United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 15-0760**
	)	**Issued: October 13, 2015**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Fort Lauderdale, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2015 appellant filed a timely appeal from an August 28, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed between the last merit decision dated August 15, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's case.[2]

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the August 28, 2014 nonmerit decision, OWCP received additional evidence. Appellant also submitted new evidence on appeal. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal appellant argues that her reconsideration request was timely because she mailed her response on June 7, 2014 and that an OWCP individual confirmed receipt of her packet on August 18, 2014 for scanning. She further argued that the postmark date, U.S. Postal Service receipts, and case law establish that her request for reconsideration was timely filed.

FACTUAL HISTORY

On June 17, 2013 appellant, then a 40-year-old customs and border patrol officer, filed a traumatic injury claim alleging that on June 8, 2013 she sustained a severe headache, whiplash, fatigue, and sleepiness from being in a motor vehicle accident. The employing establishment controverted the claim because she was not in the performance of duty because her shift had ended and she was on her way home.

By letter dated July 12, 2013, OWCP informed appellant that the evidence of record did not establish her claim. It advised her of the type of medical and factual evidence required and gave her 30 days to provide this information.

On July 29, 2013 OWCP received disability notes for the period June 10 to July 25, 2013 from Dr. Ron Weschel, a chiropractor, indicating that appellant was disabled for work beginning June 8, 2013 until being released to return to work with restrictions on July 23, 2013 due to the automobile accident.

In a July 31, 2013 attending physician's report (Form CA-20), Dr. Weschel reported multiple cervical and lumbar subluxations. Diagnoses included whiplash, lumbar sprain/strain, and radiculitis and the box "yes" was checked regarding whether the diagnosis was employment related. Dr. Weschel found appellant totally disabled for the period June 8 to July 22, 2013. Appellant was released to light-duty work on July 23, 2013.

A June 8, 2013 Broward Health emergency room report noted that appellant had been seen by Dr. Christopher D. Van Smith, an examining osteopath, for back pain. Appellant was discharged on June 8, 2013 and the discharge summary reported a diagnosis of neck and back pain.

In a June 10, 2013 report, Dr. Steven S. Greenberg, a treating Board-certified orthopedic surgeon, related that appellant had been injured in a June 8, 2013 automobile accident and that she was transported by ambulance to the emergency room for treatment at Broward General Hospital. He provided physical examination findings and reviewed diagnostic tests. Dr. Greenberg diagnosed a cervical spine injury with associated pain, restriction of motion, and spasm; lumbar injury with associated muscular pain, restriction of motion, and spasm; and bilateral knee injuries with articular cartilage damage. He found appellant disabled for the period June 10 to 17, 2013.

An August 1, 2013 magnetic resonance imaging (MRI) scan revealed C5-6 and C6-7 disc bulges with thecal sac impingment and straightening of cervical lordosis consistent with spasm.

Dr. Weschel, in an August 7, 2013 report, provided a description of the June 8, 2013 automobile accident and noted that appellant was seen on June 11, 2013 for complaints of neck and upper, mid and lower back pain; headaches; and right wrist pain. On physical examination he found diffuse pain and swelling in the mid and low back and neck with joint pain, swelling

and bilateral wrist tenderness with restriction on extension and flexion, and joint swelling. Cervical, mid and lower back range of motion was very restricted and guarded. Dr. Weschel diagnosed cervical, thoracic, and lumbar sprains/strains; cervical and lumbar radiculitis; headaches; left ankle strain/sprain; right wrist strain/sprain; and bilateral knee strain/sprain.

By decision dated August 15, 2013, OWCP denied appellant's claim finding that fact of injury had not been established. It found that the record lacked any medical evidence with a diagnosis causally related to the accepted June 8, 2013 incident.

On September 13, 2013 OWCP received a June 8, 2013 report from Broward Health containing an x-ray noting a clinical impression of lumbosacral sprain.

On April 14, 2014 OWCP received an August 1, 2013 addendum to an Authorization for Treatment (Form CA-16) from Dr. Weschel providing dates of treatment and diagnoses of cervical, thoracic, and lumbar strains/sprains; cervical and lumbar radiculitis; headaches; right wrist strain/sprain; left ankle strain/sprain; and bilateral knee strain/sprain.

