

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

B.M., Appellant)
and) Docket No. 14-1188
DEPARTMENT OF HOMELAND SECURITY,) Issued: October 6, 2014
TRANSPORTATION SECURITY)
ADMINISTRATION, Seattle, WA, Employer)

)

Appearances:

Stephanie N. Leet, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 28, 2014 appellant, through her representative, filed a timely appeal from a January 24, 2014 Office of Workers' Compensation Programs' (OWCP) decision which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days has elapsed between the most recent OWCP merit decision, dated January 2, 2013, and the filing of this appeal on April 28, 2014, the Board lacks jurisdiction to review the merits of appellant's 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 determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 7, 2011 appellant, then a 62-year-old transportation security officer, filed a Form CA-1, notice of traumatic injury, alleging that, on March 21, 2011, while performing a bag check she lifted a bag and pulled her left shoulder and neck. She did not stop work.

Appellant submitted reports from Dr. Pamela Girres, a Board-certified internist, from May 13 to August 19, 2011, who treated appellant for left arm and neck pain which developed after a lifting incident at work. Dr. Girres diagnosed cervical sprain and left shoulder strain and recommended physical therapy and light duty.

By letter dated September 9, 2011, OWCP advised appellant that her claim was accepted for cervical sprain and left shoulder strain.

In a February 24, 2012 report, Dr. Girres noted that appellant reached maximum medical improvement. She indicated that appellant's persistent pain and reported functional limitations were mainly due to her multiple barriers to recovery rather than the direct effects of the injury. Dr. Girres noted multiple attempts were made to activate appellant to assist her with her chronic pain but her active participation was limited. She recommended that treatment be concluded and she did not recommend work restrictions.

Appellant submitted a February 10, 2012 report from Dr. Timothy D. Steege, a neurosurgeon, who treated appellant for bilateral cervicobrachial symptoms. She reported straining her neck in March 2011 while lifting bags as a security screener. Dr. Steege noted an August 2011 magnetic resonance imaging (MRI) scan of the cervical spine revealed a large herniated disc indenting the spinal cord. He diagnosed large central disc herniation compressing the cord dramatically at C4-5 and recommended a C5-6 anterior discectomy and fusion.

On March 7, 2012 OWCP issued a notice of proposed termination of compensation benefits on the grounds that Dr. Girre's report dated February 24, 2012 established no residuals of the work-related employment conditions.

A February 26, 2012 MRI scan of the cervical spine revealed multilevel degenerative changes at C4-5 with central disc protrusion which impinged on the ventral spinal cord. Appellant submitted a March 2, 2012 report from Dr. Steege who noted the February 26, 2012 MRI scan results and recommended a C4-5 anterior discectomy and fusion. In reports dated March 14 and May 4, 2012, Dr. Steege noted that appellant had not shown improvement with conservative treatment and recommended a C4-5 anterior discectomy and fusion. He noted that appellant worked light duty which involved the use of her neck which caused pain and numbness in the extremities. Dr. Steege advised that appellant was totally disabled.

An April 10, 2012 OWCP medical adviser report noted that the C4-5 anterior cervical discectomy and fusion was not necessitated by the accepted work injury of March 21, 2011. The medical adviser noted that the cord compression was not caused or aggravated by the work injury and therefore was not necessitated by the work injury.

By decision dated May 31, 2012, OWCP terminated all of appellant's benefits effective the same day on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her accepted employment injury.

On June 20, 2012 appellant requested an oral hearing which was held on October 16, 2012. She submitted a June 8, 2012 report from Dr. Steege who disagreed with OWCP's medical adviser's report of April 10, 2012. Dr. Steege indicated that the medical adviser relied too heavily on the inadequate records of Dr. Girres who did not provide an adequate description of appellant's symptoms. He opined that the herniated C4-5 disc with cord compression occurred on March 21, 2011 and he recommended surgery. In a July 25, 2012 report, Dr. Steege noted that appellant underwent a work-related C4-5 anterior discectomy and fusion for a resection of a large central disc herniation. He noted that she was asymptomatic, neurologically intact with the paresthetic sensation improved. Dr. Steege noted that appellant could return to unrestricted duties in six weeks. In an August 27, 2012 report, he noted that she was still recovering but returned to her preinjury status. Dr. Steege advised that he released appellant to full duty without restrictions on August 23, 2012. In a November 8, 2012 report, he noted that she was four months post C4-5 anterior discectomy and fusion and had developed myofascial pain syndrome and pain in her upper trapezius. Dr. Steege noted that appellant remained overweight and had intact strength and sensation.

In a decision dated January 2, 2013, an OWCP hearing representative affirmed the decision dated May 31, 2012.

