

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

S.S., Appellant)	
)	
and)	Docket No. 17-0706
)	Issued: November 24, 2017
U.S. POSTAL SERVICE, POST OFFICE, LaGrange, GA, Employer)	
)	

Appearances:
Alex Dixon, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 7, 2007 appellant, through counsel, filed a timely appeal from an August 18, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated May 18, 2015 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 this case.

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.

² 5 U.S.C. § 8101 *et seq.*

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.

On appeal appellant, through counsel, contends that her reconsideration request was timely filed. Counsel also contends that the evidence clearly establishes that appellant was injured in an employment-related motor vehicle accident on March 31, 2015.

FACTUAL HISTORY

On April 1, 2015 appellant, then a 63-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 31, 2015 she was involved in an employment-related motor vehicle accident when her vehicle was struck from behind, causing her to suffer a concussion and injury to her leg. She received continuation of pay.

The only evidence submitted in support of appellant's claim was a copy of the job description of a rural carrier and a nurse's note dated April 22, 2015 indicating that appellant was tentatively scheduled to return to work on June 8, 2015.

By decision dated May 18, 2015, OWCP denied appellant's claim. While OWCP accepted that the incident had occurred as alleged, it denied the claim as there was no medical evidence diagnosing a condition causally related to the accepted work event.

By letter addressed to the employing establishment and received by OWCP on May 28, 2015, counsel objected to the termination of benefits, and demanded that appellant continue to receive compensation for her employment-related injury. He argued that appellant clearly had injuries that were employment related.

OWCP received evidence that appellant was treated in an emergency department. On March 31, 2015 Dr. William E. Behm, a radiologist, interpreted an x-ray of appellant's head as showing minimal subarachnoid hemorrhage. An x-ray of appellant's lumbar spine was interpreted by Dr. Behm as showing lumbar degenerative change, with no acute lumbar spine fracture or subluxation. An x-ray of the left lower leg showed no acute left tibia or fibula abnormality. An electrocardiograph was interpreted as showing a fascicular block. Dr. Julia Ballard, a physician Board-certified in emergency medicine, documented appellant's visit. She described the history of the motor vehicle accident and diagnosed a small, traumatic subarachnoid bleed, abrasion contusion left calf, and low back pain.

In an April 1, 2015 progress note, Dr. Marc Goldman, a Board-certified orthopedic surgeon from Midtown Medical Center, indicated that appellant had been transferred to Dr. Goldman's facility with a closed-head injury. He noted that appellant's vehicle was struck by another vehicle traveling approximately 60 miles per hour. Dr. Goldman noted that the computerized tomography (CT) scan demonstrated a small amount of post-traumatic sulcal and subarachnoid hemorrhage involving her right convexity. He noted that a repeat scan demonstrated resolution of the above abnormality and was otherwise normal.

At an April 18, 2015 visit, Dr. Arvind Chakravarthy, an emergency room physician, diagnosed myofascial strain. He listed method of injury as motor vehicle crash.

On May 19, 2016 appellant requested reconsideration. On May 24, 2016 counsel requested reconsideration. He argued that it was absolutely clear that appellant had been seriously injured as a direct result of the March 31, 2015 motor vehicle collision, and that such injury resulted in ongoing treatment and care of appellant and significant time was missed from work as a result of the employment accident. In support of the reconsideration request, counsel submitted a copy of the accident report.

Appellant and her counsel also submitted multiple reports from Dr. Warren J. Henderson, appellant's treating Board-certified internist. In an April 22, 2015 report, Dr. Henderson noted that appellant was status post intracranial bleed which occurred with a motor vehicle accident. He diagnosed status post intracranial hemorrhage, concussion, contusions, probable left calf hematoma, and impaired mobility. In a May 27, 2015 note, Dr. Henderson indicated that appellant was under his care and was unable to return to work due to swelling of her ankle and feet. He noted continued physical therapy. In a June 3, 2015 report, Dr. Henderson indicated that appellant's concussion had resolved and that multiple contusions had improved. In a separate June 3, 2015 note, he indicated that appellant was currently under his care, and could return to work on June 8, 2015. In a July 13, 2015 report, Dr. Henderson noted that appellant had returned to work, but that it was physically draining and caused increased pain. Appellant noted that she had to take at least one day off each work period in order to be able to continue working. Dr. Henderson diagnosed osteoarthritis, increased pain since return to work, and elbow symptom suspicious for nerve root entrapment. In a November 10, 2015 note, he indicated that appellant was currently under his care and that, due to medical reasons, she could only work three shifts per week. In a December 16, 2015 report, Dr. Henderson listed appellant's problems and health issues as brain concussion, diverticulosis, fatigue, gastric bypass status for obesity, gastroesophageal reflux disease, osteoarthritis of the knee, post-traumatic stress, primary generalized osteoarthritis, psoriasis, rheumatoid arthritis, tinea corporis, tobacco user, traumatic cerebral hemorrhage, and traumatic contusion.

