United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 18-0555**
	)	**Issued: August 8, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Torrance, CA, Employer	)	

Appearances:
James Wright, for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2015 appellant, through her representative, filed a timely appeal from a January 15, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year elapsed from the last merit decision, dated December 6, 2002, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[3]

[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.*

[3] For final adverse decisions of OWCP issued prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(d)(2) (2008).

ISSUE

The issue is whether OWCP properly denied appellant's March 27, 2012, March 20, 2013, and October 16, 2014 requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 17, 1998 appellant, then a 31-year-old part-time flexible (PTF) city carrier, filed a traumatic injury claim (Form CA-1) alleging that she fell on November 13, 1998 when walking on a broken sidewalk while delivering mail in the performance of duty, causing injury to her left ankle and right knee. She stopped work and received continuation of pay from November 14 through 27, 1998, at which time the employing establishment terminated her for cause. OWCP accepted the claim for left ankle sprain, and paid wage-loss compensation beginning November 28, 1998.[4] Appellant's then-treating physician, Dr. Steven L. Zeitzew, a Board-certified orthopedic surgeon, restricted her to performing sedentary work with limited walking and limited standing.

In a May 24, 1999 report, Dr. Frank Cunningham, a Board-certified orthopedic surgeon and OWCP referral physician, noted that he had examined appellant on May 17, 1999. Appellant's chief complaint was left ankle pain with prolonged standing. Dr. Cunningham noted that on November 13, 1998 appellant was delivering her mail route when she stepped on an irregular sidewalk surface, sustaining a twisting inversion force to the left ankle, during which she also impacted the right knee. Appellant reported having continued delivering her route and completing her workday, albeit with increasing pain. Dr. Cunningham summarized appellant's prior medical treatment for her left ankle, including objective studies, physical therapy, and Dr. Zeitzew's initial evaluation and follow-up examinations. On physical examination Dr. Cunningham observed slight tenderness, both medially and laterally, in the left ankle. Range of motion was normal. Dr. Cunningham diagnosed status post left ankle injury sprain (anterior talofibular ligament) and right knee superficial abrasion -- healed. He reported that there were no objective findings to support appellant's subjective complaints of ankle pain with prolonged standing. Dr. Cunningham concluded that appellant "sustained an acute injury on November 13, 1999 and there has been healing of the injured ligament in the ankle." He indicated that appellant was capable of performing her work without restrictions.

On June 3, 1999 OWCP advised appellant of its proposal to terminate her wage-loss compensation and medical benefits based on Dr. Cunningham's May 24, 1999 report. It provided appellant a copy of Dr. Cunningham's report and afforded her 30 days to submit additional evidence and/or argument should she disagree with the proposed termination of benefits.

In response, appellant submitted disability status reports from Dr. Zeitzew dated April 8 to July 1, 1999. He indicated that appellant was able to work with restrictions of sedentary work only.

[4] OWCP placed appellant on the periodic compensation rolls, effective March 28, 1999.

In a June 24, 1999 narrative report, Dr. Zeitzew examined appellant's left ankle and diagnosed left ankle chronic sprain and peroneal tendinitis. He indicated that she could work modified duty with restrictions of no prolonged standing or walking and no carrying more than 25 pounds.

By decision dated July 26, 1999, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that same date. It found that the weight of medical evidence rested with Dr. Cunningham, the second opinion examiner, who had determined, in a May 24, 1999 report, that appellant's November 13, 1998 employment injury had resolved and that she was no longer disabled as a result of her work-related injury.

Appellant filed several reconsideration requests following the July 26, 1999 termination decision.[5] In statements dated September 28, 1999 to August 2, 2000, she requested reinstatement of her benefits because she still needed medical attention and wage-loss compensation until she was physically capable of performing her duties as a letter carrier. Appellant noted that, without rehabilitation and therapy, she could not return to work.

OWCP received an October 5, 1999 note by Dr. Stanley K. Lowe, a podiatrist, who indicated that appellant was seen on September 16, 1999 for complaints of ankle pain. It also received an August 9, 1999 emergency room record that is mostly illegible.

