

giving the weight of the medical opinion to an OWCP referral physician as to whether appellant had any employment-related residuals or disability.

FACTUAL HISTORY

On May 21, 1993 appellant, then a 35-year-old clerk typist, filed an occupational disease claim (Form CA-2) for carpal tunnel syndrome. OWCP accepted the claim for bilateral carpal tunnel syndrome, bilateral trigger finger, right de Quervain's tenosynovitis, and right radial styloid tenosynovitis. It authorized right carpal tunnel, right de Quervain's, and right thumb releases performed on March 17, 1998 and left trigger thumb release performed on July 21, 1998. Appellant stopped work at the employing establishment in January 2000. She has not returned to work.

In a February 9, 2000 decision, OWCP granted appellant a schedule award for four percent permanent impairment of the right upper extremity and six percent permanent impairment of the left upper extremity. Appellant had requested an increased schedule award but, on May 13, 2005, OWCP denied the claim.

Appellant submitted medical evidence, including treatment notes, from an unknown provider, dated November 4, 1998 to July 5, 2000, magnetic resonance imaging (MRI) scan reports dated March 10, 1998 and July 10, 2000 from Dr. Yong W. Kim, a Board-certified radiologist, progress reports dated November 20 and December 6, 2001 from Dr. William W. Dzwierzynski, a Board-certified plastic surgeon specializing in hand surgery, and a letter dated October 27, 2003 from Dr. John T. Kroner, a Board-certified orthopedic surgeon, which addressed her left knee, cervical, and bilateral upper extremity conditions.

On August 26, 2005 OWCP accepted appellant's claim for mental disorder secondary to her medical condition.

In an April 24, 2006 decision, OWCP denied appellant's claim for compensation for leave without pay from April 18, 2002 to September 20, 2003. It noted that disability compensation covering the period July 1, 2001 to June 3, 2003 had been paid in part through April 17, 2002. In a June 12, 2006 decision, OWCP vacated the April 24, 2006 decision. It found that appellant was entitled to compensation from April 18, 2002 to April 6, 2003.

By decision dated March 7, 2011, OWCP reduced appellant's wage-loss compensation effective that date as she had the capacity to earn wages in a constructed position of receptionist. Appellant continued to receive partial disability compensation payments on the periodic rolls.

In 2013 OWCP referred appellant to Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon, for a second opinion to determine the nature and extent of her employment-related conditions. In an October 25, 2013 medical report, Dr. Lampert provided appellant's history of injury and medical and family background. He reviewed medical records, reported examination findings, and diagnosed postoperative right de Quervain's surgery, bilateral carpal tunnel surgery, and multiple surgeries on her right hand fingers. Dr. Lampert advised that there was no objective evidence to indicate that appellant's ongoing subjective complaints were secondary to her accepted employment injuries. He further advised that there was no evidence to

indicate either a temporary or permanent aggravation. Dr. Lampert opined that, there was no objective evidence to indicate any residual disability due to appellant's accepted conditions. He also opined that she had reached maximum medical improvement and released her to her date-of-injury work.

In a notice dated November 12, 2013, OWCP advised appellant that it proposed to terminate her compensation benefits based on the weight of the medical evidence, as represented by Dr. Lampert. It afforded her 30 days to submit additional evidence or argument in disagreement with the proposed action.

In a December 20, 2013 decision, OWCP terminated appellant's partial wage-loss compensation and medical benefits effective that date. It found that the weight of the evidence was represented by Dr. Lampert. OWCP noted that appellant had failed to submit any evidence in response to the November 12, 2013 termination notice.

Appellant resubmitted the February 9 to July 5, 2000 treatment notes with an unknown signature, Dr. Kim's March 10, 1998 and July 19, 2000 MRI scan reports, Dr. Dzwierzynski's November 20, 2001 progress report, and Dr. Kroner's October 27, 2003 letter.

In a lumbar MRI scan report with a partial date of 1999, Dr. Kim found no acute fracture. He found facet arthropathy from L3 through S1 with narrowing of disc space at L5-S1.

In an April 8, 2014 letter, appellant requested maintenance payments from OWCP regarding her participation in a vocational rehabilitation program in 2009.

On October 5, 2015 appellant requested reconsideration of the December 20, 2013 decision. She disagreed with Dr. Lampert's opinion and contended that she continued to suffer from residuals of her accepted work-related conditions. Appellant asserted that she had been unable to receive any medical treatment for her accepted emotional condition.

Appellant submitted OWCP's August 26, 2005 letter in which it had expanded her accepted conditions to include a mental disorder secondary to her medical condition.