In November 16 and December 16, 2015 reports, Barbara A. Phillips, a licensed professional counselor, diagnosed anxiety disorder due to another medical condition and post-traumatic stress disorder. She noted that appellant had been in an automobile accident in March 2015, had not been able to work more than three days a week since that time and that she was concerned that she would not be able to pay her monthly bills.

In a November 16, 2015 CT scan, Dr. J. Matthew Meadows, a Board-certified orthopedic surgeon, diagnosed no acute abnormality and atherosclerotic vascular disease.

By decision dated August 18, 2016, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ For merit decisions issued on or after August 29, 2011, a request for reconsideration needed to be received by OWCP within one year of its decision for which review is sought.⁵ 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).⁶

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁷ OWCP's regulations and procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ 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

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁶ *Id.* at Chapter 2.1602.4b.

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* n. 5 at Chapter 2.1602.3d (January 2004).

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See Leona D. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁴

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.

OWCP properly determined that appellant's May 19, 2016 reconsideration request was untimely filed.¹⁵ According to OWCP's procedures, timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in iFECS.¹⁶ As iFECS lists the received date for appellant's reconsideration request as May 19, 2016, more than one year after OWCP's May 18, 2015 decision, the reconsideration request was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.

The Board finds that appellant has failed to demonstrate clear evidence of error. The underlying issue is whether appellant established an injury causally related to her employment-related motor vehicle accident of March 31, 2015. Appellant had not submitted any medical evidence in support of her claim at the time that it was denied on May 18, 2015. Since that time, she submitted multiple items of medical evidence. However, appellant has failed to submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed an error, under the clear evidence of error standard.¹⁷

The diagnostic studies of Dr. Behm and Dr. Meadows do not address causal relationship, nor does the medical report of Dr. Chakravarthy. Drs. Ballard, Goldman, and Henderson noted treatment for injuries which occurred with a motor vehicle accident. However, these reports do not reflect error nor raise a substantial question as to the correctness of OWCP's decision.

Ms. Phillips, a counselor, discussed appellant's concerns about her financial situation, but she is not a medical doctor and could not reach any conclusions with regard to the cause of

¹⁴ *Leon D. Faidley, Jr., supra* note 4.

¹⁵ The Board notes initially that on May 28, 2015 OWCP received counsel's letter which was addressed to the employing establishment and which demanded that appellant's compensation benefits be continued. This letter was received by OWCP 10 days following the May 18, 2015 merit decision. However, it did not constitute a timely request for reconsideration. OWCP regulations require that an application for reconsideration be sent to a specific address as instructed by OWCP in the final decision. The word reconsideration does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested. Counsel's letter was not addressed nor was it sent by counsel to OWCP, rather it was sent to the employing establishment. He did not request that OWCP reconsider the May 18, 2015 decision, but rather requested that the employing establishment maintain continuation of pay benefits. This document therefore did not constitute a valid request for reconsideration of OWCP's May 18, 2015 decision. 20 C.F.R. § 10.606. *See also M.H.*, Docket No. 14-1389 (issued October 22, 2014); and *A.J.*, Docket No. 14-1617 (issued December 23, 2014).

¹⁶ Federal (FECA) Procedure Manual, *supra* n. 5 at Chapter. 2.1602.4(b) (October 2011); *see also G.F.*, Docket No. 15-1053 (issued September 11, 2015).

¹⁷ *S.G.*, Docket No. 17-0175 (issued June 15, 2017).

appellant's physical injuries. As previously noted, even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have been sufficient to require further development of the evidence, is insufficient to demonstrate clear evidence of error.¹⁸

For these reasons, the evidence submitted by appellant and counsel does not raise a substantial question concerning the correctness of OWCP's May 18, 2015 decision. Thus, OWCP properly denied appellant's 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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 18, 2016 is affirmed.

Issued: November 24, 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

¹⁸ *Id.*