

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

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| R.A., Appellant |) | |
| |) | |
| and |) | Docket No. 14-1271 |
| |) | Issued: October 1, 2014 |
| U.S. POSTAL SERVICE, GENERAL MAIL |) | |
| FACILITY, White Plains, NY, Employer |) | |
| _____ |) | |

Appearances:
Stephen Larkin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 12, 2014 appellant, through her representative, filed a timely appeal from a nonmerit February 24, 2014 decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was not timely filed and failed to present clear evidence of error. The most recent merit decision of record is dated December 22, 2010. There is no merit decision within 180 days of May 12, 2014, the date appellant filed her appeal with the Board. Therefore, pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's representative asserts that OWCP erred by refusing to consider expanding the claim to include cervicalgia, a herniated cervical disc and cervical facet syndrome.

FACTUAL HISTORY

This is the fourth appeal before the Board. By decision and order issued May 3, 2012,² the Board affirmed OWCP's May 28, 2011 nonmerit decision denying reconsideration on the grounds that it did not raise substantive legal questions or include new and relevant evidence. The Board found that the evidence submitted on reconsideration was repetitive and therefore insufficient to warrant a merit review.³ The facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

In an April 24, 2013 letter, appellant's representative requested reconsideration. He asserted that new medical evidence established that an accepted January 8, 2006 cervical sprain also caused or aggravated herniated discs at C4-5 and C5-6, cervical spondylosis and neuroforaminal narrowing at C6-7. Appellant's representative contended that appellant had ongoing injury-related residuals.

In a December 24, 2012 report, Dr. John V. Ioia, an attending Board-certified orthopedic surgeon, diagnosed a herniated cervical disc. He opined that the medical record documented that the January 8, 2006 lifting incident caused a "herniated cervical disc and not just a simple strain and she [was] having ongoing issues." In March 20 and April 17, 2013 chart notes, Dr. Ioia, diagnosed cervical radiculopathy and significant degenerative disc disease from C3 to C5.

In an undated report received on April 30, 2013, Dr. David Ginsburg, an attending Board-certified anesthesiologist and pain management specialist, noted the January 8, 2006 lifting incident and accepted cervical sprain. He opined that a magnetic resonance imaging (MRI) scan performed at the time of the January 8, 2006 injury demonstrated that the incident also caused a disc herniation at C4-5, neuroforaminal narrowing at C5-6 and C6-7 and cervical spondylosis because appellant heard a cracking noise in her neck at the time of injury. Dr. Ginsburg attributed appellant's degenerative disc disease to a "natural progression over a period of time from the original injury of January 8, 2006."

Appellant's representative also provided a March 27, 2013 MRI scan showing degenerative disc disease throughout the cervical spine.

By decision dated February 24, 2014, OWCP denied appellant's request for reconsideration on the grounds that the request was not timely filed and failed to present clear evidence of error. It found that appellant's request was received on April 30, 2013, more than

² Docket No. 11-2091 (issued May 3, 2012).

³ On May 21, 2012 appellant filed a petition for reconsideration, repeating arguments made on appeal. The Director filed an answer on June 1, 2012 requesting that the Board deny the petition as no error of law or fact had been cited. Appellant's attorney filed a June 5, 2012 response, alleging that the Director's answer was vague. By order issued July 27, 2012, the Board issued an order denying appellant's petition for reconsideration on the grounds that it failed to establish any error of fact or law warranting further reconsideration.

one year after the December 22, 2010 decision, the most recent merit decision in the claim.⁴ OWCP further found that appellant's argument and evidence did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁶ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁷ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁹

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹⁰ OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed

⁴ OWCP actually stated that the decision was issued December 20, 2010. This is a typographical error as the decision was issued on December 22, 2010.

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁷ *Thankamma Mathews, id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁸ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 6; *Jesus D. Sanchez, supra* note 7.

¹⁰ *Thankamma Mathews, supra* note 6.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Thankamma Mathews, supra* note 6.

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Jesus D. Sanchez, supra* note 7.

so as to produce a contrary conclusion.¹⁵ 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 by OWCP.¹⁶ The Board must make 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.¹⁷

ANALYSIS

In its February 24, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision of record was rendered on December 22, 2010. Appellant requested reconsideration by April 24, 2013 letter received by OWCP on April 30, 2013, more than one year from the issuance of the December 22, 2010 decision. OWCP denied the request by February 24, 2014 decision on the grounds that it was not timely filed and failed to present clear evidence of error. As it is now settled that the April 30, 2013 reconsideration request was not timely filed, it must now be determined whether the request demonstrated clear evidence of error.

In his April 24, 2013 letter, appellant's representative alleged that new medical evidence demonstrated that OWCP should expand the claim to accept herniated cervical discs, cervical spondylosis and neuroforaminal narrowing. The Board finds that this argument, which OWCP previously rejected, does not raise a substantial question as to whether that decision was in error or shift the weight of the evidence in appellant's favor. Also, repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the claimant.¹⁸ Therefore, the April 24, 2013 letter is insufficient to establish clear evidence of error.

Appellant's representative also submitted reports from Dr. Ioia, an attending Board-certified orthopedic surgeon, who opined that the January 8, 2006 lifting incident caused a cervical disc herniation in addition to the accepted strain. He also provided a report from Dr. Ginsburg, an attending Board-certified anesthesiologist and pain management specialist, who explained that the January 8, 2006 injury caused cervical disc herniations and neuroforaminal narrowing because appellant "heard a cracking noise" in her neck at the time she sustained the accepted cervical sprain. Appellant's representative also submitted a March 27, 2013 imaging study MRI scan showing degenerative disc disease throughout the cervical spine. The Board finds that these medical reports do not establish that OWCP erred in anyway in its previous merit decision. While the opinions of Dr. Ioia and Dr. Ginsburg and the MRI scan study suggest a contrary conclusion to that reached by OWCP, such evidence is insufficient to establish clear evidence of error.¹⁹

¹⁵ *Leona N. Travis, supra* note 13.

¹⁶ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Gregory Griffin, supra* note 8.

¹⁸ *D.E.*, 59 ECAB 438 (2008).

¹⁹ *Leona N. Travis, supra* note 13.

The Board finds that the additional evidence submitted does not demonstrate clear evidence of error. Appellant has not provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the previous merit decision. Consequently, OWCP properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

On appeal, appellant's representative asserts that OWCP erred by refusing to consider expanding the claim to include cervicalgia, a herniated cervical disc and cervical facet syndrome. As noted, OWCP properly denied reconsideration. It previously considered and rejected the argument concerning expansion of the claim.

ORDER

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

Issued: October 1, 2014
Washington, DC

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

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

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