

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

E.D., Appellant)	
)	
and)	Docket No. 16-0708
)	Issued: January 17, 2017
U.S. POSTAL SERVICE, POST OFFICE,)	
Fenton, MO, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 26, 2016 appellant filed a timely appeal from September 29, 2015 and January 4, 2016 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 13, 2013, to the filing of this 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 this case.

ISSUE

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

On appeal appellant contends that she demonstrated clear evidence of error as: (1) she submitted evidence from 1994 that made the Board's April 26, 2011 decision invalid; (2) that she submitted evidence that made OWCP's March 13, 2013 decision invalid; (3) that her file contained evidence improperly filed from other claims; and (4) that OWCP lost crucial pieces of her record.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 7, 1994 appellant, then a 28-year old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she slipped on snow while exiting her vehicle to deliver mail and fractured her left ankle. OWCP accepted appellant's claim for trimalleolar fracture of the left ankle and open reduction internal fixation left medial and lateral malleoli. Appellant returned to work with the employing establishment on January 13, 1994 with restrictions and was released to full-duty work on July 8, 1994. Her employment with the employing establishment terminated on August 2, 1994 after which time she performed nonfederal employment.

On December 23, 2008 OWCP denied appellant's claim for wage-loss compensation from December 20, 1995 through August 31, 2004 as the medical evidence of record failed to establish a causal connection between the January 7, 1994 employment injury and the claimed period of disability. Appellant requested a hearing. The hearing representative affirmed the December 23, 2008 decision on April 7, 2009. Appellant subsequently requested reconsideration. By decision dated December 16, 2009, OWCP denied modification of the April 7, 2009 decision, and this decision was affirmed by the Board on April 26, 2011.³

On August 26, 2009 OWCP terminated appellant's wage-loss compensation benefits, effective August 30, 2009, after finding that her injury-related disability had ceased. Appellant filed numerous requests for reconsideration that were denied by OWCP. OWCP last reviewed the merits of this claim on March 13, 2013 and denied modification. It subsequently declined appellant's request for merit review in decisions dated July 15, September 16 and November 15, 2013, and March 21, 2014.

In a decision dated August 15, 2014, the Board affirmed the November 15, 2013 and March 21, 2014 OWCP decisions which denied reconsideration without conducting a merit review regarding the termination of benefits.⁴

On June 1, 2015 appellant asked OWCP to reconsider the termination decision of August 26, 2009. Along with appellant's request for reconsideration, OWCP received a magnetic resonance imaging (MRI) scan of the lumbar spine dated August 7, 2014, which was interpreted as showing degenerative changes in the lumbar spine.

Appellant again requested that OWCP reconsider her claim by letter dated June 17, 2015, received by OWCP on June 22, 2015. She related that she was enclosing MRI scans as supporting medical evidence. OWCP received with appellant's request for reconsideration a May 2, 2012 MRI scan of the left ankle which showed medial malleolar postsurgical changes

² Docket No. 10-1245 (issued April 26, 2011); Docket No. 14-1102 (issued August 15, 2014).

³ *Id.*

⁴ *Id.*

with likely residual postoperative thickening of the tibionavicular and tibiocalcaneal ligaments and no acute osseous ligament or tendon abnormality.

On August 3, 2015 OWCP received a letter dated July 29, 2015, wherein appellant again asked OWCP to reconsider the decision of August 26, 2009 and the Board's April 26, 2011 decision. Appellant forwarded two MRI scan reports which she claimed showed a consequential injury of the back and continuing residuals and disability due to her accepted conditions which she alleged was sufficient to demonstrate clear evidence of error. She also submitted an October 5, 2006 report by Dr. David E. Chalk, a Board-certified orthopedic surgeon.

By decision dated September 29, 2015, OWCP denied appellant's requests for reconsideration of the merits of its March 13, 2013 decision as they were untimely filed and failed to demonstrate clear evidence of error.

On October 29, 2015 OWCP received appellant's October 26, 2015 request for reconsideration of the March 13, 2013 merit decision. Appellant resubmitted the October 5, 2006 medical report by Dr. Chalk. She also alleged that the May 2, 2012 ankle MRI scan, the January 2, 2013 narrative report, and the January 2, 2013 duty status report (Form CA-17) were all in the record prior to the March 13, 2013 decision.

By decision dated January 4, 2016, OWCP denied appellant's October 29, 2015 reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶ 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.⁷

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁸ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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 demonstrates clear evidence of error on the part of OWCP.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To demonstrate 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.¹⁵

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for reconsideration of the merits as the request was untimely filed and failed to demonstrate clear evidence of error.

Prior to OWCP's September 29, 2015 decision, OWCP received appellant's requests reconsideration on June 1 and 22, and August 3, 2015. As these requests were received more than one year after the last merit decision, dated March 13, 2013, the reconsideration requests were untimely filed.¹⁶ Likewise, prior to OWCP's January 4, 2016 decision, OWCP received appellant's October 26, 2015 request for reconsideration on October 29, 2015. As this request

⁹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). 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 2.1602.3c.

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁶ Insofar as appellant also requested on July 29, 2015 that OWCP reconsider the claim for wage-loss benefits for the period December 20, 1995 through August 31, 2004, OWCP has not issued a final decision regarding that aspect of appellant's request for reconsideration.

was also received more than one year following the March 13, 2013 merit decision, it was untimely filed.

The Board further finds that appellant's untimely requests for reconsideration fail to demonstrate clear evidence of error. In support of her requests for reconsideration, appellant submitted an October 5, 2006 report by Dr. Chalk, a report that was already in the record and had been previously considered by OWCP. She also submitted MRI scan reports that were not previously in evidence. However, these reports do not demonstrate clear evidence of error as they do not establish on their face that OWCP improperly terminated benefits effective August 30, 2009.¹⁷ These reports do not address the issue of continuing disability from the accepted employment condition.

Appellant argued in her reconsideration request dated October 29, 2015 that the May 2, 2012 MRI scan report was before OWCP at the time of the March 13, 2013 decision. She is incorrect as this MRI scan was first submitted with her request for reconsideration on October 29, 2015. Finally, appellant contended that the January 2, 2013 narrative and the January 2, 2013 duty status reports were all in the record prior to the March 13, 2013 decision. These items were in evidence prior to the March 13, 2013 decision, as is demonstrated by the fact that both of these items of evidence were discussed and reviewed by OWCP in the March 13, 2013 decision.

On appeal appellant argues that the medical evidence submitted prior to the last merit decision establishes that the March 13, 2013 decision was invalid. As previously noted, the Board does not have jurisdiction to reconsider the merits of the case and can only address whether OWCP properly denied merit review of the case.¹⁸ Appellant has not submitted any evidence to support that crucial pieces of information were not in the record.

The Board notes that clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed well-rationalized 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.¹⁹

Accordingly, the Board finds that OWCP properly denied appellant's untimely reconsideration requests, as they were untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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

¹⁷ *Supra* note 9.

¹⁸ 20 C.F.R. § 501.3(3); *see also* *F.W.*, Docket No. 15-1891 (issued January 13, 2016).

¹⁹ *B.W.*, Docket No. 15-0892 (issued August 26, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 4, 2016 and September 29, 2015 are affirmed.

Issued: January 17, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board