

ISSUE

The issue is whether OWCP properly denied appellant's March 23, 2014 reconsideration request under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 16, 1988 appellant, then a 51-year-old medical clerk, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome and thoracic outlet syndrome as a result of repetitive writing, stapling, and use of an address graph machine while in the performance of duty. OWCP accepted her claim for bilateral carpal tunnel syndrome, lumbar degenerative displacement, and aggravation of degeneration of lumbar intervertebral disc without myelopathy. Appellant stopped work on November 19, 1986 and returned to work on October 7, 1987. Thereafter, she stopped work again and received wage-loss compensation. Appellant was placed on the periodic compensation rolls beginning December 1, 1990.

In a letter dated March 30, 2012, appellant, through counsel, requested that her claim be expanded to include the conditions of depression, anxiety, and pain disorder. She submitted a January 24, 2012 report from Dr. April K. Getz, a Board-certified family practitioner, who noted that on January 6, 1985 while at work, appellant stepped on a stool as she was reaching for supplies and became dizzy and fell. Appellant diagnosed employment-related bilateral carpal tunnel syndrome, degeneration of the lumbar spine, and displacement of the intervertebral disc without myelopathy. Dr. Getz noted that appellant also had concomitant diagnoses of hypothyroidism, hypertension, asthma, diverticulosis, irritable bowel syndrome, obstructive sleep apnea, osteoarthritis, hyperlipidemia, and depression/anxiety. She opined that as a result of appellant's employment-related injuries her chronic conditions were exacerbated. Dr. Getz indicated that appellant's pain caused elevation in her blood pressure and worsened her depression and anxiety. She noted that her examination revealed increased anxiety and depressive symptoms.

In a letter dated April 19, 2012, OWCP noted receipt of Dr. Getz' January 24, 2012 report and requested that she provide a full medical report to support her opinion that appellant had an emotional condition related to chronic pain from her accepted injuries.

In a decision dated June 6, 2012, OWCP denied appellant's request to expand her claim to include hypothyroidism, hypertension, asthma, diverticulosis, irritable bowel syndrome, obstructive sleep apnea, osteoarthritis, hyperlipidemia, and depression and anxiety.

Appellant requested an oral hearing which was held on October 3, 2012. She submitted a report from Dr. Getz dated September 8, 2012 who noted a history of injury on January 6, 1985 and diagnosed employment-related conditions of bilateral carpal tunnel syndrome, degeneration of the lumbar spine, and displacement of intervertebral discs without myelopathy. Dr. Getz opined that these permanent injuries caused significant distress and new diagnoses of depressive disorder and pain disorder. She noted that appellant was totally disabled for all employment secondary to her employment-related injury.

In the course of developing the claim, OWCP referred appellant to Dr. John Custer, a Board-certified psychiatrist. In a February 19, 2013 report, Dr. Custer noted that he reviewed appellant's history and performed an examination. Under Axis 1, he diagnosed pain disorder associated with psychological factors and a medical condition. Dr. Custer opined that appellant's psychiatric condition was relatively minor and noted that he could not establish any causality with the original work injury. He advised that her emotional condition was not disabling and also indicated that she had a depressive syndrome that predated her work injuries.⁴

In a decision dated March 22, 2013, OWCP denied appellant's claim for an emotional condition finding the medical evidence of record did not establish that the alleged emotional conditions were related or consequential to the established work factors.

On March 23, 2014 OWCP received appellant's March 22, 2014 reconsideration request. Appellant asserted that OWCP unfairly denied her claim and she was requesting reconsideration based on new evidence and argument. She further indicated that OWCP's decision should be rescinded and wage-loss compensation and medical benefits be paid accordingly. Appellant submitted medication management notes dated October 24 and November 14, 2012 prepared by an individual whose signature is illegible who diagnosed post-traumatic stress disorder, chronic pain, and disability claim. She submitted a September 10, 2013 report from Dr. Getz, who noted a history of injury on January 6, 1985 and diagnosed bilateral carpal tunnel syndrome, degeneration of the lumbar spine, and displacement of intervertebral discs without myelopathy. Appellant opined that these injuries caused appellant emotional stress and appellant was totally disabled secondary to her employment injury. In a progress note dated September 10, 2013, Dr. Getz treated appellant for back pain radiating into the right lower extremity, carpal tunnel pain, and occasional anxiety. She noted that appellant reported being treated by a Dr. Krebs last year who diagnosed possible post-traumatic stress disorder related to her chronic dealings with her disability claim, lumbar and cervical herniated disc, osteoarthritis, degeneration of lumbar/lumbosacral disc without myelopathy, and carpal tunnel syndrome.⁵ Similarly, in a March 11, 2014 report, Dr. Getz noted a history of injury and diagnoses and opined that appellant's conditions were employment related, totally disabling, and caused appellant emotional stress. Appellant submitted an appointment reminder from Dr. Michael W. Peelle, a Board-certified orthopedist, for March 5, 2014.

By decision dated September 17, 2014, OWCP denied appellant's March 23, 2014 request for reconsideration finding that her request did not meet any of the requirements for further merit review pursuant to 5 U.S.C. § 8128(a). It determined that her letter did not raise a substantive legal question nor did it include new and relevant evidence.

⁴ OWCP also referred appellant for an orthopedic examination which indicated that she continued having orthopedic residuals of her accepted conditions.

⁵ No report from a Dr. Krebs accompanies Dr. Getz' report.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁶

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides 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.⁷

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. 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, but does not include prerecoupment hearing decisions.⁸ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.⁹

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹⁰

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹¹

ANALYSIS

The most recent decision reviewing the merits of appellant's case was OWCP's March 22, 2013 decision. As the appeal rights attached to that decision explained, appellant had one calendar year from the date of that decision or until March 22, 2014, to ensure receipt by OWCP of any reconsideration request.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (October 2011).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.607.

¹¹ *Supra* note 8 at Chapter 1.1602.5.a (October 2011).

Appellant's reconsideration request dated March 22, 2014 was received by OWCP and entered into iFECs on March 23, 2014. As this was more than one year after March 22, 2013, appellant's reconsideration request was untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, OWCP did not determine whether appellant's reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the wrong standard of review to the untimely request for reconsideration, the Board will set aside OWCP's September 17, 2014 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.¹²

CONCLUSION

The Board finds that OWCP improperly denied appellant's March 23, 2014 reconsideration request under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further review under the clear evidence of error standard.

Issued: June 13, 2016
Washington, DC

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

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

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

¹² See 20 C.F.R. § 10.607(b). See *L.D.*, Docket No. 15-0865 (issued October 6, 2015).