

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

C.N., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Houston, TX, Employer)

Docket No. 14-1391
Issued: November 17, 2014

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 2, 2014 appellant filed a timely appeal of an April 30, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration without conducting a merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 and because more than 180 days elapsed from November 15, 2012, the date of the most recent OWCP merit decision, to June 2, 2014, when this appeal was filed, the Board lacks jurisdiction to review the merits of the case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 18, 2011 appellant, then a 44-year-old city carrier, injured her left foot when she stepped into a hole and fell. She indicated that she felt pain in her left leg and ankle. Appellant stopped work on July 19, 2011. OWCP subsequently accepted the claim for cervical spondylosis without myelopathy, contusion of left knee and other internal derangement of the left knee.

An August 8, 2011 magnetic resonance image (MRI) scan of the left knee was unremarkable while an August 9, 2011 cervical spine MRI scan showed herniation at C2-3 and C3-4, along with multilevel degenerative disc disease. Appellant's physician, Dr. Arnold Ravdel, an orthopedic surgeon, opined that appellant was totally disabled.

OWCP continued to develop the claim and, by letter dated March 6, 2012, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Zvi Kalisky, Board-certified in physical medicine and rehabilitation. In an April 2, 2012 report, Dr. Kalisky stated that appellant displayed pain behavior and there was a disproportion between subjective complaints and objective findings. He opined that she could return to work for eight hours a day with restrictions in place for three months.

In a May 29, 2012 report, Dr. Ravdel noted appellant's history of injury and treatment and diagnosed lumbago, internal derangement of the left knee, chondromalacia patella and left knee pain. He indicated that her status was unchanged and recommended left knee arthroscopy.

On June 6, 2012 OWCP referred appellant along with a statement of accepted facts and the medical record to Dr. Grant McKeever, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Kalisky and Ravdel regarding the resolution of appellant's accepted condition and work restrictions.

In a July 3, 2012 report, Dr. Ravdel stated that he disagreed with Dr. Kalisky. He indicated that Dr. Kalisky was not an orthopedic surgeon and an opinion from an orthopedic surgeon who practiced knee surgery would be needed.

Dr. McKeever noted appellant's history of injury and treatment and examined her. In his July 25, 2012 report, he noted that examination findings of the lower extremities were normal. Dr. McKeever determined that appellant had a normal examination of the spine and lower extremities. He noted that, with standing, her knees were fully extended, there was no effusion and no crepitus. Dr. McKeever opined that no further treatment was necessary.

On September 4, 2012 OWCP issued a notice of proposed termination of compensation. It proposed to terminate appellant's compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. McKeever, established that the residuals of the work injury had ceased.

Dr. Ravdel, in an October 15, 2012 disability certificate, indicated that appellant was incapacitated to work until further notice pending surgery to the left knee.

In a November 15, 2012 decision, OWCP terminated appellant's compensation benefits effective November 17, 2013. It found that the weight of medical evidence rested with

Dr. McKeever, the impartial medical examiner, which supported that appellant no longer had residuals of the accepted work-related conditions.

Appellant continued to submit medical evidence. OWCP received another copy of the August 9, 2011 cervical spine MRI scan and an October 4, 2012 left knee MRI scan that was normal. It also received a September 11, 2012 functional capacity evaluation and an April 10, 2013 laboratory report. Also submitted were numerous treatment and prescription notes from Dr. Ravdel. In a November 19, 2012 report, Dr. Ravdel repeated the history of injury and his request for treatment. He indicated that arthroscopy was requested and constantly denied. Dr. Ravdel argued that appellant still had clinical problems and surgery was needed. He continued to treat her and submit reports in which he requested the surgery.

