

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

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Z.S., Appellant)	
)	
and)	Docket No. 16-1745
)	Issued: May 18, 2017
DEPARTMENT OF THE AIR FORCE,)	
AERONAUTICAL SYSTEMS CENTER,)	
WRIGHT-PATTERSON AIR FORCE BASE, OH,)	
Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 30, 2016 appellant filed a timely appeal from an April 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the last merit decision, dated January 23, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

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

¹ Appellant timely requested oral argument. However, the Board exercised its discretion and denied her request pursuant to 20 C.F.R. § 501.5(a). *See Order Denying Request for Oral Argument*, Docket No. 16-1745 (issued March 3, 2017).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.⁴

In an October 7, 2011 decision,⁵ the Board set aside OWCP's August 4, 2010 nonmerit decision denying appellant's request for reconsideration of its April 27, 2010 merit decision.⁶ The Board directed OWCP to conduct a merit review and issue an appropriate decision. In a decision dated August 15, 2012,⁷ the Board set aside a February 13, 2012 OWCP decision and remanded the case for further medical development as there remained a conflict in medical opinion. The Board noted that Dr. Pietro Seni, a Board-certified orthopedic surgeon and OWCP referral physician, produced a May 13, 2009 report in which he diagnosed severe degenerative left hip osteoarthritis and concluded that appellant had a preexisting arthritic condition, which ceased being aggravated by the January 27, 2004 fall in mid-February 2004. In contrast, Dr. Suzanne Croteau, an attending osteopath, produced an August 15, 2011 report in which she diagnosed left piriformis and hip strains and opined that the January 27, 2004 fall caused an injury to the left hip and piriformis muscle. She concluded that work factors contributed to the development of continuing erosive osteoarthritis. The Board ordered OWCP to refer appellant to a Board-certified impartial medical specialist for an opinion regarding whether her continuing left hip condition and need for total left hip replacement surgery on December 28, 2006 were work related.

On remand, OWCP referred appellant to Dr. Alan R. Kohlhaas, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding whether she continued to have a work-related left hip condition and whether her December 28, 2006 total left hip replacement surgery was necessitated by a work-related condition. In an April 10, 2013

³ Docket No. 11-0842 (issued October 7, 2011), Docket No. 12-0862 (issued August 15, 2012), and Docket No. 13-1499 (issued January 23, 2014).

⁴ On January 27, 2004 appellant, then a 57-year-old logistics management specialist, slipped and fell on ice at work. OWCP accepted her claim for back, face, scalp, and neck contusions under OWCP File No. xxxxxx160. On September 15, 2006 appellant filed an occupational disease claim (under File No. xxxxxx470) for left hip joint pain due to her temporary assignment in Germany for the period April 27 to June 9, 2005. On September 9, 2008 she filed another occupational disease claim (also under File No. xxxxxx470), alleging that her left hip joint symptoms were exacerbated by physical therapy in 2005. On December 15, 2009 OWCP expanded the claim to include temporary aggravation of preexisting left hip osteoarthritis. Appellant underwent total left hip replacement surgery on December 28, 2006, which was not authorized by OWCP, and later claimed that the surgery was necessitated by a work-related condition. The documents contained in File Nos. xxxxxx160 and xxxxxx470 have been administratively combined.

⁵ Docket No. 11-0842 (issued October 7, 2011).

⁶ In an April 27, 2010 decision, an OWCP hearing representative had determined that appellant ceased to have a work-related left hip condition by mid-February 2004 and that her December 28, 2006 total left hip replacement surgery was not necessitated by a work-related condition. She considered several reports of attending physicians, including a June 5, 2008 report of Dr. James Beegan, a Board-certified physical medicine and rehabilitation physician, and found that they did not establish appellant's claim of a continuing work-related left hip condition. In an August 4, 2010 decision, OWCP denied appellant's June 23, 2010 request for merit review of the April 27, 2010 decision.

⁷ Docket No. 12-0862 (issued August 15, 2012).

report, Dr. Kohlhaas opined that the fall on January 27, 2004 did not cause the degenerative changes that had continued to slowly progress over time in both hips. He noted that, following her January 27, 2004 fall, appellant had significant improvement and was able to return to a fairly active lifestyle. Dr. Kohlhaas opined that the temporary aggravation of a preexisting condition caused by the January 27, 2004 fall had ceased by the time of appellant's skiing trip in March 2005. He further opined that appellant's need for total left hip replacement surgery on December 28, 2006 was due to the natural progression of her left hip osteoarthritis that preexisted her fall on January 27, 2004. Dr. Kohlhaas opined that the most likely cause of her condition and need for surgery was a nonwork-related femur acetabulum impingement condition.

In an April 29, 2013 decision, OWCP determined that the previously accepted temporary aggravation of preexisting left hip osteoarthritis had ceased by March 2005 and that the December 28, 2006 total left hip replacement surgery was not necessitated by a work-related condition. Appellant appealed to the Board.

By decision dated January 23, 2014,⁸ the Board affirmed OWCP's April 29, 2013 decision finding that the work-related temporary aggravation of appellant's preexisting left hip osteoarthritis had ceased and that the December 28, 2006 total left hip replacement surgery was not necessitated by a work-related condition. The Board found that the weight of the medical opinion evidence rested with the opinion of Dr. Kohlhaas, the impartial medical specialist.

