

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

B.C., Appellant)	
)	
and)	Docket No. 15-0550
)	Issued: January 28, 2016
U.S. POSTAL SERVICE, POST OFFICE,)	
Chicago, IL, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 12, 2015 appellant filed a timely appeal from the August 22, September 23, and December 8, 2014 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP).¹ The last merit decision in this case was the Board's May 9, 2008 decision. As there has been no OWCP merit decision issued within one year of the filing of this appeal,² pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ On January 12, 2015 appellant submitted a timely request for oral argument in connection with OWCP's December 8, 2014 decision. After exercising its discretion, the Board, in an order issued on June 2, 2015, denied her request for oral argument, finding that the arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0550 (issued June 2, 2015).

² For decisions issued prior to October 20, 2008, a claimant had up to one year to file an appeal to the Board. 20 C.F.R. § 501.3(d)(2) (2007).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly determined that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant contends that OWCP removed a chiropractor from her case without first giving her an opportunity to replace him with a qualified physician.

FACTUAL HISTORY

This case has previously been before the Board.

On May 7, 1985 appellant, then a 28-year-old letter sorter machine operator, filed a traumatic injury claim (Form CA-1) under File No. xxxxxx086 alleging that she sustained an ankle, left hip, and left neck injuries on that day as a result of slipping down a flight of stairs at work. OWCP accepted the claim for cervical and lumbar strains, and left hip and left ankle strains. Subsequently, it accepted that appellant sustained a recurrence of disability on July 24, 1985. In a claim filed under File No. xxxxxx103, OWCP accepted that she sustained cervical and thoracic strain, and left trapezius myositis while in the performance of duty on July 24, 1985. It combined this claim and the instant claim under File No. xxxxxx086 into a master claim assigned File No. xxxxxx086.

In decisions dated September 14, 2000, August 4, 2003, and February 9, 2005, the Board affirmed OWCP's nonmerit decisions denying appellant's requests for reconsideration regarding a denial of recurrence of disability as they were untimely filed and failed to demonstrate clear evidence of error.⁴

In a December 8, 2006 notice, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on the impartial medical opinion of Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, who opined that appellant no longer had any residuals of her accepted May 7 and July 24, 1985 employment injuries.

In a January 18, 2007 decision, OWCP finalized the termination of wage-loss compensation and medical benefits based on Dr. Komanduri's impartial medical opinion.

By letter dated January 29, 2007, appellant requested an oral hearing before an OWCP hearing representative. In a decision dated November 15, 2007, an OWCP hearing representative affirmed the January 18, 2007 termination decision. He found that Dr. Komanduri's impartial medical opinion represented the special weight of the medical evidence. On December 18, 2007 appellant, through counsel, appealed to the Board.

In a May 9, 2008 decision,⁵ the Board affirmed the January 18 and November 15, 2007 termination decisions. The Board found that OWCP had met its burden of proof to terminate

⁴ Docket No. 99-0958 (issued September 14, 2000), *Order Denying Petition for Reconsideration*, Docket No. 99-0958 (issued June 5, 2001); Docket No. 03-0956 (issued August 4, 2003) and Docket No. 94-1741 (issued February 9, 2005).

⁵ Docket No. 08-0571 (issued May 9, 2008).

appellant's medical benefits on January 18, 2007 based on Dr. Komanduri's impartial medical opinion. The Board also found that she had failed to establish that she had any continuing employment-related residuals after January 18, 2007.

By order dated April 15, 2009, the Board remanded the case for consolidation of appellant's prior claims.⁶ Following the remand, OWCP denied appellant's request for reconsideration on a number of occasions because the requests were untimely filed and failed to establish clear evidence of error. The December 15, 2011 OWCP decision was appealed to the board. By decision dated March 13, 2012, the Board affirmed the denial of appellant's reconsideration request because it was untimely and failed to establish clear evidence of error.⁷

Appellant continued filing requests for reconsideration and an appeal was filed to the Board of OWCP's March 18, 2013 decision. By a May 16, 2014 Order Remanding Case, the Board found that OWCP had improperly designated appellant's request for reconsideration as from its denial of recurrence rather than from its termination decision. The Board remanded the case for OWCP to correct its procedural error.⁸

Following the Board's May 16, 2014 remand, OWCP issued a July 1, 2014 decision, denied appellant's request for reconsideration of its January 18, 2007 termination decision finding it was untimely filed and failed to demonstrate clear evidence of error.

