

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

On appeal, appellant argued that her request for reconsideration was timely filed as it was mailed on January 31, 2013 *via* certified mail. She submitted a certified mail receipt stamped February 6, 2013 to the Board.

FACTUAL HISTORY

On April 30, 2007 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that she developed back pain and right knee chondromalacia. In support of her claim, she submitted a magnetic resonance imaging (MRI) scan dated October 4, 2006 which demonstrated minimal L5-S1 disc bulge and an unremarkable cervical spine. Dr. Fabian A. Proano, a Board-certified anesthesiologist, diagnosed degenerative lumbar spine disease with right leg radicular pain. On August 18, September 20 and November 3, 2006 Dr. Bradley M. Thomas, a Board-certified orthopedic surgeon, stated that he treated appellant for right knee traumatic chondromalacia following a dog bite. He stated that she developed significant back pain and radicular pain in her right leg likely from limping on the right leg. Dr. Thomas opined that appellant had a consequential injury.

In a letter dated May 15, 2007, OWCP noted that appellant's right knee chondromalacia had been accepted under a separate claim and that the medical evidence submitted was not sufficient to establish a causal relationship between her accepted knee condition and her diagnosed lumbar condition. It requested additional medical evidence in support of her claim and allowed 30 days for a response. Dr. Thomas responded on May 31, 2007 and stated that it was possible that appellant developed radicular pain due to prolonged limping causing her to lean forward in her lumbar spine which resulted in excess stress in the lumbar spine and leading to lumbar disc herniation. He stated that she walked even while on light duty and opined that it was "quite probable" that her lumbar disc disease and right leg radicular pain was exacerbated by her right knee chondromalacia.

OWCP denied appellant's claim on July 23, 2007 finding that the medical evidence did not establish a causal relationship between her diagnosed back condition and her employment. Appellant requested reconsideration through submission of a form on July 26, 2007. By decision dated August 21, 2007, OWCP declined to reopen her claim for consideration of the merits.

On August 31, 2004 Dr. Thomas stated that appellant had reached maximum medical improvement in regard to her right knee injury. He stated that she had returned to modified duty eight hours a day walking two hours at a time with 15-minute breaks. Dr. Thomas noted that appellant walked without a limp.

Dr. Thomas completed a report on August 10, 2007 and noted appellant's history of injury including a dog bite on November 21, 2002 which resulted in continued knee pain, catching in her knee, inability to straighten her knee and a limp. Appellant also reported back pain, numbness and tingling in her lower leg and decreased sensation over the knee and lower

right leg. Dr. Thomas opined that her back pain was directly related to her limp as a result of her right knee injury.

OWCP reviewed appellant's claim on November 30, 2007 and denied modification of its prior decisions. Appellant, through her representative, requested reconsideration on August 14, 2008. Dr. Serge Obukhoff, a Board-certified neurosurgeon, completed a report on March 21, 2008 and described her employment duties. He found diminished sensation in L5 and S1 distributions on the right and reviewed her MRI scan. Dr. Obukhoff diagnosed back pain syndrome, degenerative back disease with disc herniation and degeneration, facet joint disease and sciatica. He attributed appellant's back condition to carrying, pushing and pulling as well as walking on uneven terrain and steps while in the performance of her job duties. Dr. Obukhoff stated that her type of work produced significant stress to the vertebral column and resulted in acceleration of the degenerative process. He opined that the work that appellant had been doing for years was contributing to degeneration and development of her current symptoms.

OWCP denied modification of appellant's prior decisions on November 18, 2008.

Appellant requested reconsideration on April 16, 2009. Dr. Obukhoff completed reports on July 11, August 8, September 5, October 3 and 24, 2008 as well as November 14, 2008. He listed appellant's employment duties. Dr. Obukhoff diagnosed lumbar facet joint disease and spondylosis as well as back pain syndrome. He opined that appellant should be managed conservatively. On February 7 and 22, 2009 Dr. Obukhoff found significant facet joint disease and spondylosis of the lumbar spine. He stated that appellant was experiencing increased radiculopathy. Dr. Obukhoff diagnosed back pain syndrome and degenerative spondylosis. In a note dated March 27, 2009, he noted that appellant walked with a cane and experienced persistent back pain with leg radiation. Dr. Obukhoff recommended surgical treatment. He corrected his prior reports regarding appellant's work duties on April 24, 2009 and described her periods of full duty, leave of absence and limited duty from 1997 through August 16, 2006. Dr. Obukhoff stated that she was medically released to return to work with restrictions on March 14, 2008, but that no appropriate light duty was available at the employing establishment. In a separate note of the same date, he diagnosed back pain syndrome due to facet arthropathy. Dr. Obukhoff found that appellant was totally disabled and requested authorization for surgery. On June 8 and July 10, 2009 he diagnosed severe degenerative lower back disease, back pain syndrome at L4-5 and L5-S1 with bilateral facet arthropathy.

By decision dated August 28, 2009, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decisions.