In a letter dated January 15, 2015 and received by OWCP on January 26, 2015, appellant requested reconsideration of OWCP's April 29, 2013 decision. She contended that the reports of her attending physicians, including the June 5, 2008 report of Dr. Beegan⁹ and the August 15, 2011 report of Dr. Croteau, established her claim that she had a continuing work-related left hip condition and that her December 28, 2006 total left hip replacement surgery was necessitated by a work-related condition. Appellant also argued that the April 10, 2013 report of Dr. Kohlhaas was insufficiently well rationalized to constitute the weight of the medical opinion evidence with respect to these matters.

Appellant submitted additional evidence in support of her reconsideration request including additional narrative statements which were similar to her January 15, 2015 statement, timelines she created concerning her medical treatment, administrative documents concerning her OWCP claims, and statements expressing her concerns about the processing of her OWCP claims.

In an April 27, 2016 decision, OWCP denied appellant's request for reconsideration of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error. Appellant's reconsideration request was received on January 26, 2015 more than one year after the issuance of the Board's January 23, 2014 merit decision. OWCP considered the reconsideration request under the clear evidence of error standard and found that appellant had not shown clear error in its April 29, 2013 decision. It noted that appellant was merely attempting to make arguments which had previously been considered by OWCP.

⁸ Docket No. 13-1499 (issued January 23, 2014).

⁹ *Supra* note 5.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁰ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹¹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹² OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”¹³ The request must establish on its face that such decision was erroneous.¹⁴ Where a request for reconsideration is untimely and fails to present any clear evidence of error, OWCP will deny the request without reopening the case for a review on the merits.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant’s January 26, 2015 request for reconsideration was untimely filed. The last merit decision of record was the Board’s January 23, 2014 decision, which affirmed OWCP’s April 29, 2013 decision regarding appellant’s ongoing left hip complaints and her prior left total hip arthroplasty. The one-year period for filing a request for reconsideration begins on the date of the original OWCP decision, but also accompanies any subsequent merit decision by the Board.¹⁶ As such, appellant had one year from the Board’s January 23, 2014 decision to timely request reconsideration. Her request would have been timely if received by OWCP on or before Friday, January 23, 2015. Although the request was dated January 15, 2015, OWCP did not receive it until January 26, 2015, which in

¹⁰ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.607.

¹² *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees’ Compensation System (iFECs). *Id.* at Chapter 2.1602.4b. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be mailed to OWCP within one year of OWCP’s decision for which review is sought. *Id.* at Chapter 2.1602.4e.

¹³ 20 C.F.R. § 10.607(b).

¹⁴ *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.608(b).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.1602.4a.

this case is the relevant date for purposes of determining timeliness.¹⁷ Because appellant's January 26, 2015 request for reconsideration was untimely, she must demonstrate clear evidence of error with respect to OWCP's April 29, 2013 merit decision.¹⁸

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its April 29, 2013 decision.

Appellant did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error in its April 29, 2013 decision.¹⁹ In her January 26, 2015 request for reconsideration, appellant argued that the reports of her attending physicians, including the June 5, 2008 report of Dr. Beegan and the August 15, 2011 report of Dr. Croteau, established her claim that she had a continuing work-related left hip condition and that her December 28, 2006 left total hip arthroplasty was necessitated by a work-related condition.²⁰ Appellant also argued that the April 10, 2013 report of Dr. Kohlhaas was not sufficiently well rationalized to constitute the weight of the medical opinion evidence with respect to these matters.

The Board notes that appellant's contentions made reference to evidence previously of record and already considered. OWCP had already considered the evidence mentioned by appellant when it issued its April 29, 2013 decision finding that the previously accepted temporary aggravation of preexisting left hip osteoarthritis had ceased by March 2005 and that the December 28, 2006 left total hip arthroplasty was not necessitated by a work-related condition. The evidence and arguments she submitted did not raise a substantial question concerning the correctness of OWCP's April 29, 2013 decision.²¹ OWCP found that the weight of the medical opinion evidence with respect to these matters rested with the well-rationalized April 10, 2013 opinion of Dr. Kohlhaas and appellant's lay opinion regarding the sufficiency of this medical opinion would not demonstrate clear error in OWCP's April 29, 2013 decision.²²

Appellant also submitted additional evidence in support of her reconsideration request, including statements which were similar to her January 15, 2015 statement, timelines she created concerning her medical treatment, administrative documents concerning her OWCP claims, and statements expressing her concerns about the processing of her OWCP claim. The issue in the present case is medical in nature and appellant did not explain how this nonmedical evidence raised a substantial question as to the correctness of OWCP's April 29, 2013 decision.

¹⁷ *Id.* at Chapter 2.1602.4b.

¹⁸ 20 C.F.R. § 10.607(b).

¹⁹ *Id.*; *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

²⁰ On appeal, appellant raised similar arguments about the medical reports of her attending physicians.

²¹ See *Annie L. Billingsley*, 50 ECAB 210 (1998); *Jimmy L. Day*, 48 ECAB 652 (1997). The Board notes that, on appeal, appellant submitted documents regarding Freedom of Information Act proceedings that are not directly relevant to this appeal.

²² With particular regard to Dr. Croteau's November 28, 2011 report, the Board had already determined that this report constituted one side of the conflict in the medical opinion evidence that was resolved by the April 10, 2013 report of Dr. Kohlhaas.

The Board finds that appellant's application for review does not show on its face that OWCP committed error when it found in its April 29, 2013 decision that the previously accepted temporary aggravation of preexisting left hip osteoarthritis had ceased by March 2005 and that the December 28, 2006 total left hip replacement surgery was not necessitated by a work-related condition.²³ Clear evidence of error is intended to represent a difficult standard.²⁴ Other than simply reiterating her previous arguments, appellant has not met this standard in this case.

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's April 29, 2013 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²³ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

²⁴ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).