On July 8, 2014, appellant again requested reconsideration of OWCP's January 18, 2007 termination decision. She contended that Dr. Komanduri's report was not entitled to the weight of the medical evidence as he focused on Marfan syndrome, the shoulder, and cervical degenerative disease, conditions which had not been accepted by OWCP. Dr. Komanduri did not discuss her accepted employment-related left hip, left ankle, left trapezius, myalgia/myositis, and thoracic conditions.

In a report dated July 15, 2014, Dr. Sylvia A. De La Llana, a physiatrist, provided a history of the May 7, 1985 employment injuries, and appellant's employment, medical treatment, and personal background. She noted appellant's complaints of neck pain which radiated into her legs, and bilateral shoulders, bilateral hips, and low back pain. Dr. De La Llana further noted her difficulty with performing activities of daily living (ADL). She reported physical examination findings and diagnostic test results. Dr. De La Llana provided nonindustrial diagnoses of Marfan syndrome by history and connective tissue disorder. She provided industrial diagnoses related to appellant's accepted claims which included chronic lumbar sprain and strain with myofasciitis, lumbar disc disease with radiculopathy at L5-S1, chronic bilateral hip, cervical spine, bilateral shoulder, thoracic spine, and left ankle sprain and strain with myofasciitis, chronic left ankle sprain and strain with internal derangement, cervical spine radiculopathy, and loss of cervical lordosis with a right vertebral artery dissection. Dr. De La Llana opined that based on appellant's history, radiographic data, and mechanism of injury, her subjective complaints were consistent with the injuries sustained at the time of her fall. She further opined that because

⁶ Docket No. 09-42, *Order Remanding Case* (issued April 15, 2009).

⁷ Docket No. 12-0554 (issued March 13, 2012), *Order Denying Petition for Reconsideration*, Docket No. 12-0554 (issued September 14, 2012).

⁸ Docket No. 13-1824, *Order Remanding Case* (issued May 16, 2014).

appellant had been diagnosed with unspecified connective tissue disease and had received treatment for Marfan syndrome, the musculoskeletal injuries during her fall at work had accelerated and exacerbated her above-noted medical condition. Dr. De La Llana advised that her symptoms were aggravated and exacerbated when she performed her usual and customary work duties which included walking, standing, sitting, prolonged walking, standing, and sitting, bending, stooping, lifting, carrying, twisting, pushing, pulling, and reaching. She related that these activities caused an aggravation and exacerbation of appellant's symptoms which were a direct result of continuous trauma in the course of her job at the employing establishment. Dr. De La Llana noted that repetition of the above-noted activities prolonged weight bearing over a period of seven to eight years and had accelerated the osteoarthritic process causing the development of progressive pain, disc disease, osteoarthritic changes, significant functional difficulties with performance of the essential demands of appellant's job, and difficulty performing activities of daily living. She concluded that aggravation of appellant's connective tissue disorder was permanent.

In an August 22, 2014 decision, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On August 28, 2014 appellant yet again requested reconsideration of the January 18, 2007 termination decision and, by decision dated September 23, 2014, OWCP again denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

Appellant again exercised her rights to reconsideration and on October 26, 2014, contended that her request was not untimely filed. Appellant asserted that OWCP erred in treating Dr. Gary Ogurkiewicz, a chiropractor, as her attending physician, as he was not considered a physician under FECA, and finding that his May 14, 1985 report was sufficient to establish that her work-related conditions had ceased. She further asserted that it erred in ordering her to see Dr. Michael R. Treister, a Board-certified orthopedic surgeon and an OWCP referral physician, for a second opinion evaluation.

In a November 11, 2014 addendum to her request for reconsideration, appellant contended that she was entitled to disability compensation for the period November 7, 1986 to January 18, 2007.

Appellant resubmitted a November 6, 1986 attending physician's supplemental report (Form CA-20a) from Dr. Treister who diagnosed subjective cervical pain and indicated with an affirmative mark that the diagnosed condition was due to appellant's accepted May 7, 1985 employment injuries. He released her to return to work without restrictions on the day of his examination.

Appellant also resubmitted Dr. De La Llana's July 15, 2014 report.

