

ISSUE

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

FACTUAL HISTORY

On August 13, 2014 appellant, then a 49-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on June 4, 2014 at 7:30 a.m. she slipped and almost fell in the parking lot. She noted that as she stepped out of her car and up onto the curb her foot slipped multiple times. Appellant alleged that she sprained her right ring finger, fractured her right hand, dislocated three middle toes, and bruised her right ankle.

In a letter dated August 21, 2014, OWCP noted that appellant had not filed her traumatic injury claim within 30 days and was not entitled to continuation of pay (COP). In a separate letter of the same date, it requested additional factual and medical evidence supporting appellant's traumatic injury claim.

Dr. Christine Bosserman, an emergency medicine physician, examined appellant on September 12, 2014 and noted that appellant had slipped on the curb in the parking lot with multiple twists and falls without hitting the asphalt. She related that appellant had placed her right foot on the curb and slipped off three times while trying to move along the length of her car. Dr. Bosserman indicated that appellant injured her right foot, toes, ankle, right ring finger, and ribs. Appellant had initially received care from a podiatrist. This injury aggravated preexisting right ankle arthritis. Dr. Bosserman diagnosed right foot joint pain.

By decision dated September 29, 2014, OWCP denied appellant's traumatic injury claim finding that she had not established that the employment incident occurred as alleged due to delays in reporting the incident, delay in seeking medical treatment, and the failure to offer a clear description of the employment incident. It also noted that she failed to submit medical evidence of a diagnosed condition.

Appellant submitted a narrative statement describing the events of June 4, 2014. She noted that she was parked in the nonpatient parking lot next to the curb. Appellant stepped out of her car with her right foot on the curb and her left foot on the asphalt. Her right foot slipped from the curb and twisted. Appellant repeated this motion twice more to get to the end of her car. Her right foot began hurting and she sprained her ring finger on her right hand. Appellant arrived at work at 7:30 a.m. and worked through lunch. She contacted her primary care physician who ordered x-rays, wrapped her foot, and referred her to a podiatrist. The podiatrist prescribed a cam walker which appellant wore for three weeks with no improvement. She then sought treatment from Dr. Bosserman.

Dr. Kim Yen Vo, a Board-certified family practitioner, examined appellant on June 5, 2014 for right foot pain. Appellant included e-mails dated June 5, 2014 between Dr. Vo and appellant noting that she had slipped the previous week and was experiencing ankle pain after her foot slid off the curb and twisted. Appellant indicated that she had experienced this pain for three days. On June 6, 2014 Dr. Vo provided results on examination and diagnosed right foot

pain caused by slipping, tripping, or stumbling as well as right ankle arthritis and adjustment disorder with anxiety. She listed appellant's date of injury as May 28, 2014 when she was stepping out from her car onto the curb and her right foot slipped with right ankle inversion.

Appellant also provided her treatment notes from Dr. Jake Lee, a podiatrist, beginning on July 18, 2014.

Dr. Bosserman completed a report on October 6, 2014 and found moderate degenerative osteoarthritis of the anterior medial tibiotalar joint and mild-to-moderate degenerative osteoarthritis of the posterior subtalar joint. She again diagnosed right foot joint pain.

Dr. Masoud Ghalambor, a Board-certified orthopedic surgeon, examined appellant on October 24, 2014. He described her history of injury as falling off a curb at work on June 4, 2014 injuring her right foot. Dr. Ghalambor found very limited range of motion in the right ankle and crepitus with movement. He diagnosed closed fracture of the right metatarsal bones, traumatic arthropathy right ankle and foot with metatarsal stress fracture, and preexisting right ankle post-traumatic arthritis and talus fracture malunion. Dr. Ghalambor found that as a result of her industrial injury appellant sustained an overloading of the right lateral foot with stress fracture formation in the fourth and fifth metatarsals. On December 1, 2014 he noted that appellant had experienced improvement with the cam walker and should continue to wear this device.

Appellant requested an oral hearing from OWCP's Branch of Hearings and Review on January 7, 2015. By decision dated February 23, 2015, the Branch of Hearings and Review denied appellant's request for an oral hearing as it was untimely.

In a letter dated January 22, 2016, counsel requested that OWCP rescind the September 29, 2014 decision based on a report from Dr. Ghalambor dated December 22, 2015. In this report, Dr. Ghalambor noted that he first examined appellant on October 24, 2014 and listed her date of injury as June 4, 2014. He indicated that the exact nature of appellant's injury was unknown and that it was more than likely a twisting injury due to stepping off a curb. Dr. Ghalambor opined that, as a result of the twisting injury, appellant was bearing more weight on the outside of her foot and eventually developed stress fractures. He noted that appellant developed stress fractures as she had a preexisting severe arthritis of the right ankle and subtalar joint.

On May 26, 2016 counsel noted that the motion to rescind should be considered a request for reconsideration.

By decision dated July 15, 2016, OWCP declined to reopen appellant's claim for consideration of the merits finding that the January 22, 2016 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request, the "received date" in the Integrated Federal Employee's Compensation System (iFECS).⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP's procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration 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 be 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 demonstrate 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

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016). *G.F.*, Docket No. 15-1053 (September 11, 2015).

⁷ *Supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

⁸ *Supra* note 4 at 770.

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

¹⁰ *Supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5 at 968.

¹³ *Supra* note 11.

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's decision.¹⁵ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

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

Counsel requested reconsideration of OWCP's September 29, 2014 merit decision on January 26, 2016. As this request was not received within one year of the most recent merit decision, the Board finds that OWCP properly determined that it was untimely.

The Board further finds that appellant's request for reconsideration failed to demonstrate clear evidence of error. OWCP denied appellant's traumatic injury claim finding as she had not established that the employment incident occurred as alleged. Following the September 29, 2014 merit decision, appellant submitted a factual statement as well as medical evidence from Drs. Vo, Lee, and Ghalambor. This evidence casts further doubt on the timing of appellant's alleged employment incident. Dr. Vo indicated that appellant sustained her right ankle injury on May 28, 2014. This date is in keeping with the e-mail correspondence between appellant and Dr. Vo in which appellant noted on June 5, 2014 that her ankle pain had continued over several days.

Furthermore, Dr. Ghalambor's December 22, 2015 note attributed appellant's diagnosed stress fractures not to her employment incident, but rather to the act of walking on her right foot for several months after the initial injury.

The Board finds that the additional evidence submitted by appellant does not shift the weight of the evidence in favor of the claimant nor does it raise a substantial question as to the correctness of OWCP's decision. Therefore, appellant has failed to demonstrate clear evidence of error in her untimely request for reconsideration.

CONCLUSION

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

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

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *Nancy Marciano*, 50 ECAB 110 (1998).

ORDER

IT IS HEREBY ORDERED THAT July 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2017
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