Appellant submitted a November 24, 1999 report by Dr. Lowe. Dr. Lowe related appellant's complaints of ankle pain with increased standing and walking. Upon examination of appellant's left ankle, he observed pain upon palpation at the anterior talofibular ligament and left ankle with plantar flexion. Dr. Lowe diagnosed chronic lateral ankle pain with edema, secondary to severe inversion sprain of the left ankle.

In an October 6, 2000 attending physician's report (Form CA-20), Dr. Ali Berenji, a Board-certified orthopedic surgeon, noted a date of injury of November 13, 1998 and indicated that appellant still needed physical therapy for treatment of her left ankle.

In an October 31, 2000 report, Dr. Berenji indicated that appellant suffered a work-related injury to her left ankle. He recommended corrective surgery and indicated that the surgery was also related to the "industrial accident" on November 13, 1998.

OWCP denied modification of the July 26, 1999 termination decision on December 17, 1999, April 20 and February 5, 2001.[6] It found that the medical reports submitted were of diminished probative value to overcome the weight of medical evidence given to Dr. Cunningham, OWCP's second opinion physician, who opined in a May 24, 1999 report that appellant no longer had residuals or disability causally related to her November 13, 1998 employment injury. OWCP determined that the medical evidence of record was insufficient to establish that appellant's current condition was causally related to her November 13, 1998 employment injury.

[5] OWCP received appellant's reconsideration requests on October 19, 1999, January 26 and August 2, 2000.

[6] OWCP also denied reconsideration of the merits of appellant's claim by decision dated August 4, 2000.

On August 15, 2001 appellant requested reconsideration. She reiterated the medical treatment she had received due to her continuing left ankle symptoms and alleged that she needed medical attention and compensation until she was physically capable of performing her job duties.

In reports dated August 4, 2000 and January 19, 2001, Dr. Kevin Heaton, an osteopath specializing in sports medicine, related appellant's complaints of continued difficulty with her left ankle since November 1998. He examined appellant's left ankle and diagnosed peroneal tendinitis. Dr. Heaton recommended physical therapy and referral to a foot and ankle specialist.

Appellant also submitted various emergency room treatment records dated September 8, 2001 by an unknown provider.

By decision dated November 13, 2001, OWCP denied modification of its February 5, 2001 decision.

On September 19, 2002 appellant underwent left ankle ligament reconstruction surgery.

On September 26, 2002 appellant again requested reconsideration. She alleged that she was still in need of medical attention and compensation until she was physically able to perform her job duties.

In a September 26, 2002 report, Dr. Sheila Tai, Board-certified in internal medicine, indicated that appellant had seen different physicians since March 2000 for her left ankle problem. She noted that an ankle specialist, Dr. Benjamin Song, a Board-certified orthopedic surgeon, finally diagnosed chronic tendinitis of appellant's left ankle and status post sprain of the left ankle and performed surgery on September 22, 2002. Dr. Tai opined that appellant's sprain was due to history of injury dating back to November 13, 1998.

By decision dated December 6, 2002, OWCP denied modification of the November 13, 2001 decision. It indicated that it reviewed the merits of appellant's case and found that Dr. Tai's September 26, 2002 report was insufficient to establish that appellant's current symptoms and inability to work were related to her November 13, 1998 employment injury.

On July 15, 2003 appellant requested reconsideration. In a statement dated June 16, 2003, she asserted that it was inappropriate for OWCP to discontinue her benefits based on Dr. Cunningham's May 24, 1999 medical report. Appellant noted that she had received medical treatment from several different doctors and underwent surgery by Dr. Song. She related that Dr. Song informed her that her problems came from an old injury that happened on November 13, 1998. Appellant asserted that her need for surgery showed that there was still something wrong with her left ankle. She requested that OWCP reconsider restoration of her benefits until she had a full and complete recovery.

By decision dated July 29, 2003, OWCP denied reconsideration of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that she had not submitted any new or relevant evidence or new or relevant argument sufficient to warrant further merit review of her claim.

Appellant subsequently submitted several additional reconsideration requests.[7] In statements dated July 19, 2004 to December 28, 2009, she again alleged that it was inappropriate for OWCP to terminate her compensation benefits in July 1999 based on Dr. Cunningham's report because she still needed medical treatment. Appellant reviewed the medical treatment that she had received and related that she still had problems with her left ankle. She asserted that her compensation benefits should continue until she completely recovered from her employment injury.

Appellant submitted a September 19, 2002 operative report by Dr. Song.

