United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 16-0600**
	)	**Issued: May 25, 2016**
U.S. POSTAL SERVICE, POST OFFICE, West Monroe, LA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 9, 2016 appellant, through counsel, filed a timely appeal from November 12, 2015 and February 3, 2016 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from December 20, 2012, the date of the most recent OWCP merit decision, and 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 the claim.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 31, 2012 appellant, then a 57-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 2012 her left knee "popped while turning to push a mail cart out to load." She stopped work on October 31, 2012.

Appellant submitted a November 1, 2012 duty status report from Dr. Floyd Jones, an osteopath, who treated her for left lateral meniscus pain. Dr. Jones noted that appellant was totally disabled. An October 31, 2012 x-ray of the left knee revealed no abnormalities.

By letter dated November 16, 2012, OWCP advised appellant that her claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. Appellant's claim had been administratively handled to allow medical payments up to $1,500.00, but the merits of the claim had not been formally adjudicated. OWCP advised that because appellant had not returned to full duty her claim would be formally adjudicated. It requested that she submit additional information including a comprehensive medical report from her treating physician with a reasoned explanation as to how the specific work factors contributed to her claimed left knee injury.

Appellant submitted an attending physician's report from Dr. Jones dated November 12, 2012 who diagnosed degenerative joint disease with effusion. Dr. Jones noted by checking a box marked "yes" that appellant's condition was caused or aggravated by an employment activity. He returned appellant to work light duty. In a December 11, 2012 duty status report, Dr. Jones diagnosed partial meniscus tear of the left knee, resolved. He noted that appellant could return to work regular duty on December 11, 2012.

Appellant was treated by Dr. John Ledbetter, a Board-certified anesthesiologist, from October 9 to December 10, 2012, for worsening neck and arm pain which radiated down the shoulders. Dr. Ledbetter diagnosed cervicalgia in the neck, intervertebral disc with cervical myelopathy, brachial neuritis, and cervical radiculitis. On November 12, 2012 he performed cervical epidural steroid injections and diagnosed cervical radiculitis and intervertebral disc disorder with myelopathy.

Appellant submitted a report from Dr. Jones dated December 12, 2012 who treated appellant for a twisted left knee injury which had resolved. Dr. Jones noted that appellant had a migraine which appeared to be triggered by her cervical condition.

By decision dated December 20, 2012, OWCP denied appellant's claim for failing to submit sufficient medical evidence to establish that the medical conditions were causally related to the work incident.

On February 12, 2013 Dr. Jones noted treating appellant on January 30, 2013 for a twisted left knee condition which had resolved. He noted that appellant continued to have migraines secondary to her cervical disc condition.

In a June 27, 2013 report, Dr. Jones noted that appellant's knee injury was denied by OWCP as causal relationship was not established. He noted that appellant injured her knee on

October 30, 2012 while at work. Appellant reported pushing a cart weighing approximately 487 pounds and, when she turned, her knee "popped." Dr. Jones diagnosed partial meniscus tear that resolved. He noted that although appellant had mild osteoarthritis and degenerative changes he opined that pushing the heavy cart aggravated her condition and caused the injury. Dr. Jones indicated that he faxed the letter to OWCP and the employing establishment.

Appellant submitted a magnetic resonance imaging (MRI) scan of the left knee dated November 8, 2012 which revealed degenerative changes of the medial joint compartment and medial meniscus with no acute meniscal tear. She submitted a May 28, 2014 MRI scan of the cervical spine, which revealed spinal and neural stenosis at C4-5 and C5-6, moderate disc bulging, mild disc bulging at C6-7, and mild broad central and left paracentral disc protrusion at C3-4.

On April 20, 2015 appellant submitted a signed appointment of representative appointing her current counsel as her representative before OWCP. Also submitted was a letter dated April 21, 2015 noting that she was no longer represented by her prior representative, Lenin Perez.

In a letter dated May 20, 2015, OWCP acknowledged receipt of appellant's authorization to change his representative before OWCP and advised counsel that appellant's claim had been denied and instructed him to refer to the appeal rights attached to that decision if he wished to appeal appellant's claim.

In a letter dated October 24, 2015 and received on November 2, 2015, appellant requested reconsideration. She indicated that shortly after her injury her attending physician closed his practice which made it difficult to obtain her medical records. Appellant submitted a floor plan of the work area which she believed explained the extenuating circumstances which contributed to her injury. She also submitted information on the deficient equipment she was issued at work. Appellant noted that she was released to limited duty on November 12, 2012 but her supervisor denied her modified-duty request. She had been off work since June 17, 2014 due to a separate work injury to her spine for which she had a spinal fusion. Appellant submitted a statement of contributing factors to her injury on December 30, 2012, reiterated the factual circumstances of her injury, and submitted additional information.

Appellant resubmitted the October 31, 2012 Form CA-1. She submitted a duty status report dated November 1, 2012 from Dr. Jones who diagnosed lateral meniscus tear and cervical disc disease. Dr. Jones noted that appellant was totally disabled. A duty status report from Dr. Jones dated November 12, 2012 noted that appellant could return to work full time with restrictions. In a December 3, 2012 report, he noted that appellant injured her left knee at work on October 30, 2012. Appellant reported that while at work she turned to push a cart and her left knee popped. Dr. Jones noted a left knee MRI scan revealed degenerative changes of the medial joint compartment and medial meniscus. He diagnosed knee injury, swelling and degenerative joint changes. Dr. Jones opined that appellant had osteoarthritis and degenerative joint changes and the injury she sustained to her knee had aggravated these conditions as evidenced by the swelling and tenderness observed in the area. He had returned appellant to light duty on November 19, 2012.