In a December 8, 2014 decision, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ 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 decision for which review is sought.¹⁰ 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 application must establish, on its face, that such decision was erroneous.¹¹

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

ANALYSIS

The Board finds that OWCP properly determined that appellant had failed to file a timely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues. The most recent merit decision in this case was issued by the Board on May 9, 2008. Appellant's requests for reconsideration were not received by OWCP until July 8, August 28, and October 26, 2014, more than one year after the May 9, 2008 merit decision. Therefore, they were untimely filed.

The Board also finds that appellant's untimely requests for reconsideration failed to demonstrate clear evidence of error. The Board's May 9, 2008 merit decision affirmed OWCP's January 18 and November 15, 2007 decisions finding that OWCP met its burden of proof to terminate appellant's benefits based on Dr. Komanduri's impartial medical opinion that she no longer had any residuals or disability causally related to her accepted May 7 and July 24, 1985

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹¹ 20 C.F.R. § 10.607(b).

¹² *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.4(b) (October 2011).

employment-related injuries. In her untimely reconsideration requests, appellant contended that Dr. Komanduri's report was not entitled to the weight of the medical evidence as he focused on Marfan syndrome, the shoulder, and cervical degenerative disease, conditions which had not been accepted by OWCP. She stated that he did not discuss her accepted employment-related left hip, left ankle, left trapezius, myalgia/myositis, and thoracic conditions. Appellant further contended that her request for reconsideration was not untimely filed. She asserted that OWCP erred in treating Dr. Gary Ogurkiewicz, a chiropractor, as her attending physician and finding that his May 14, 1985 report was sufficient to establish that her work-related conditions had ceased. Appellant also asserted that it erred in ordering her to see Dr. Treister for a second opinion evaluation. She contended that she was entitled to disability compensation from November 7, 1986 to January 18, 2007. Lastly, appellant contended that she did not receive a proposed notice of termination of her compensation benefits. However, these contentions do not establish error on the part of OWCP, but merely repeat arguments previously raised on prior appeals before the Board. The Board previously affirmed OWCP's finding that appellant's contentions failed to establish clear evidence of error. The Board finds that her arguments on reconsideration are insufficient to raise a substantial question concerning the correctness of OWCP's termination of her compensation benefits or to shift the weight of the evidence in her favor. Also, repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the claimant.¹⁴

Dr. De La Llana's July 15, 2014 report found that appellant's diagnosed lumbar, bilateral hip, cervical spine, bilateral shoulder, thoracic spine, and left ankle conditions were consistent with her accepted employment-related injuries and that these conditions were aggravated or exacerbated by her regular work duties. She further found that because appellant had been diagnosed with unspecified connective tissue disease and had received treatment for Marfan syndrome, the musculoskeletal injuries during her fall at work had accelerated and exacerbated her above-noted medical condition. While this report offers some support for causal relationship, the Board has held that the term clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹⁵ The Board finds that Dr. De La Llana's report is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in terminating her compensation benefits.

Appellant resubmitted a November 6, 1986 Form CA-20a report from Dr. Treister which was previously of record. The resubmission of this evidence does not shift the weight of the evidence in her favor or raise a substantial question as to the correctness of OWCP's termination decision.¹⁶ Appellant did not explain how resubmission of Dr. Treister's report was positive, precise and explicit in manifesting on its face that OWCP committed an error in terminating her compensation benefits. It is not apparent how resubmission of this evidence is sufficient to raise

¹⁴ *D.E.*, 59 ECAB 438 (2008); *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

¹⁵ *D.G.*, 59 ECAB 455 (2008); *see* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (October 2011).

¹⁶ *See* cases cited, *supra* note 12.

a substantial question as to the correctness of OWCP's decision. Thus, this resubmitted evidence is insufficient to show clear evidence of error.

The arguments and evidence submitted by appellant are insufficient to raise a substantial question as to the correctness of the last merit decision. Consequently, appellant has not met her burden to establish clear evidence of error on the part of OWCP such that it erred in denying merit review.

On appeal, appellant reiterated an assertion that she made before the Board indicating that the termination of her benefits was improper as it removed a chiropractor from her case without first giving her an opportunity to replace him with a qualified physician. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration because they were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 8, September 23, and August 22, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 28, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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