

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

J.G., Appellant)
and) Docket No. 17-0709
U.S. POSTAL SERVICE, POST OFFICE,) Issued: July 21, 2017
Big Lake, MN, Employer)
Big Lake, MN, Employer)

)

Appearances:
Allen Webb, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 8, 2016 appellant, through counsel, filed a timely appeal of a December 14, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision on September 28, 2015 to the filing of this appeal, pursuant to 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 reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

FACTUAL HISTORY

On April 29, 2015 appellant, then a 53-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging a low back injury in the performance of duty on September 25, 2013. She indicated on the claim form that she backed into a cart that was level with her low back. Appellant did not stop work.

On May 8, 2015 OWCP advised appellant that the evidence of record was insufficient to establish her claim. Appellant was informed that further factual evidence was necessary to establish that the incident occurred as alleged and that it caused injury. She was afforded 30 days to submit the necessary factual and medical evidence.

The medical evidence received thereafter included a May 21, 2015 form report (Form CA-20) from Dr. Steven Stulc, an osteopath. Dr. Stulc wrote that one and a half years earlier appellant was hit by a cart, and he diagnosed lumbar spondylosis and lumbago. He checked a box marked "yes" indicating that the conditions were causally related to employment.

On May 26, 2015 OWCP received additional statements from appellant wherein she again described how she was hit by a cart. Appellant provided diagrams of the scene of the incident.

By decision dated June 12, 2015, OWCP denied the claim for compensation. It accepted that the incident occurred as alleged, but found that the medical evidence of record was insufficient to establish the claim.

Appellant requested reconsideration on July 14, 2015. She submitted a June 22, 2015 report from Dr. Stulc, who again reported appellant had injured her back one and a half years ago when she was hit in the back by a cart. Dr. Stulc reported that a magnetic resonance imaging (MRI) scan showed disc desiccation at multiple levels and lumbar facet arthropathy at L4-5 and L5-S1. He wrote that he believed it was a work injury, given appellant's "historical features." In a report dated July 27, 2015, Dr. Stulc indicated that appellant noted improvement with her low back pain.

By decision dated September 28, 2015, OWCP reviewed the merits of the claim. It found the evidence of record was insufficient to modify the June 12, 2015 decision, as there was no rationalized medical evidence.

On September 30, 2016 OWCP received a reconsideration request dated September 26, 2016 from counsel. Appellant submitted a September 22, 2016 report from Dr. Stulc, providing a history that appellant was struck by a cart on September 24, 2013 that had been pushed by a coworker. Dr. Stulc reported that appellant denied having back pain prior to the incident. He opined that given that appellant did not have prior pain, experienced pain following the incident, and continued with chronic back pain, it was more likely than not the incident at work precipitated the chronic back pain. Dr. Stulc wrote that in many cases patients could have degenerative changes that were asymptomatic until an injury occurred.

The record also contains an August 11, 2016 report from Dr. Stulc, received by OWCP on August 31, 2016. Dr. Stulc reported appellant had right back pain and occasional right leg

pain. On November 1, 2016 appellant submitted an October 13, 2016 report from Dr. Stulc indicating that appellant was treated for low back pain.

OWCP also received a September 25, 2016 report from a physician assistant.

By decision dated December 14, 2016, OWCP found appellant's reconsideration was untimely filed. It also found that appellant had failed to demonstrate clear evidence of error in OWCP's denial of the claim.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.² The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."³

According to 5 U.S.C. § 8128(a), a claimant is not entitled 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 under 5 U.S.C. § 8128(a) of FECA.⁶ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁸

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.605 (2012).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.607 (2012).

⁸ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

OWCP denied appellant's claim for a back injury on September 25, 2013. The last decision on the merits of the claim was dated September 28, 2015. Appellant had one year to timely request reconsideration. Pursuant to 20 C.F.R. § 10.607, as noted above, the application for reconsideration must be received by OWCP within one year of September 28, 2015 to be considered timely. According to OWCP procedures, the date received is determined by the document received date in the Integrated Federal Employees' Compensation System (iFECS).¹⁴ In this case the date received in iFECS was Friday, September 30, 2016. Since this is more than one year after the September 28, 2015 merit decision, it is an untimely reconsideration request.

As the reconsideration request was untimely, appellant is not entitled to a merit review unless she demonstrates clear evidence in OWCP's decision denying her claim. In this case appellant submitted a September 22, 2016 report from Dr. Stulc, who opined that appellant had suffered an employment-related back injury from the September 2013 employment incident when she was struck by a cart. Dr. Stulc refers to a lack of symptoms prior to the incident, but the Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury, but symptomatic after it, is not sufficient, without supporting rationale, to establish causal relationship.¹⁵ Moreover, even if the medical evidence included a detailed, well-rationalized medical report which, if submitted before

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹³ See *C.B.*, Docket No. 16-0008 (issued February 19, 2016); *B.C.*, Docket No. 15-0550 (issued January 28, 2016).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). This section provides that for decisions prior to August 29, 2011, the application for reconsideration must be mailed within one year.

¹⁵ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (because the employee is symptomatic after an injury is not sufficient to establish causal relationship without supporting rationale).

the denial was issued, could have created a conflict in medical opinion requiring further development, it is not clear evidence of error.¹⁶ The September 22, 2016 report does not shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.

Appellant submitted reports dated August 11 and October 13, 2016, which do not address the underlying medical issue. Also, the report from a physician assistant does not constitute competent medical evidence as a physician assistant is not considered a physician under 5 U.S.C. § 8101(2).¹⁷ This evidence does not shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.

The Board accordingly finds that appellant has failed to demonstrate clear evidence of error in this case. Appellant is therefore not entitled to a merit review of her claim.

In finding that appellant failed to demonstrate clear evidence of error, OWCP writes in the December 14, 2016 decision that new medical evidence is not used to determine error, and establishing error in the prior decision can only be based on evidence that was before OWCP at the time of the prior decision. As discussed above, even rationalized medical evidence that could have created a conflict is insufficient to demonstrate clear evidence of error. But clear evidence of error may be demonstrated by evidence that was not before OWCP at the time of the merit decision. The evidence submitted with an untimely reconsideration request must relate to the issue presented and the evidence that was before OWCP at the time of the prior decision.¹⁸ In the present case, the underlying issue was a medical issue, and appellant has not demonstrated clear evidence of error by OWCP.

On appeal counsel argues that OWCP did not properly review the September 22, 2016 report from Dr. Stulc. OWCP did indicate that it had received the September 22, 2016 report in the December 14, 2016 decision. For the reasons discussed above, the report is insufficient to demonstrate clear evidence of error.

CONCLUSION

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

¹⁶ *Supra* note 13.

¹⁷ *George H. Clark*, 56 ECAB 162 (2004).

¹⁸ *Supra* note 12. In *A.B.*, Docket No. 10-1070 (issued March 8, 2011), for example, claimant submitted new evidence with an untimely reconsideration request, including an Equal Employment Opportunity (EEO) decision relating to her allegations of error by the employing establishment. The Board found clear evidence of error was established.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 14, 2016 is affirmed.

Issued: July 21, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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