On August 21, 2014 appellant requested reconsideration. In support of her request, she submitted medical evidence which had previously been submitted and considered by OWCP. The new evidence is set forth below.

In an August 22, 2013 disability certificate, Dr. Weschel released appellant to light duty on August 22, 2013.

In progress reports/treatment notes, for the period September 24 to November 5, 2013, Dr. Bruce S. Selden, a Board-certified otolaryngologist, provided a history of the automobile accident and physical findings.

In disability notes dated September 20 and October 29, 2013, Dr. Harold Gregory Bach, a treating Board-certified orthopedic surgeon, requested that appellant be excused from work. In various disability notes, he indicated periods of disbility from September 23, 2013 to March 20, 2014.

In September 23, 2013 chart notes, Dr. Roberto A. Moya, an examining Board-certified orthopedic surgeon, diagnosed cervical sprain/strain, cervicalgia, cervical facet joint syndrome, lumbar sprain/strain, lumbar pain, lumbar facet syndrome, hand and wrist pain, wrist/hand tenosynovitis, knee pain, and knee internal derangement. He also completed a Florida Workers' Compensation Uniform Medical Treatment Form dated September 23, 2013 which noted an injury date of June 8, 2013 and opined that appellant was totally disabled from working at that time.

On September 30 and October 1 and 3, 2013, Dr. Henry Glick, a treating osteopath specializing in opthalmology, noted that appellant was involved in an automobile accident on June 8, 2013, provided eye examination findings, and returned her to full duty on October 2, 2013. He noted that appellant had been involved in an automobile accident on June 8, 2013 and had pain since then. Physical examination findings were provided.

October 4, 2013 MRI scan reports of both knees, left ankle, right wrist, and thoracic areas noted that appellant was in a June 8, 2013 automobile accident and has had pain in these areas

since the June 8, 2013 incident. The MRI scans revealed left and right knee anterior cruciate ligament strain, left and right knee medial meniscus posterior horn tears, left knee posterior cruciate ligament partial tear, right medial collateral ligament strain, T6-7 one millimeter broad left posterolateral disc herniation with thecal sac compression, T7-8 and T8-9 broad-based bulging annuli with thecal sac compression, left ankle joint effusion, left ankle anterior talofibular ligament strain, carpi ulnaris tendon partial tear, and six-millimeter septated ganglion cyst dorsal to the carpus.

In an October 9, 2013 report, Dr. Bach noted that appellant was involved in an automobile accident on June 8, 2013 and was being seen for complaints of pain in her neck, mid to low back, both knees, right wrist, and left ankle. His diagnoses included cervical disc displacement, occipital neuralgia, lumbar sprain/strain, thoracic disc herniation, cephalalgia, deranged medial mensicus, internal knee derangement, and hand and wrist tenosynovitis.

An October 14, 2013 Florida Workers' Compensation Uniform Medical Treatment Form noting an injury date of June 8, 2013 and noted that surgery was required by Dr. Moya. The record also contains chart notes from Dr. Moya dated October 14, 2013 providing physical examination findings. Based on review of the objective evidence and physical examination, he recommended bilateral knee surgery.

In an October 20, 2013 disability note, Dr. Bach found that appellant was totally disabled from work for the period October 20 to November 2013 and released her to return to light-duty work with restrictions effective November 20, 2013. In a November 20, 2013 disability note, he found her totally disabled the period November 20 to December 20, 2013 and released her to return to light duty with restrictions on December 20, 2013.

In a November 18, 2013 report, Dr. Roy R. Casiano, who reported that appellant was involved in an automobile accident on June 8, 2013, noted the physical treatment since the accident, and provided physical examination findings. He related that she had been referred by Dr. Selden for complaint of right clear rhinorrhea fluid.

A December 16, 2013 disability note signed by Anna M. Trzcinski, a registered nurse, noted that appellant was a patient of Dr. Bach who was seen on December 16 and 20, 2013 and was released to return to work on December 28, 2013.

On February 20, 2014 Dr. Bach noted that appellant was seen that day and requested that she be excused from work.

By decision dated August 28, 2014, OWCP denied appellant's request for reconsideration as that it was untimely and failed to establish clear evidence of error on the part of OWCP. It stated that her letter requesting reconsideration was not received with one year from the August 15, 2013 decision. The request for reconsideration was not received until August 21, 2014 and, therefore, was untimely. OWCP further found that the evidence submitted with the untimely request for reconsideration did not establish clear evidence of error and was not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's 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.[3] 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.[4]

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[5] OWCP regulations and procedures provide that OWCP 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.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[7] The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.[12]

---

[3] 20 C.F.R. § 10.607(a).

