

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.

FACTUAL HISTORY

On October 5, 2011 appellant, then a 58-year-old part-time flexible clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 2011, while throwing a mail tray into a truck, she fell from the truck dock and broke her right leg and ankle. OWCP accepted her claim for bimalleolar open fracture of the right ankle and expanded her claim to include sprain of the back, lumbar region, and traumatic arthropathy of the right ankle and foot. Appellant stopped work on October 1, 2011 and worked intermittently thereafter.³

Appellant was treated by Dr. Joseph Galles, Jr., a Board-certified orthopedic surgeon, on October 1, 2011, who diagnosed grade 2 open right ankle fracture dislocation. On October 1, 2011 Dr. Galles performed an authorized irrigation and debridement followed by an open reduction internal fixation of grade 2 open right ankle fracture and diagnosed grade 2, open right ankle fracture dislocation. In reports dated October 10 and 17, 2011, he noted that appellant was doing remarkably well and placed her in a short leg fiberglass nonwalking cast.

On August 18, 2014 Dr. Thomas Klein, an osteopath, performed a left hip steroid injection with fluoroscopic guidance and diagnosed left hip pain.

On December 26, 2014 appellant requested an expansion of her claim to include a consequential injury to her left hip due to weakness and impairment caused by her accepted work-related injury. She reported balance issues and other side effects from her October 1, 2011 work injury. Appellant had been diagnosed with a work-related back sprain and she developed an altered gait pattern and left hip pain. She believed that the treatment records for her left hip condition clearly stated the relationship to the initial work injury.

Evidence submitted by appellant included a September 2, 2014 report from Dr. Galles, who treated her for left foot pain from a left third toe fracture. Dr. Galles noted that appellant experienced trauma at work on June 29, 2014 and an x-ray of the left third toe revealed solid healing of an oblique fracture. He diagnosed closed fracture of third toe. In an October 6, 2014 report, Dr. Galles saw appellant in follow up for right ankle pain. He noted that an electromyogram (EMG) and nerve conduction velocity (NCV) testing revealed evidence of pathology related to the posterior tibial nerve. Dr. Galles noted that appellant continued to experience dysesthesias and paresthesia of the right foot with incapacitating pain. He diagnosed tarsal tunnel syndrome and obesity. Appellant reported that she lost her balance as a result of issues related to the right ankle which caused her to fall injuring her left foot. Dr. Galles opined that the left toe injury would be related and secondary to her right ankle injury. He noted that he had nothing further to offer appellant. On January 16, 2015 appellant presented and reported severe pain with ambulatory activity. Dr. Galles noted that appellant failed extensive

³ On September 5, 2013 OWCP granted appellant a schedule award for six percent permanent impairment of the right leg. In subsequent decisions, most recently on December 16, 2015, it denied her claim for an additional award.

conservative measures and x-rays of the right ankle demonstrated post-traumatic arthritic changes of the tibiotalar joint with slight valgus alignment. He diagnosed osteoarthritis of ankle and obesity.

In a letter dated February 3, 2015, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim for a consequential left hip condition and requested that she submit such evidence, particularly requesting that she submit a reasoned opinion addressing the relationship of her claimed left hip condition and the October 1, 2011 accepted work injury.

In a March 20, 2015 report, an OWCP medical adviser opined that the medical evidence did not establish a left hip diagnosis causally related to the accepted right ankle injury.

On April 17, 2015 OWCP denied appellant's claim for a consequential left hip injury as the medical evidence of record did not demonstrate that the weakness or impairment caused by the accepted work-related injury led to the aggravation of the original injury or to a new consequential injury.

In an August 9, 2015 letter, appellant noted enclosing her latest medical report. An accompanying August 4, 2015 report from Dr. Brian J. Schultz, a Board-certified orthopedist, noted treating appellant for left hip and right ankle conditions. Dr. Schultz noted a history of injury and diagnosed localized primary osteoarthritis of the left pelvis and trauma arthropathy at the tibial joint of the right ankle. He opined that the findings in appellant's ankle were the result of her injury and her painful left hip was due to the chronic altered gait which occurred when favoring the right ankle. Dr. Schultz recommended physical therapy and an intra-articular cortisone injection.

In a letter dated August 31, 2015, OWCP acknowledged receipt of Dr. Schultz's August 4, 2015 medical report received after the final decision of April 17, 2015. It advised that if appellant wished to dispute that decision she must follow the appeal rights which accompanied it.

By letter dated February 6, 2016, appellant inquired about her claim for a schedule award due to her right ankle condition. In a March 1, 2016 statement, she sought reimbursement for compression stockings prescribed by Dr. Galles. In a March 2, 2016 letter, appellant advised OWCP regarding her work restrictions. She noted that her right ankle had never recovered and that she continued to have disability. In a March 5, 2016 statement, appellant indicated that on February 1, 2016 Dr. Galles indicated that she was totally disabled and recommended she seek a consultation with Dr. John E. Femino, a Board-certified orthopedic surgeon.

