

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

C.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION)
MEDICAL CENTER, Sioux Falls, SD, Employer)

**Docket No. 14-0410
Issued: July 22, 2015**

Appearances:

Shawn M. Nichols, Esq., for the appellant
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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 12, 2013 appellant, through counsel, filed a timely appeal of an August 20, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As more than 180 days elapsed from the most recent merit decision in appellant's record, dated January 23, 2013 to the filing of this appeal, 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 501.3.²

¹ 5 U.S.C. § 8101 *et seq.*

² Counsel submitted additional evidence on appeal. The Board, however, is precluded from reviewing this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ISSUE

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

FACTUAL HISTORY

On February 8, 2012 appellant, then a 49-year-old nurse, filed a traumatic injury claim alleging that on February 3, 2012, she slipped on ice on a parking lot sidewalk while in the performance of duty. She fractured her right wrist, bruised her right hip and sustained a sore neck and shoulder. Appellant stopped work on February 3, 2012. On February 6, 2012 she underwent surgery, an open reduction and internal fixation of extra articular distal radius fracture with significant dorsal comminution. On April 5, 2012 OWCP accepted the claim for closed fracture shaft radius and ulna of the right wrist and sprain of the neck.

On April 20, 2012 appellant filed a Form CA-7 claim for compensation for the period April 9 to 20, 2012. In an April 25, 2012 report, Dr. Timothy L. Walker, a Board-certified orthopedic surgeon and treating physician, found that she could return to work with no limitations.

In a June 6, 2012 decision, OWCP denied appellant's claim for wage-loss compensation for the period April 9 to 20, 2012 based on the report of Dr. Walker.

In a June 26, 2012 report, Dr. Todd Sorenson, a family practitioner and a treating physician, found that appellant could return to work with no restrictions due to the accepted wrist and neck conditions.³

Based on appellant's treating physicians, in a July 2, 2012 decision, OWCP terminated appellant's eligibility for wage-loss benefits effective that date. It noted that her file would remain open for medical treatment for the accepted cervical and wrist conditions.

On July 5, 2012 appellant requested a hearing for the June 6, 2012 denial of her wage-loss claim for the period April 9 to 20, 2012. The hearing was held on November 13, 2012.

Appellant submitted a September 26 2012 report from Dr. Sorenson in which he diagnosed depression and postconcussion syndrome.

³ In a June 11, 2012 report from Dr. Sorenson, appellant was advised to return to work only two hours a day. OWCP determined, however, that the reduction in hours of work was related to appellant's anxiety which was not an accepted condition due to the February 3, 2012 work-related injury.

In a January 23, 2013 decision, an OWCP hearing representative affirmed the June 6, 2012 decision denying appellant's period of wage loss due to the wrist and neck conditions.⁴

In a letter dated June 26, 2013 and received by OWCP on July 5, 2013, appellant requested reconsideration of the July 2, 2012 termination decision. She claimed she was unable to work due to the newly accepted condition of postconcussion syndrome.

By decision dated August 20, 2013, OWCP denied appellant's request for reconsideration of the termination of benefits effective July 2, 2012 as it was untimely filed and failed to present clear evidence of error. It noted that at the time of that decision, appellant's attending physicians had released appellant to full, unrestricted duty.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.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 nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁷ OWCP regulations and procedure 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 which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must

⁴ Appellant submitted an April 17, 2013 letter to OWCP requesting a formal decision regarding her request to expand her accepted condition to include postconcussion syndrome. She submitted additional medical evidence in support of her request and OWCP accepted postconcussion syndrome on June 6, 2013. Appellant was advised that if she had any temporary total disability or intermittent wage loss attributable to the newly accepted condition, she would need to submit medical evidence. She was formally advised of the acceptance by letter dated July 16, 2013.

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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 2.1602.5a (October 2011). OWCP procedure further provides, "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."

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

ANALYSIS

OWCP determined that appellant failed to file a timely reconsideration request of the July 2, 2012 termination decision. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of OWCP's decision and the request must be received by OWCP within one year of the date of the decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent decision on the issues.¹⁵ As appellant's June 26, 2013 request for reconsideration was not received until July 5, 2012, more than one year after the July 2, 2012 termination decision, her request was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her request for reconsideration.

OWCP terminated appellant's compensation for wage-loss benefits effective July 2, 2012 as it found that the medical evidence from her treating physicians established that she no longer had any disability due to her accepted wrist and neck conditions. The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's July 2, 2012 decision, nor does it shift the weight of the evidence of record in her favor. OWCP terminated appellant's wage-loss benefits effective July 2, 2012 based upon the April 25, 2012 report of Dr. Walker and the June 26, 2012 report of Dr. Sorenson, both treating physicians, who determined that appellant could return to work with no restrictions based on the accepted wrist and neck conditions.

On reconsideration, appellant has presented no evidence that any disability was based on the accepted conditions. Rather, she has argued that any disability was related to the now accepted condition of postconcussion syndrome.¹⁶ To establish clear evidence of error, a claimant must submit evidence which raises a substantial question concerning the correctness of OWCP's decision. The Board finds that appellant has failed to meet her burden of proof. There is no evidence establishing any error in the July 2, 2012 termination decision.

¹⁰ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁶ If appellant were to claim total or intermittent wage loss attributable to the postconcussion syndrome (Form CA-7), OWCP develop those claims as appropriate.

On appeal, counsel argues that appellant relied on advice from OWCP office in Kentucky that the request would be timely so long as it was “post-marked” before July 2, 2013. He provides no proof or documentation of this advice. Furthermore, the July 2, 2012 OWCP decision clearly advised in bold print that the request for reconsideration needed to be “received” within one calendar year of the date of the decision.¹⁷ Contrary to the argument advanced by counsel, appellant had sufficient notice that any request for reconsideration had to be received by OWCP within one year of the date of the July 2, 2012 termination decision.

Additionally, counsel argues on appeal that OWCP’s acceptance of postconcussion syndrome supported clear evidence of error in the previous termination decision. However, there is no evidence to support that the July 2, 2013 decision was in error.¹⁸

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2013 decision of the Office of Workers’ Compensation Programs is affirmed.¹⁹

Issued: July 22, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

¹⁷ Effective August 29, 2011 OWCP amended its regulations to reflect 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. 20 C.F.R. § 10.607(a). Under the Federal (FECA) Procedure Manual, it clearly states that: “[t]imeliness is determined by the document receipt date of the reconsideration request [the ‘received’ date in the Integrated Federal Employees’ Compensation System (iFECS)].” *Supra* note 5 at 2.1602(4)(b).

¹⁸ The Board notes that any claimed wage loss associated with the later accepted condition of postconcussion syndrome would have to be decided by OWCP prior to any review by the Board.

¹⁹ Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.