[4] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

[6] *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (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. *Id.* at Chapter 2.1602.3(c).

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

[8] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[9] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[10] *See Leona N. Travis*, *supra* note 8.

[11] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[12] *Leon D. Faidley, Jr.*, *supra* note 4.

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.[13]

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated August 28, 2014 in which it declined to reopen appellant's case on the merits because the request was untimely filed and did not show clear evidence of error. OWCP properly determined that she failed to file a timely application for review. It issued a merit decision denying appellant's claim on August 15, 2013. OWCP received her request for reconsideration on August 21, 2014; thus, the request was outside the one-year time limit.[14] Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.[15]

The Board also finds that appellant has not established clear evidence of error by OWCP. The issue is medical in nature and, on reconsideration, appellant resubmitted Broward Health reports dated June 8, 2013; reports and disability notes covering the period June 29 to August 7, 2013 from Dr. Weschel; June 20, 2013 reports and disability note from Dr. Greenberg, an August 1, 2013 MRI scan. OWCP had previously considered this evidence and her, in submitting this document, 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 substantial question as to the correctness of OWCP's decision.

Following OWCP's August 15, 2013 decision, on reconsideration, appellant submitted additional medical evidence. Form CA-16 reports from Dr. Weschel are not medical evidence. Dr. Weschel is not a physician as defined under FECA as he did not diagnose a spinal subluxation based on x-ray and therefore his reports are irrelevant to the underlying issue and do not establish error in OWCP's decision.[16]

Appellant also submitted reports and disability notes from Drs. Bach, Casiano, Glick, Moya, and Selden. The report and chart notes from Dr. Moya provided physical examination findings and recommend knee surgery. Drs. Casiano and Selden, in their reports, noted the employment injury history and provided examination findings. Dr. Glick noted the employment

[13] *Supra* note 3.

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4) (October 20112011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

[15] 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

[16] 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides that the term physician ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. *See also Mary A. Ceglia*, 55 ECAB 626 (2004) (in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2); a chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist).

injury history, provided examination findings, and related that appellant had been in pain since the June 8, 2013 incident. The reports from Dr. Bach covered the period September 20, 2013 to February 20, 2014, and documented periods of disability. Dr. Bach noted that appellant had been involved in a June 8, 2013 automobile accident, and diagnosed cervical disc displacement, occipital neuralgia, lumbar sprain/strain, thoracic disc herniation, cephalalgia, deranged medial meniscus, internal knee derangement, and hand and wrist tenosynovitis.

Clear evidence of error is intended to represent a difficult standard. The new evidence from appellant is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that none of the reports Drs. Bach, Casiano, Glick, Moya, and Selden submitted on reconsideration are sufficient to raise a substantial question as to the correctness of OWCP's decision. No other medical evidence submitted by appellant raises a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its September 13, 2012 decision.

Appellant also submitted a December 16, 2013 disability note signed by Ms. Trzcinski, a registered nurse. However, registered nurses are not physicians as defined under FECA, and thus their opinions are of no probative value.[17]

The remaining evidence of MRI scans of both knees, left ankle, right wrist, and thoracic areas is insufficient to establish that OWCP's decision was erroneous or to raise a substantial question as to the correctness of OWCP's decision in denying appellant's traumatic injury claim.[18]

On appeal, appellant argued that OWCP erred in finding that her request was untimely as the postmark clearly established that it had been mailed within the one-year period. As noted above, OWCP changed its procedures effective August 29, 2011 to provide that for timeliness purpose the date of reconsideration request is the date received by OWCP and not the date the request was mailed. As appellant's request was not received by OWCP until August 21, 2014, her request for reconsideration was untimely.

The Board finds that the November 25, 2014 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute an abuse of discretion.

CONCLUSION

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

[17] 5 U.S.C. § 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See B.B.*, Docket No. 09-1858 (issued April 16, 2010); *Roy L. Humphrey*, 57 ECAB 238 (2005).

[18] *L.D.*, Docket No. 14-132 (issued June 11, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 28, 2014 is affirmed.

Issued: October 13, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board