

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sioux Falls, SD, Employer**

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**Docket No. 15-1735
Issued: December 24, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 14, 2015 appellant filed a timely appeal from a March 4, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of February 25, 2014 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for further review of the merits as her request for reconsideration was untimely filed and failed to establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 23, 2013 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim alleging that on August 22, 2013 she injured her neck when she moved a heavy tub of mail from the back of her vehicle to the front. She stopped work on August 24, 2013. The employing establishment indicated that there was a possibility that the injury was not work related because appellant was in a personal car accident a few days before the alleged employment injury occurred.²

Appellant was examined by Dr. Craig M. Smith, a Board-certified family practitioner specializing in sports medicine, who noted, in an August 23, 2013 report, that appellant worked as a rural mail carrier and complained of acute neck pain beginning on August 23, 2013 when she carried two heavy tubs of mail. Dr. Smith provided findings on examination and opined that although appellant's condition looked like a chronic problem, he suspected that she sustained an acute disc rupture. He diagnosed degenerative joint disease with accompanying acute work related to probable disc rupture. Dr. Smith recommended a magnetic resonance imaging (MRI) scan examination for more information. He also provided return to work and duty status forms and a September 12, 2013 attending physician's report.

By letter dated September 10, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish her claim and requested additional evidence.

In a September 17, 2013 report, Dr. Smith described appellant's symptoms as degenerative joint disc disease of the cervical spine and acute neck injury secondary to whiplash. He opined that it was "certainly possible" that appellant's symptoms resulted from the July 31, 2013 motor vehicle accident. Dr. Smith reported that appellant needed an MRI scan to determine whether surgical intervention was needed.

In an October 3, 2013 report, Dr. Smith conducted a follow-up examination for appellant's whiplash-style injury with cervical radiculopathy. He noted that there was some discrepancy regarding a previous car accident and the acute injury she had on the job. Dr. Smith reported that appellant's MRI scan demonstrated chronic spondylosis with moderate spinal stenosis that looked chronic and disc space narrowing. He explained that the neck inflammation and disc space narrowing could accompany acute pain from acute injury regarding whiplash. Dr. Smith provided examination findings and diagnosed cervical degenerative spondylosis, chronic, with acute whiplash. He provided a duty status report and return to work form which recommended that appellant remain off work for three weeks.

On October 7, 2013 appellant responded to OWCP's development letter. She explained that on July 31, 2013 she was a passenger in a van when it was struck after clearing an intersection. Appellant indicated that she had not sustained any injuries and provided a copy of the motor vehicle accident report.

² Appellant has two previously accepted traumatic injury claims for a January 14, 2011 employment incident (File No. xxxxxx488) and a January 28, 2012 employment incident (File No. xxxxxx572). The record contains no other information as to what conditions had been accepted.

In a decision dated October 16, 2013, OWCP accepted that the August 22, 2013 employment incident occurred as alleged and that appellant had a diagnosed cervical condition. However, it denied her claim finding insufficient medical evidence to establish that her cervical condition was causally related to the accepted incident.

On January 14, 2014 OWCP received appellant's request for reconsideration. Appellant described the August 22, 2013 employment incident and the medical treatment she received shortly after the alleged injury. She alleged that the employing establishment erroneously attributed her condition to a motor vehicle accident that occurred a few days earlier when, in fact, the motor vehicle accident happened three weeks prior to the August 22, 2013 employment incident. Appellant noted that she was including a new December 17, 2013 report by Dr. Smith.

Appellant submitted an October 25, 2013 return to work form from Dr. Smith which noted that appellant could return to work with limitations on October 29, 2013.

In a letter dated December 17, 2013, Dr. Smith further indicated that appellant had preexisting cervical degenerative disease and spondylosis. He explained that the acute whiplash injury was related to the reported August 22, 2013 work injury and that appellant temporarily aggravated a preexisting condition.

In a decision dated February 25, 2014, OWCP denied modification of the October 16, 2013 denial decision.

By letter dated February 23, 2015 and received by OWCP on March 2, 2015, appellant again requested reconsideration. She reiterated that she injured herself as a result of lifting and manipulating 20- to 75-pound tubs of mail six days a week in the performance of duty. First, appellant alleged that OWCP admitted in its October 16, 2013 decision that she provided sufficient evidence to establish her claim when it accepted that her employment factor occurred, that a medical condition was diagnosed, and that she was in the performance of duty. She asserted that OWCP contradicted itself when it accepted that she was in the performance of duty, but denied her claim based on causal relationship. Secondly, appellant alleged that, once she established her claim, the burden shifted to OWCP to present substantial evidence of absence of or lack of connection between the injury and employment and cited *Bath Iron Works Corp. v. Preston*.³ Third, she pointed out that even if her initial injury occurred as a result of the July 31, 2013 motor vehicle accident, her condition was aggravated by her employment duties. Fourth, appellant alleged that OWCP and the Department of Labor violated her Sixth Amendment right to counsel and Fourteenth Amendment right to equal protection under the law by not allowing her to retain an attorney.