Appellant requested reconsideration on August 27, 2010. Dr. Obukhoff submitted a report dated April 30, 2010 continuing to diagnose severe degenerative low back disease, back pain syndrome at L4-5 and L5-S1 as well as bilateral facet arthropathy. He no longer recommended surgery, instead suggesting facet joint Luschka nerve rhizotomy at L4-5 and L5-S1. On July 21, 2010 Dr. I. Grant Orlin, a general practitioner, provided appellant's work history. OWCP denied modification of its prior decisions on November 30, 2010 finding that she had not submitted the necessary medical opinion evidence to establish a causal relationship between her diagnosed condition and her accepted employment duties.

Appellant underwent a lumbar MRI scan on February 11, 2011 which demonstrated a broad-based disc protrusion at L5-S1 associated with mild narrowing of the left neural foramina with no evidence of spinal canal stenosis. By decision dated August 5, 2011, OWCP denied modification of its prior decisions finding that Dr. Orlin's reports were not based on a proper factual background and did not establish that appellant's current back condition was causally related to her employment.

Appellant requested reconsideration on December 22, 2011. She submitted a report from Dr. Orlin describing her employment history dated December 22, 2011. This report contained typographical errors indicating that appellant was off work in 2010 rather than 2001. Dr. Orlin completed a form report on October 27, 2011 and indicated that she was capable of modified work due to her right foot and ankle sprain and strain. He did not offer an opinion discussing the cause of appellant's back pain. By decision dated February 2, 2012, OWCP denied modification of her claim noting the factual errors in Dr. Orlin's December 22, 2011 report.

Appellant requested reconsideration through a form dated January 28, 2013 and received by OWCP on February 6, 2013. In support of her request, she resubmitted Dr. Orlin's December 22, 2011 report and submitted a form report dated July 12, 2011 from Dr. Orlin diagnosing severe lumbar degenerative disc disease with facet arthropathy at L4-5 and L5-S1 with right radiculopathy as well as lumbosacral strain. Dr. Orlin provided work restrictions.

In a decision dated April 25, 2013, OWCP found that appellant's request for reconsideration was not timely and did not establish clear evidence of error on the part of OWCP.³

LEGAL PRECEDENT

Under section 8128(a) of FECA⁴ OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that "[a]n application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought."⁵ In *Leon D. Faidley, Jr.*,⁶ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.

³ Following the appeal to the Board on October 21, 2013, OWCP issued a decision dated November 5, 2013 denying appellant's claim as untimely and finding that she did not establish clear evidence of error on the part of OWCP. The Board and OWCP may not simultaneously have jurisdiction over the same case. Because OWCP must review its prior decisions in order to determine whether appellant submitted clear evidence of error, it may not issue a decision regarding the same issue on appeal before the Board. OWCP therefore did not have the authority to issue its November 5, 2013 decision. *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ 41 ECAB 104, 111 (1989).

OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of OWCP.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 which 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 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 fundamental question as to the correctness of OWCP's 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 it abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated April 25, 2013 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than 180 days elapsed from the date of issuance of OWCP's February 2, 2012 merit decision to the date of the filing of appellant's appeal, on October 21, 2013, the Board lacks jurisdiction to review that decision.¹⁵

⁷ *Supra* note 5; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁴ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁵ *See* 20 C.F.R. § 501.3(e).

The Board finds that the September 16, 2013 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis 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 and did not show clear evidence of error was proper and did not constitute abuse of discretion.

Appellant requested reconsideration of the February 2, 2012 merit decision through a form received by OWCP on February 6, 2012 and dated January 28, 2013. As the request for reconsideration was not received by OWCP by Monday, February 4, 2013 within one calendar year of the February 2, 2012 decision with allowances for the weekend of February 2 and 3, 2013, the request was not timely received by OWCP within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

The Board notes that on appeal, appellant submitted her certified mail receipt which indicated that her request for reconsideration was mailed on Thursday, January 31, 2013 and received by OWCP on February 6, 2013. As OWCP did not receive the request for reconsideration by Monday, February 4, 2013, instead receiving it on February 6, 2013, the request for reconsideration was untimely under OWCP's regulations.

The Board further finds that the evidence submitted by appellant in support of her untimely request for reconsideration did not establish clear evidence of error on the part of OWCP. In support of her request, appellant submitted Dr. Orlin's December 22, 2011 report attempting to address deficits in her employment history. She also submitted a form report dated July 12, 2011 from him diagnosing severe lumbar degenerative disc disease with facet arthropathy at L4-5 and L5-S1 with right radiculopathy as well as lumbosacral strain. Dr. Orlin provided work restrictions.

The Board finds that these reports are not sufficiently detailed and well reasoned to sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP's decision. The medical reports submitted by appellant are not based on an accurate factual background, do not provide detailed physical findings or well-reasoned medical rationale explaining how and why her degenerative back condition was caused or aggravated by her specific employment duties. As appellant has not provided evidence establishing clear evidence of error on the part of OWCP, the Board finds that OWCP properly declined to reopen her claim for consideration of the merits.

CONCLUSION

The Board finds that appellant's February 6, 2012 request for reconsideration was not timely filed within the one-year time limitation period and did not contain clear evidence of error on the part of OWCP.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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