By decision dated November 12, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On November 17, 2015 appellant, through counsel, again requested reconsideration. Counsel asserted that the June 27, 2013 report from Dr. Jones was a reconsideration request. He noted that the report did not contain the words "reconsideration" but indicated that there is no requirement for those words to appear on the request. Counsel indicated that the report from Dr. Jones dated June 27, 2013 constituted a valid and timely request for reconsideration and should be sufficient for OWCP to conduct a merit review.

By decision dated February 3, 2016, OWCP denied appellant's request for reconsideration finding it was untimely filed and failed to demonstrate clear evidence of error. It determined that Dr. Jones was not appellant's authorized representative and appellant did not request that her file be reviewed.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[2] This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of the OWCP decision for which review is sought.[3] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[4]

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.[5]

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,[6] is positive, precise, and explicit, and manifests on its face that OWCP committed an error.[7] The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to

[2] 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

[3] 20 C.F.R. § 10.607(a).

[4] *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

[6] *Dean D. Beets*, 43 ECAB 1153 (1992).

[7] *Leona N. Travis*, 43 ECAB 227 (1991).

show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.[8]

ANALYSIS

OWCP issued a merit decision in appellant's claim on December 20, 2012. Appellant requested reconsideration on October 24 and November 17, 2015. Both reconsideration requests were more than one year after OWCP's December 20, 2012 decision. Thus, the requests were untimely filed.

In the most recent reconsideration request, counsel contends that the June 27, 2013 report from Dr. Jones was a timely reconsideration request after the December 20, 2012 decision. He acknowledged that the report did not contain the words "reconsideration" but indicated that there is no requirement for those words to appear on a reconsideration request. Counsel also contended that the report from Dr. Jones dated June 27, 2013 constituted a valid and timely request for reconsideration and should be sufficient for OWCP to conduct a merit review. However, appellant did not submit that document. In each of the examples provided by counsel where a document was considered to be a request for reconsideration, the document had been submitted by either appellant or his or her counsel or representative of record. The document in this case was submitted by appellant's treating physician.[9] Dr. Jones was not appellant's authorized representative and thus could not act in her stead.[10] OWCP regulations state that "an employee (or representative)" may seek a reconsideration request.[11] Appellant, therefore, did not file a timely reconsideration request after OWCP's December 20, 2012 decision. She must therefore demonstrate clear evidence of error on the part of OWCP in the December 20, 2012 decision.

Appellant has failed to submit any evidence or argument which manifests on its face that OWCP committed an error in its decision. In a letter dated October 24, 2015, and her statement of contributing factors, appellant indicated that shortly after her injury her attending physician closed his practice which made it difficult to obtain her medical records. Her assertions included that she was required to use deficient equipment to perform her job and that her supervisor denied her request for modified duty. Appellant submitted a statement of contributing factors to her injury on December 30, 2012, reiterated the factual circumstances of her injury, and submitted information supporting her challenge to OWCP's denial of her knee injury claim. While she addressed her disagreement with OWCP's denial of her traumatic injury claim,

[8] *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

[9] *See id.; see also Nancy Marcano*, 50 ECAB 110 (1998) (where the Board found that OWCP's regulations regarding the representation of claimants clearly requires that a written notice, signed by the claimant, appointing a representative be sent to OWCP authorizing him to act as appellant's official representative before OWCP for the purpose of filing a reconsideration request).

[10] *See Ira D. Gray*, 45 ECAB 445, 447 (1994).

[11] *See* 20 C.F.R. § 10.606 (regarding how reconsideration is to be requested).

appellant's general allegations do not raise a substantial question as to the correctness of OWCP's decision. OWCP properly found that appellant's statements did not establish clear evidence of error.

Following OWCP's December 20, 2012 decision, appellant also submitted additional medical evidence. In reports dated June 27 and December 3, 2013, Dr. Jones noted that appellant's knee injury was denied by OWCP as causal relationship was not established. He noted that appellant injured her knee on October 30, 2012 pushing a cart weighing approximately 487 pounds when she turned and her knee "popped." Dr. Jones diagnosed partial meniscus tear that resolved. He noted that although appellant had mild osteoarthritis and degenerative changes he opined that pushing the heavy cart aggravated her condition and caused the injury. Appellant submitted duty status reports dated November 1 and 12, 2012 from Dr. Jones who diagnosed lateral meniscus tear and cervical disc disease. Dr. Jones noted appellant's disability status. In reports dated December 12, 2012 and February 12, 2013, he noted treating her for a twisted left knee injury which had resolved. Appellant also provided reports of diagnostic testing. Although some of these reports support causal relationship, they are insufficient to demonstrate clear evidence of error. The term clear evidence of error is intended to represent a difficult standard. The submission of 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.[12] This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that this medical evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not demonstrated clear evidence of error.

On appeal, counsel reiterates assertions made before OWCP indicating that the report from Dr. Jones dated June 27, 2013 constitutes a valid and timely request for reconsideration and should be sufficient to warrant a merit review. As noted above, there is no evidence that Dr. Jones was authorized to represent appellant on July 3, 2013. Section 10.700(a) of OWCP's implementing federal regulations regarding the representation of claimants clearly indicates that, for a representative to be recognized by OWCP, a written notice, signed by the claimant, appointing a representative must be sent to OWCP.[13] As explained, appellant also has not demonstrated clear evidence of error by OWCP.

CONCLUSION

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

[12] *D.G.*, 59 ECAB 455 (2008); *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011).

[13] 20 C.F.R. § 10.700.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2016 and November 12, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 25, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board