OWCP also received an undated medical report by Dr. Song who diagnosed anterolateral instability of the left ankle and explained appellant's need for left ankle ligament reconstruction surgery.

By decisions dated February 1, 2005, March 29, 2007, January 20, 2009, and March 25, 2010, OWCP denied appellant's reconsideration requests, finding that they were untimely filed and failed to demonstrate clear evidence of error in OWCP's December 6, 2002 decision.

On March 27, 2012 appellant again requested reconsideration. She related that she was still having problems with her left ankle and that she could not walk or stand without being in pain. Appellant alleged that Dr. Cunningham's report was wrong because she had suffered with her ankle for many years. She asserted that the discontinuance of her benefits was inappropriate and requested that OWCP reconsider the termination of her benefits.

On March 20, 2013 OWCP also received a March 13, 2013 reconsideration request. Appellant related that she continued to experience enduring discomfort and pain in her left ankle since the November 1998 traumatic work injury. She indicated that she had undergone several medical treatments, including one surgery, in an effort to rehabilitate her ankle. Appellant alleged that discontinuance of her benefits was inappropriate as she was still in need of medical attention and compensation.

In a February 6, 2014 letter, appellant's representative submitted an April 15, 2013 medical report from Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, and requested that OWCP authorize treatment by Dr. Nolan.

In his April 15, 2013 report, Dr. Nolan indicated that appellant was employed as a city carrier beginning in 1998. He related that on November 13, 1998 she twisted her left ankle while delivering mail and immediately experienced severe pain and swelling. Dr. Nolan indicated that appellant was initially diagnosed with an ankle sprain in the emergency room. He reported that she continued to experience persistent pain and increased swelling and reviewed the medical treatment that she had received. Dr. Nolan noted that appellant attempted to return to modified duty, but was unable to do prolonged weight bearing activities due to the pain. He related that she

[7] OWCP received appellant's reconsideration requests on July 27, 2004, February 2, 2006, March 31, 2008, and January 5, 2010.

currently worked as a home healthcare provider, which did not require prolonged weight bearing activities.

Dr. Nolan reported that appellant presently complained of constant aching pain, intermittent stabbing and numbness, and slight swelling in her left ankle. He reported that aggravation of her symptoms was brought on by prolonged weight bearing activities, including walking and standing. Dr. Nolan reviewed appellant's medical records. Upon physical examination of appellant's left ankle, he observed moderate tenderness over the posterior and lateral fibula and the peroneal tendons, moderate-plus tenderness in the anterolateral ankle at the talofibular ligaments, and slight effusion in the ankle with definite synovial thickening. Dr. Nolan diagnosed severe left ankle sprain, residual left ankle instability, secondary to severe sprain, right knee abrasion by history, left peroneal tendinitis, and left chronic pain syndrome secondary to left ankle injury.

Dr. Nolan reported that contrary to Dr. Cunningham's opinion, he found that the positive objective findings on examination substantiated appellant's subjective complaints. He opined that appellant's ankle sprain and subsequent need for surgery were a direct result of the employment injury to her left lower extremity of November 13, 1998. Dr. Nolan indicated that there was no aggravation of appellant's left ankle symptoms, but explained that it was an ongoing problem as a direct result of the sustained injury. He noted that further diagnostic testing and treatment were necessary. Dr. Nolan opined that based on the objective diagnostic treatment records, appellant was not capable of performing her work activities as a city carrier. He provided work restrictions and his recommendations for treatment.[8]

In a statement dated October 15, 2014 and received by OWCP on October 16, 2014, appellant, through her representative, again requested reconsideration. He submitted copies of OWCP's previous decisions dated from June 3, 1999 to July 25, 2014, appellant's Form CA-1, Dr. Cunningham's May 24, 1999 second opinion report, and a fiscal memorandum which showed that appellant's claim was approved.

By decision dated January 15, 2015, OWCP denied appellant's March 20, 2013 and October 16, 2014 reconsideration requests, finding that they were untimely filed and failed to demonstrate clear evidence of error in OWCP's December 6, 2002 decision.[9]

[8] On June 12, 2014 appellant, through her representative, noted her disagreement with OWCP's December 6, 2002 decision and requested an oral hearing before a hearing representative from OWCP's Branch of Hearings and Review. By In a July 25, 2014 decision, the Branch of Hearings and Review denied appellant's request for a hearing as it was untimely filed. After exercising its discretion, the Branch of Hearings and Review further found that the issue in the case could be equally well addressed through the reconsideration process.

