

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

L.B., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Omaha, NE, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-0961
Issued: July 15, 2015**

Appearances:

*Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 25, 2015 appellant, through counsel, filed a timely appeal of a December 23, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As the last merit decision issued in this case was an OWCP decision dated July 1, 2011, more than 180 days from the date of the 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 the claim.²

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The last merit decision was an OWCP decision dated July 1, 2011. For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On May 14, 2010 appellant, then a 55-year-old contract specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury casually related to repetitive stacking and lifting during federal employment. The medical evidence included a June 25, 2010 report from Dr. Ziad Zawaideh, a family practitioner. He noted that appellant had continuing complaints of back and shoulder pain, as well as sensation changes to her legs. Dr. Zawaideh stated that lifting and stacking heavy boxes at work had exacerbated appellant's symptoms.

By decision dated July 8, 2010, OWCP denied the claim for compensation, finding the medical evidence insufficient to establish the claim. Appellant requested reconsideration on July 26, 2010. She submitted physical therapy notes for treatment of her shoulders and lumbar spine. In a decision dated September 17, 2010, OWCP reviewed the case on its merits and denied modification.

On September 27, 2010 appellant again requested reconsideration of her claim. She submitted a July 28, 2010 report from Dr. Zawaideh, who stated that she was treated for bilateral shoulder bursitis and tendinitis, as well as chronic low back pain, related to work injuries.

By decision dated December 21, 2010, OWCP reviewed the case on its merits. It denied modification, finding that the medical evidence was insufficient to establish the claim. On February 1, 2011 appellant again requested reconsideration of her claim. The evidence submitted included a January 11, 2011 report from Dr. Zawaideh, who stated that appellant claimed she suffered injuries while working in 2007 by lifting heavy boxes. Dr. Zawaideh reported the results on a September 9, 2008 MRI scan and stated that appellant continued to have pain and discomfort.

OWCP reviewed the merits of the claim and denied modification by decision dated July 1, 2011. It found the medical evidence was insufficient to warrant modification.

On July 7, 2014 OWCP received a July 2, 2014 letter from appellant's counsel stating that appellant wished to expand her claim. The claim number provided on the letter was not the OWCP file number for the current claim. Appellant submitted a June 26, 2013 report from Dr. M. Stephen Wilson, a physiatrist, who provided a history and results on examination. Dr. Wilson diagnosed acute traumatic injuries to the lumbar spine "resulting in radiculopathy due to anatomical abnormalities due to disc lesions at L4-5 and L5-S1, causing left sided radicular symptoms." He also diagnosed an acute traumatic injury to the right shoulder "resulting in radiculopathy due to anatomical abnormalities due to moderate supraspinatus tendinosis with a small focal low-grade partial articular surface tear." Dr. Wilson also diagnosed an acute traumatic injury to the left shoulder "resulting in radiculopathy due to anatomical abnormalities due to degenerative changes of the acromioclavicular joint with mild subacromial/subdeltoid bursitis and a small linear partial thickness bursal sided rotator cuff tear at the insertion on the footprint." He stated that appellant's job required repetitive lifting, bending, and twisting, and such activity could cause undue pressure and trauma to the muscles, joints and tendons. Dr. Wilson opined that appellant's injuries were the direct result of her work-related activity.

By letter dated September 4, 2014, OWCP advised appellant's counsel that the report from Dr. Wilson identified the current claim for shoulder and back injuries, not the claim number identified in the July 7, 2014 letter. It stated no further action would be taken, and if appellant wished to exercise appeal rights with respect to the July 1, 2011 decision, she may exercise her appeal rights.

On September 15, 2014 OWCP received a September 4, 2014 letter from appellant, who noted that appellant's counsel had provided the wrong OWCP claim number on the July 7, 2014 letter. Appellant indicated that she was requesting reconsideration of the current claim. According to her, her counsel had delayed in filing the appeal because he was uncertain what physician would provide treatment. The record indicates that appellant submitted a September 9, 2014 letter stating that she had failed to mention in her September 4, 2014 letter that her father had been diagnosed with cancer and she was the primary caregiver. This letter was received by OWCP on September 12, 2014.

By decision dated December 23, 2014, OWCP found that appellant had submitted an untimely request for reconsideration. It further found that it did not show clear evidence of error by OWCP. OWCP noted that even the submission of substantive medical evidence with an untimely reconsideration request does not establish clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.³ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁴

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁵ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁶ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁷ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁸ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.605.

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 20 C.F.R. § 10.607.

evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰ Evidence that 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

OWCP procedures note 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 still not sufficient to establish clear evidence of error.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

In the present case, OWCP received on July 7, 2014 a letter in which appellant requested to "expand" her claim and submitted a June 26, 2013 report from Dr. Wilson. The letter did not request reconsideration, or identify an OWCP decision, and it provided an OWCP file number for a different claim involving carpal tunnel syndrome. OWCP sent a September 4, 2014 letter to appellant noting these concerns and advising appellant that she could exercise her appeal rights with respect to that claim. On September 15, 2014 appellant submitted a September 4, 2014 letter identifying the current claim and requesting reconsideration of the July 1, 2011 decision.

The last decision on the merits of the claim for compensation was dated July 1, 2011. OWCP did not receive a request for reconsideration of the July 1, 2011 decision until September 15, 2014. Appellant's request for reconsideration was therefore untimely with respect to this decision, as it was filed more than one year after the decision.

⁹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹⁴ *Thankamma Matthews*, 44 ECAB 765 (1993).

Appellant stated in her September 4, 2014 letter that appellant's counsel had delayed in filing the reconsideration request. In the September 12, 2014 letter, she also stated that she was the primary caregiver for her father who had significant health issues. To the extent appellant is arguing that she should be excused from the one year filing requirement, the Board notes that 20 C.F.R. § 10.607 provides a clear requirement that an application for reconsideration must be received by OWCP within one year of the decision for which review is sought.¹⁵ Appellant was provided with her appeal rights in the July 1, 2011 decision. A timely reconsideration request in this case must be received by OWCP within one year of the July 1, 2011 decision. Since the request for reconsideration was untimely, appellant must show clear evidence of error by OWCP.

Appellant's claim for compensation was denied by OWCP based on its review of the medical evidence. OWCP noted the reports from Dr. Zawaideh and found they were insufficient to establish causal relationship between a diagnosed back or shoulder condition and appellant's federal employment as a contract specialist. With her untimely request for reconsideration, appellant submitted the June 26, 2013 report from Dr. Wilson.

While the June 26, 2013 report is a more detailed report on causal relationship than previous medical reports, this does not itself establish clear evidence of error.¹⁶ As noted above, even a detailed, rationalized report that could support a contrary conclusion to that reached by OWCP is not clear evidence of error. Appellant had one year from the July 1, 2011 decision to submit probative medical evidence on the issue presented, but did not submit evidence from Dr. Wilson in a timely manner. The Board finds that she did not show clear evidence of error by OWCP in this case.

CONCLUSION

The Board finds that OWCP properly found appellant's reconsideration request was untimely and failed to show clear evidence of error.

¹⁵ See also *Donna M. Nakamura*, Docket No. 96-2389 (issued August 11, 1998) (appellant's allegation that her former attorney was at fault in delaying the reconsideration request did not justify or excuse the untimely filing of the reconsideration request).

¹⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 23, 2014 is affirmed.

Issued: July 15, 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