimely filed and did not show clear evidence of error. It determined that it was not required to further develop a claim upon receipt of new medical evidence and that a request for reconsideration was necessary to consider the evidence. OWCP further found that the Board case of *S.C.*, was not relevant to the instant case as in that case a claimant's attorney asked OWCP to review submitted evidence within the one-year period for requesting reconsideration.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁶ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁷

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁸ To establish clear evidence of error, a

⁵ *Id.*

⁶ See *supra* note 1.

⁷ 20 C.F.R. § 10.607.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.⁹

ANALYSIS

OWCP determined that appellant failed to file timely applications for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁰ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹¹

The Board finds that OWCP improperly determined that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in section 10.607. OWCP issued its last merit decision denying her occupational disease claim on February 22, 2012. Appellant had until February 22, 2013 to provide OWCP with a request for reconsideration.¹² OWCP determined that she requested reconsideration on May 14, 2013, which was not within the one-year time limitation. The Board finds, however, that appellant's counsel, submitted a November 12, 2012 request for reconsideration that was received by OWCP on November 15, 2012, within the required one-year time period.

In his November 12, 2012 letter, appellant's attorney indicated that he was submitting documentation relevant to OWCP file number and requested that upon receipt OWCP review the file and provide the status. He submitted additional medical evidence. Although the November 12, 2012 letter does not mention the word reconsideration, the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration.¹³ In *S.C.*, the claimant's attorney submitted an August 22, 2012 letter enclosing new medical evidence and requesting that OWCP review the evidence and accept the claim. The Board found that, even though counsel did not use the word reconsideration, he submitted relevant information with the file number and thus the letter constituted a request for reconsideration. In *Jack D. Johnson*,¹⁴ the claimant advised in correspondence dated February 15, 2005 that he was enclosing pertinent information related to his claim and provided his file number and new medical evidence. The Board found that, as he had submitted new medical evidence and provided the file number, his February 15, 2005 letter constituted a request for reconsideration. Consequently, as appellant's attorney submitted additional evidence under

⁹ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Robert F. Stone*, *supra* note 9.

¹² See *supra* note 8 at Chapter 2.1602(4) (October 2011). For decisions issued on or after August 29, 2011, 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 OWCP's decision for which review is sought.

¹³ See S.A., Docket No. 12-1019 (issued October 15, 2012); *Jack D. Johnson*, 57 ECAB 593 (2006); *Vincente P. Taimanglo*, 45 ECAB 504 (1994).

¹⁴ See *Jack D. Johnson*, *id.*

the appropriate file number and requested that OWCP review the evidence, the Board finds that the November 12, 2012 letter constituted a request for reconsideration.

The Board finds that, as appellant timely requested reconsideration, OWCP improperly denied her reconsideration requests in its August 12 and September 25, 2013 decisions by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to OWCP for review of the evidence under the standard of review for a timely reconsideration request and to undertake any additional development deemed necessary, to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that appellant's November 12, 2012 letter constituted a request for reconsideration which was timely filed within one year of the February 22, 2012 merit decision. The Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the September 25 and August 12, 2013 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 3, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board