In a September 30, 2013 report, Dr. Kristine Brazzel, a clinical psychologist, conducted a presurgical psychological evaluation to assess appellant's candidacy for a vertical sleeve gastrectomy. She provided a history of appellant's weight gain and noted that she experienced stress from her prior job at the employing establishment and having to file a workers' compensation claim for on-the-job injuries. Dr. Brazzel reported findings on psychiatric examination and diagnosed recurrent moderate major depressive disorder, post-traumatic stress disorder (by history), and victim of childhood abuse/neglect on Axis I, borderline personality disorder traits on Axis II, morbid obesity on Axis III, multiple stressors related to appellant's family of origin on Axis IV, and a global assessment functioning score of 65 on Axis V. She recommended outpatient psychotherapy and advised that once her depressive symptoms were reduced, coping skills increased, and stress decreased, she would likely be a reasonable candidate for the proposed surgery. Dr. Brazzel also recommended psychotropic medication.

By decision dated December 31, 2015, OWCP denied appellant's request for reconsideration finding it untimely filed and that it failed to demonstrate clear evidence of error.

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 OWCP's 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 and 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 demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated 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

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations⁹ and procedures¹⁰ establish a one-year time

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).

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

⁹ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.4 (October 2011); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's December 20, 2013 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive her request until October 5, 2015, it was filed outside the one-year time period. As appellant's October 5, 2015 request for reconsideration was submitted more than one year after the December 20, 2013 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹¹

The Board finds that appellant has failed to demonstrate clear evidence of error. In her request for reconsideration, appellant disagreed with OWCP's decision, terminating her partial wage-loss compensation and medical benefits effective December 20, 2013 based on the medical opinion of Dr. Lampert, an OWCP referral physician, who opined that she no longer had any residuals or disability causally related to her accepted employment injuries. She asserted that she continued to have residuals of her accepted work-related conditions, particularly her accepted emotional condition for which she was unable to receive medical treatment. The Board notes that while appellant addressed her disagreement with OWCP's termination decision, her general contentions do not demonstrate clear evidence of error as they do not raise a substantial question as to the correctness of OWCP's most recent merit decision which terminated her compensation benefits.

The Board notes that the underlying issue in her claim was medical in nature. The Board also notes that the term clear evidence of error is intended to represent a difficult standard.¹² Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.¹³ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁴

Appellant submitted Dr. Brazzel's September 30, 2013 report in which the physician assessed her candidacy for a vertical sleeve gastrectomy. Dr. Brazzel reported findings on examination and diagnosed recurrent moderate major depressive disorder, post-traumatic stress disorder (by history), and victim of childhood abuse/neglect on Axis I, borderline personality disorder traits on Axis II, morbid obesity on Axis III, multiple stressors related to appellant's family of origin on Axis IV, and a global assessment functioning score of 65 on Axis V. She opined that appellant would likely be a reasonable candidate for the proposed vertical sleeve gastrectomy following a reduction of her depressive symptoms, an increase in her coping skills, and a decrease of her stress with outpatient psychotherapy and psychotropic medication.

¹¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹² Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5 (October 2011); see *supra* note 6.

¹³ See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹⁴ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

Dr. Brazzel's report is insufficient to demonstrate clear evidence of error as it fails to demonstrate any error in OWCP's December 20, 2013 decision.¹⁵

Similarly, Dr. Kim's 1999 lumbar MRI scan report finding that appellant had no acute fracture and facet arthropathy from L3 through S1 with narrowing of disc space at L5-S1 is insufficient to demonstrate clear evidence of error. The reports do not raise any error in the underlying December 20, 2013 termination decision.¹⁶

Appellant resubmitted the February 9 to July 5, 2000 treatment notes from an unknown provider, Dr. Kim's March 10, 1998 and July 19, 2000 MRI scan reports, Dr. Dzwierzynski's November 20, 2001 progress report, and Dr. Kroner's October 27, 2003 letter. OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in terminating her compensation benefits.¹⁷ Thus, these treatment notes and reports are insufficient to discharge appellant's burden of proof, as their resubmission is insufficient to raise a substantial question as to the correctness of OWCP's decision.

Appellant submitted an April 8, 2014 letter, which addressed her request for maintenance payments for participating in a vocational rehabilitation program. However, this letter fails to establish any error in OWCP's December 20, 2013 decision.¹⁸

The Board finds that OWCP properly found that appellant's October 5, 2015 request for reconsideration failed to demonstrate clear evidence of error. It therefore properly denied appellant's reconsideration request.

On appeal, appellant reiterates assertions that she made before OWCP indicating that she had submitted sufficient medical evidence to establish continuing employment-related residuals and disability and that an OWCP referral physician's report did not constitute the weight of the medical opinion evidence. However, as noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's termination decision for which review is sought.

CONCLUSION

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

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See S.E.*, Docket No. 16-1258 (issued December 5, 2016).

¹⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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