On an appeal request form dated March 1, 2016, but received by OWCP on April 22, 2016, appellant requested reconsideration of the April 17, 2015 decision. In an attached statement, she noted seeking a second opinion from Dr. Schultz on the expansion of her claim to include a left hip condition causally related to the original right ankle injury. Appellant reported trouble walking and pain. She submitted an April 5, 2016 statement and requested an explanation from OWCP for denying her claim for compensation for the period November 14,

2015 to March 4, 2016. Appellant requested a referral to Dr. Femino for surgical evaluation of the right ankle.⁴

In an undated report, Dr. Galles indicated that appellant sustained a grade 2 open right ankle fracture dislocation on October 11, 2011 while at work. Appellant underwent surgery for irrigation and debridement followed by open reduction internal fixation of the grade 2, open right ankle fracture. Dr. Galles noted that appellant was last seen on February 1, 2016 for right ankle pain. He noted that x-rays from January 16, 2015 revealed post-traumatic arthritic changes of the tibiotalar joint on the right side with slight valgus alignment as a result of the joint space. Dr. Galles indicated that appellant's initial open injury involved the tarsal tunnel area and her symptoms were likely due to scar tissue formation which occurred around the tarsal tunnel and could be a direct result of stretch injury to the tibial nerve. He noted that appellant developed arthritis of the right ankle from her grade 2 open right ankle fracture.

OWCP also received a field nurse report dated May 25, 2016 and personnel documents.

In a letter dated May 31, 2016, appellant, through counsel, noted his continuing representation of appellant. Counsel indicated that on March 1, 2016 appellant had filed a request for reconsideration of the April 17, 2015 decision which denied expansion of her claim to include a left hip condition.

Appellant filed several claims for compensation CA-7 forms for the period April 16 to June 25, 2016.

In a statement dated June 7, 2016, appellant requested OWCP to reconsider expanding her claim to include her left hip and referenced Dr. Schultz' August 4, 2015 report. She submitted a June 13, 2016 prescription note from Dr. Galles for compression hose. Appellant also submitted a June 28, 2016 report from Dr. Femino who treated her for right ankle pain. Dr. Femino noted that appellant was off work for five weeks and could return to work on August 2, 2016 with restrictions.

By decision dated July 6, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and 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.⁵ 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

⁴ In a letter dated May 25, 2016, OWCP instructed appellant to contact Dr. Femino directly for treatment and submit a written request to change physicians.

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

OWCP's decision for which review is sought.⁶ The Board found that imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

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 must reopen the case for merit review.⁸

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP⁹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹⁰ 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.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹² As appellant's request for reconsideration was not received by OWCP until April 22, 2016, more than one year after issuance of the last merit decision by OWCP on April 17, 2015, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In her reconsideration request, appellant disagreed with OWCP's April 17, 2015 decision denying her request to expand her claim to include a left hip condition. On May 31,

⁶ 20 C.F.R. § 10.607(a).

⁷ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *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 2016) (the term "clear evidence of error" is intended to represent a difficult standard).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹² 20 C.F.R. § 10.607(a).

2016 appellant, through counsel, asserted that appellant had filed on March 1, 2016 a request for reconsideration of the April 17, 2015 decision which denied expansion of her claim to include a left hip condition. Other statements dated March 1 and June 7, 2016 referenced an August 4, 2015 report from Dr. Schultz which addressed her left hip and right ankle conditions. Appellant requested OWCP to reconsider expanding her claim to include her left hip. The Board notes that, while appellant addressed her disagreement with OWCP's decision denying her claim for a left hip condition, her general allegations do not raise a substantial question as to the correctness of OWCP's most recent merit decision.

Appellant also submitted medical evidence. She submitted an August 4, 2015 report from Dr. Schultz who diagnosed localized primary osteoarthritis of the left pelvis and trauma arthropathy at the tibial joint of the right ankle. Dr. Schultz opined that the findings in appellant's ankle were the result of her injury and her painful left hip was due to the chronic altered gait which occurred when favoring the right ankle. While he provided support for causal relationship, his report did not demonstrate clear evidence of error. The Board notes that clear evidence of error is intended to represent a difficult standard. 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.¹³ The Board finds that this evidence does not rise to the level of clear evidence of error.

Appellant submitted a September 2, 2014 report from Dr. Galles who diagnosed closed fracture of the third toe. Dr. Galles noted that appellant experienced trauma at work on June 29, 2014 and sustained an oblique fracture. In an October 6, 2014 report, he noted EMG and NCV results revealed evidence of pathology related to posterior tibial nerve and he diagnosed tarsal tunnel syndrome and obesity. Similarly, on January 16, 2015, Dr. Galles diagnosed osteoarthritis of ankle and obesity. In an undated statement, he opined that appellant developed arthritis of the right ankle from her grade 2 open right ankle fracture. Likewise, in a June 28, 2016 report, Dr. Femino treated appellant for right ankle pain and noted that she was off work for five weeks. On August 18, 2014 Dr. Klein performed a left hip steroid injection with fluoroscopic guidance and diagnosed left hip pain. However, this evidence is insufficient to demonstrate clear evidence of error as not only do the reports fail to address the underlying factual issue in this case, they raise no error in OWCP's decision.¹⁴

Thus, the Board finds that OWCP properly found that appellant's March 1, 2016 request for reconsideration, received on April 22, 2016, was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant, through counsel, asserts that she timely submitted her request for reconsideration of the April 17, 2015 decision. As noted above, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁵

¹³ *D.G.*, 59 ECAB 455 (Docket No. 08-137, issued April 14, 2008).

¹⁴ *See F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error). *See also supra* note 13.

¹⁵ 20 C.F.R. § 10.607(a).

In this case, the reconsideration request was received by OWCP on April 22, 2016 and there is no other evidence to substantiate that it was timely received. Appellant further asserts that the medical evidence submitted with the request for reconsideration positively, precisely, and explicitly shows that OWCP's refusal to expand the accepted injuries to include the left hip was clearly in error. However, as explained above, the medical evidence submitted is insufficient to demonstrate clear evidence of error.

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.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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