In a request dated December 27, 2013 and received by OWCP on January 6, 2014, appellant's counsel requested reconsideration. She asserted that the medical adviser's opinion was not rationalized, was speculative and lacked probative value and should not have been the weight of the evidence in determining whether appellant's C4-5 herniated cervical disc was work related and whether benefits should have been terminated. Counsel indicated that Dr. Steege's reports were well rationalized and supported a causal relationship between the work injury and the diagnosed C4-5 herniated disc. She asserted that OWCP erroneously applied and interpreted a point of law as to whether Dr. Steege's or the medical adviser's reports were speculative in nature.

Appellant submitted reports from Dr. Steege dated February 10 to November 8, 2012, a February 26, 2012 cervical spine MRI scan report, and the April 11, 2012 report of an OWCP medical adviser, all previously of record. She submitted a July 10, 2012 operative report from Dr. Steege who performed a C4-5 anterior discectomy and fusion and diagnosed C4-5 central disc herniation with myelopathy. In an April 17, 2013 report, Dr. Steege noted last treating appellant on November 8, 2012. Appellant reported seeking treatment in 2013 for bilateral shoulder problems. Dr. Steege noted that she had a cervical spine MRI scan on March 8, 2013 which showed resolution of the C4-5 disc problem but an increase in central bulging at C3-4 and C5-6 with no impingement. He noted strength testing was compromised by obvious give way and lack of effort in several muscle groups and strength and sensation testing were intact. Dr. Steege returned appellant to work without restrictions.

Appellant submitted an April 30, 2013 report from Dr. Margaret Forgette, a Board-certified physiatrist, who treated her for neck and shoulder pain which began on March 21, 2011

when lifting a bag at work. Dr. Forgette diagnosed chronic neck and left shoulder pain, primarily myofascial pain of the left upper trapezius, history of C5-6 disc herniation, status post anterior C5-6 decompression and fusion in July 2012, reduced shoulder range of motion bilaterally, chronic sleep impairment and mild left ptosis which began in mid-2012. In a May 29, 2013 report, she noted that appellant presented with persistent neck pain into the left arm. Dr. Forgette noted that appellant underwent an EMG in September 2011 which was normal. She diagnosed chronic neck and left shoulder pain, primarily myofascial, history of C5-6 disc herniation with myelopathy, status post anterior C5-6 decompression and fusion in July 2012, chronic sleep impairment and deconditioned status. She recommended an updated EMG and physical therapy.

By decision dated January 24, 2014, OWCP denied appellant's request for reconsideration as it was untimely and did not establish 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, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.³ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. 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 be manifest on its face that OWCP committed an error.⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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 substantial question as to the correctness of OWCP's decision.⁵

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ As appellant's request for reconsideration was not received by OWCP until January 6, 2014, more than one year after issuance of the January 2, 2013 merit decision, it was untimely.¹¹ Consequently, she must demonstrate clear evidence of error by OWCP in its January 2, 2013 decision affirming the previous termination of benefits.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In her December 27, 2013 statement, appellant's counsel indicated that Dr. Steege's reports were well rationalized and supported a causal relationship between the work injury and the diagnosed C4-5 herniated disc. She asserted that OWCP erroneously applied and interpreted a point of law as to whether Dr. Steege's or the medical adviser's reports were speculative. Counsel contends that the medical adviser's opinion was not well rationalized and was couched in speculative terms and should not have been relied upon to terminate benefits. While appellant addressed her disagreement with OWCP's termination of her benefits, her general allegations do not raise a substantial question as to the correctness of OWCP's decision.

In support of her reconsideration request, appellant also submitted evidence. She submitted reports from Dr. Steege dated February 10 to November 8, 2012, an MRI scan of the cervical spine dated February 26, 2012 and a report from OWCP's medical adviser dated April 11, 2012, all previously of record. OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in denying her claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ On appeal, appellant's counsel asserts that the reconsideration request was timely received by OWCP and submitted a U.S. Postal Service Track & Confirm e-mail noting when the request was available to be picked up. The Board notes that it may not consider new evidence on appeal as its review is limited to the evidence that was in the case record that was before OWCP at the time of its final decision. See 20 C.F.R. § 501.2(c)(1).

substantial question as to the correctness of OWCP's decision. Thus, this resubmitted evidence is insufficient to show clear evidence of error.

Appellant submitted a July 10, 2012 operative report from Dr. Steege and an April 17, 2013 report in which he noted MRI scan findings and returned appellant to work without restrictions. She also submitted April 30 and May 29, 2013 reports from Dr. Forgette who treated appellant for neck and shoulder pain which appellant reported began on March 21, 2011 when lifting a bag at work. Dr. Forgette noted findings and diagnoses. However, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of 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.¹²

Thus, appellant has not established clear evidence of error by OWCP in its January 24, 2014 decision.

On appeal, appellant reiterated assertions that she made before OWCP indicating that the termination of her benefits was improper and that the reports of Dr. Steege were well rationalized and supported that appellant had residuals of her work-related injury. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹² D.G., 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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