

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

S.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Greensboro, NC, Employer**

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**Docket No. 14-555
Issued: May 19, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2014 appellant filed a timely appeal from an August 19, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days elapsed from the most recent merit decision dated July 9, 2012 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 denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 15, 2012 appellant, then a 49-year-old letter carrier, filed an occupational disease claim alleging a postsurgical aggravation or acceleration of degenerative disc disease and aggravation of osteopenia due to her employment duties of repetitious lifting, bending and carrying mail. She first became aware of her condition on September 12, 2011 and first related it to her employment on that date.

Appellant submitted a narrative statement dated February 15, 2012, noting that her back pain began in 2004. She underwent back surgery in March 2009 and returned to full duty after 90 days. Appellant's work required repetitive lifting and bending while handling mail. Her back pain returned six to eight months after surgery and, in 2011, she developed stabbing pain in both legs which increased with the Christmas holiday. On January 9, 2012 appellant woke up with back pain and stabbing pain in her left leg.

In a letter dated June 5, 2012, OWCP requested that appellant provide additional evidence in support of her claim including a detailed report from a physician. Appellant submitted a January 19, 2012 report from Dr. Kenneth J. Rich, a Board-certified neurosurgeon, who reviewed a magnetic resonance imaging (MRI) scan and found that L1-2 was the worse disc. Dr. Rich recommended conservative treatment and trigger point injections. Appellant also submitted medical records regarding her March 20, 2009 surgery and treatment.

By decision dated July 9, 2012, OWCP denied appellant's claim. It found insufficient medical evidence to establish a causal relationship between her back condition and her employment.

In a letter dated July 8, 2013, appellant requested reconsideration. OWCP received this request on July 11, 2013. Appellant submitted a July 1, 2013 report from Dr. Andrew Drabick, a Board-certified family practitioner, who first examined appellant on January 23, 2013 and diagnosed multilevel lumbar degenerative disc disease for which she underwent surgery at L2-3 and L3-4 on March 20, 2009. Dr. Drabick noted that in the summer of 2011 appellant began having episodes of low back pain which worsened in early 2012. He reviewed her MRI scan which demonstrated bulging discs at L3-4 and L4-5. Dr. Drabick stated that appellant's work at the employing establishment involved sitting and repetitive lifting of more than 20 pounds which contributed to her underlying lumbar degenerative disc disease. He found that appellant was partially disabled and provided work restrictions. Appellant also submitted treatment notes from Dr. Drabick dated June 6 and 25, 2013. Dr. Drabick diagnosed back pain with radiation and lumbosacral degenerative disc disease. Appellant submitted a January 16, 2012 MRI scan which demonstrated a small disc herniation at L2-3 due to scar tissue.

By decision dated August 19, 2013, OWCP declined to reopen appellant's claim for reconsideration of the merits. It found that her request for reconsideration was received on July 11, 2013, more than one year after the July 9, 2012 merit decision. OWCP further found that appellant failed to establish clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² 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. Effective August 29, 2011, section 10.607(a) provides that, “An application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.”³ In *Leon D. Faidley, Jr.*,⁴ 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. 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.

If a 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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, *supra* note 5.

⁹ *See supra* note 7.

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

fundamental question as to the correctness of OWCP's decision.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹²

ANALYSIS

The only decision before the Board is the August 19, 2013 OWCP decision which 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 July 9, 2012 merit decision to the filing of appellant's appeal, on January 13, 2014, the Board lacks jurisdiction to review that decision.¹³ The Board finds that refusal of OWCP to reopen appellant's claim for further reconsideration of the merits was proper and did not constitute an abuse of discretion.

Appellant's request for reconsideration was received by OWCP on July 11, 2013 more than one year after the July 9, 2012 merit decision. Her request was therefore untimely as it was not received within one year of the July 9, 2012 decision. As the request for reconsideration was not timely, the evidence submitted must be evaluated under the clear evidence of error standard.

Appellant submitted medical evidence from Dr. Drabick addressing her ongoing back condition. Dr. Drabick advised that appellant's employment duties aggravated her underlying degenerative disc disease. He stated that sitting and repetitive lifting of more than 20 pounds contributed to exacerbating her underlying lumbar degenerative disc disease. While these reports provide support for appellant's claim of an occupational aggravation of her underlying degenerative disc disease, the medical evidence is not sufficient to meet the clear evidence of error standard. 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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁴

CONCLUSION

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

¹¹ *Leon D. Faidley, Jr.*, *supra* note 4.

¹² *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

¹³ *See* 20 C.F.R. § 501.3(e).

¹⁴ *Dean D. Beets*, 43 ECAB 1153 (1992); *supra* note 7. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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