On March 7, 2014 appellant requested reconsideration. She submitted treatment notes from Dr. James Key, a Board-certified orthopedic surgeon, dating from January 30, 2013 to February 5, 2014, in which he advised her to continue physical therapy, requested an electromyogram of the upper extremities and prescribed epidural steroid injections. Dr. Key also ordered a cervical discogram. He diagnosed cervical spondylosis, contusion of the left knee and internal derangement of the left knee. In a November 1, 2013 report, Dr. Key advised that he had been treating appellant for several months, noting that she was injured on the job. He explained that her condition had not improved substantially since her initial injury. Dr. Key noted that appellant was not working for more than 12 months and opined that it was not likely that she would be able to return to work within the next 12 months. He opined that she was temporarily totally disabled. On February 5, 2014 report Dr. Key advised that for some “inexplicable reason” appellant’s case was not open. He indicated that he wished to upgrade her condition to internal disc displacement and upgrade her contusion of the left knee to possible internal derangement of the left knee.

A February 21, 2013 cervical spine MRI scan read by Dr. Stephen Ladner, a Board-certified diagnostic radiologist, revealed multiple cervical disc bulges with small disc herniations at C2-3, C3-4, C4-5 and C5-6. OWCP also received a June 14, 2013 nerve conduction study, as well as several disability certificates, progress notes, discharge instructions and prescriptions dating from April 25, 2013 to January 8, 2014. They indicated that appellant was totally incapacitated.

On October 16, 2013 OWCP also received an undated statement from appellant. Appellant explained that she was unable to work due to her original injury and needed surgery. She explained that she was desperate to get pain relief. Appellant also described her original injury. She provided a notice of recurrence and filled in that she was off since the injury.

In an April 30, 2014 decision, OWCP denied appellant’s request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”²

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).³ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provide that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought.⁴

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.⁵

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

² *Id.* at § 8128(a).

³ *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Id.* at § 10.607(b).

⁶ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

a substantial question as to the correctness of OWCP's decision. 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.⁷

ANALYSIS

In its April 30, 2014 decision, OWCP properly determined that appellant had not filed a timely reconsideration request. It rendered its last merit decision on November 15, 2012. Appellant requested reconsideration on March 7, 2014, more than one year after the merit decision. Thus, the request was untimely.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. OWCP, on November 15, 2012, terminated appellant's compensation benefits finding that the opinion of Dr. McKeever, the impartial specialist, established that injury-related residuals of her accepted conditions had ceased.

On reconsideration, appellant provided an undated statement which was received on October 16, 2013. She described her original injury, explained that she was unable to work due to this injury and needed surgery. The evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature and, therefore, appellant statement would not be relevant to the issue.

Appellant also submitted numerous medical records. In a November 19, 2012 report, Dr. Ravdel repeated the history of injury and his request for treatment. He indicated that arthroscopy was requested and repeatedly denied. Dr. Ravdel argued that appellant still had clinical problems and surgery was needed. He continued to treat her and prescribe medication. 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 report, which if submitted prior to OWCP's 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 a case.⁸

Appellant also provided several reports from Dr. Key, who placed her off work and request treatment authorization. Dr. Key also indicated that he wanted to expand her claim to include other conditions. In his November 1, 2013 report, he advised that he had been treating the patient for several months, noting that appellant was injured on the job. Dr. Key explained that her condition had not improved substantially since her initial injury. He noted that appellant

⁷ *Id.*

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998); *E.R.*, Docket No. 09-599 (issued June 3, 2009).

was not working for more than 12 months and opined that it was not likely that she would be able to return to work within the next 12 months. Dr. Key opined that she was totally disabled. In his February 5, 2014 report, he advised that for some “inexplicable reason” appellant’s case was not open. However, the Board finds that Dr. Key’s reports are insufficient to establish clear evidence of error. This evidence is insufficient to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP’s decision

Other medical evidence submitted on reconsideration, including treatment records and diagnostic test results, is also insufficient to establish clear evidence of error. These reports do not provide positive, precise or explicit evidence that manifests on its face that OWCP committed an error in its November 15, 2012 decision.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the November 15, 2012 decision and OWCP properly determined that she did not show clear evidence of error in that decision.

On appeal, appellant reiterates that she still has residuals of her original injury and that her physician supports her claim. However, the Board does not have jurisdiction to consider the merits of the claim and, for the reasons noted, she has not established clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant’s claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 17, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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