OWCP denied appellant's March 2, 2015 request for reconsideration on March 4, 2015, finding that it was untimely filed and did not establish clear evidence of error.

³ 380 F. 3d 597 at p. 602 (2004).

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide 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.⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁷ OWCP regulations and procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁹ Evidence that 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 In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹² To establish clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting

⁴ 20 C.F.R. § 10.607.

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (October 2011). OWCP procedures further provide that 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 that a schedule award was miscalculated). 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.

⁹ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

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

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.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 improperly denied merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on February 25, 2014. OWCP did not receive appellant's reconsideration request until March 2, 2015, more than one year after the February 25, 2014 merit decision. Therefore, it was not timely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying her claim.

On appeal appellant alleges that computation of time should be based on the postmark date and provided copies of section 1201.22 of Title 5 of the Code of Federal Regulations. She noted that her reconsideration request was postmarked within one year of the February 25, 2014 OWCP decision and provided a copy of the mailing receipt. According to OWCP regulations, however, an application for reconsideration must be received by OWCP within one year of its decision for which review is sought.¹⁵ Appellant's reliance on 5 C.F.R. § 1201.22 does not pertain to filing a request for reconsideration before OWCP.¹⁶ Accordingly, the fact that appellant's reconsideration request was mailed within one year of the decision does not constitute a timely filing according to 20 C.F.R. § 10.607(a).¹⁷ Because OWCP did not receive appellant's reconsideration request until March 2, 2015, more than one year after the February 25, 2014 OWCP decision, her reconsideration request was not timely filed. Accordingly, for OWCP to review the merits of appellant's claim, she must demonstrate clear evidence of error.

The Board finds that appellant has not established clear evidence of error by OWCP in the denial of her present claim. Following the February 25, 2014 decision, appellant submitted a statement along with her March 2, 2015 reconsideration request. She alleged that OWCP contradicted itself when it accepted that appellant was in the performance of duty but denied her claim based on causal relationship. Appellant contended that she provided sufficient evidence to establish her claim and that once she did so, the burden shifted on OWCP to establish a lack of connection between her condition and her employment. Despite her allegation, however, the Board finds that appellant has not submitted sufficient evidence to establish error in OWCP's

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹⁵ 20 C.F.R. § 10.607(a). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹⁶ The Board notes that Title 5, Sections 1200-1299 provide regulations for the Merit Systems Protection Board.

¹⁷ See *D.C.*, Docket No. 15-293 (issued September 11, 2015).

February 25, 2014 decision. OWCP denied her claim due to insufficient evidence to establish a causal relationship between her diagnosed condition and the August 22, 2013 employment injury. Appellant has not presented any evidence that has raised a substantial question as to the correctness of OWCP's decision to deny her traumatic injury claim because of a lack of causal relationship.

Appellant further asserted that even if her initial injury had occurred as a result of the July 31, 2013 motor vehicle accident, her condition was aggravated by her employment duties. She did not, however, submit any medical evidence to establish an aggravation of her preexisting condition or to demonstrate that OWCP committed an error in denying her claim. As noted above, it is not enough to show that the evidence could be construed so as to produce a contrary conclusion. The weight of the evidence must shift in favor of the claimant.¹⁸ Accordingly, appellant has not shown clear evidence of error in OWCP's October 16, 2013 denial decision.

The Board notes that appellant also raised arguments in her reconsideration request that are outside the jurisdiction of the Board. To the extent that appellant has asserted that she was denied right to counsel and equal protection under the Sixth and Fourteenth Amendments, the Board notes that this argument relates to constitutional questions. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.¹⁹ As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant.²⁰ Appellant's arguments, therefore, do not show clear evidence of error in OWCP's decision denying her traumatic injury claim.

As none of the evidence of record raises a substantial question concerning the correctness of OWCP's decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.

CONCLUSION

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

¹⁸ *Supra* note 13.

¹⁹ *See Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

²⁰ *See also Robert F. Stone*, 57 ECAB 292 (2005); *Diana L. Smith*, 56 ECAB 524 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 24, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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