[9] The Board notes that the January 15, 2015 OWCP decision does not reference the March 27, 2012 request for reconsideration. The Board finds that this deficiency is harmless error as appellant made the same arguments in her March 20, 2013 and October 16, 2014 reconsideration requests and she did not submit any additional evidence with her March 27, 2012 request.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[10] This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.[11] 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.[12] 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 (*i.e.*, the received date in the Integrated Federal Employees' Compensation System (iFECS)).[13]

OWCP, however, may not deny an application for reconsideration solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.[14] In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.[15]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.[16] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or demonstrate 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.[19] The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial

[10] *Thankamma Matthews*, 44 ECAB 765, 768 (1993).

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

[12] 20 C.F.R. § 10.607(a). 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. 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[13] *Id.* at § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

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

[15] *See* 20 C.F.R. § 10.607(b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

[16] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

[17] *Jimmy L. Day*, 48 ECAB 652 (1997).

[18] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[19] *Annie L. Billingsley*, 50 ECAB 210 (1998).

was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.[20]

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[21]

ANALYSIS

OWCP's last merit decision dated December 6, 2002 denied modification of the termination of appellant's wage-loss compensation and medical benefits, effective July 26, 1999. Appellant requested reconsideration on March 27, 2012, March 20, 2013, and October 16, 2014. By decision dated January 15, 2015, OWCP denied reconsideration because the requests were untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant's requests for reconsideration were untimely filed. Timeliness is determined by the document receipt date of the reconsideration request (*i.e.*, the received date in the Integrated Federal Employees' Compensation System (iFECS)).[22] OWCP's last merit decision was dated December 6, 2002. It received her latest requests for reconsideration on March 27, 2012, March 20, 2013, and October 16, 2014, which were outside of the one-year time limit. Consequently, the requests were untimely filed and appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.[23]

The Board further finds that the evidence submitted on reconsideration does not raise a substantial question as to the correctness of OWCP's December 6, 2002 merit decision and is, therefore, insufficient to demonstrate clear evidence of error.

In its most recent merit decision of December 6, 2002, OWCP denied modification of the termination of appellant's wage-loss compensation and medical benefits based on the May 24, 1999 second opinion report of Dr. Cunningham, who determined that appellant's November 13, 1998 employment injury and disability had ceased. With her most recent reconsideration requests, appellant provided an April 15, 2013 report by Dr. Nolan. Dr. Nolan accurately described the November 13, 1998 employment injury and appellant's continued symptoms regarding her left ankle. He provided physical examination findings and opined that the objective physical findings substantiated appellant's subjective complaints. Dr. Nolan opined that appellant continued to require medical treatment and remained disabled from work due to her November 13, 1998 employment injury. The Board finds that although this report provides an affirmative opinion that appellant continued to suffer residuals and remained disabled as a result of her accepted employment injury, it does not raise a substantial question as to the correctness of OWCP's

[20] *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

[21] *Cresenciano Martinez*, 51 ECAB 322 (2000); *supra* note 10.

[22] *Supra* note 13 at Chapter 2.1602.4(b) (February 2016).

[23] *Supra* note 12; *Debra McDavid*, 57 ECAB 149 (2005).

December 6, 2002 merit decision and is insufficient to demonstrate clear evidence of error.[24] As previously noted, even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.[25]

In order to demonstrate clear evidence of error, the evidence 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.[26] Dr. Nolan's April 15, 2013 report submitted by appellant does not have sufficient probative value to shift the weight of the evidence in her favor.

On appeal appellant's representative contends that OWCP abused its discretion in denying further merit review. He cited to *Herbert E. Widincamp,* 32 ECAB 1090 (1981), as evidence to show that OWCP's refusal to reopen the case for merit review when the claimant submitted probative medical evidence was considered an abuse of discretion and warranted the Board to remand the claimant's case for further review of the merits. The Board, however, distinguishes the facts of the case in *Herbert E. Widincamp* because the claimant's reconsideration request in that case was timely filed. In the present case, however, OWCP properly found that appellant's reconsideration requests were untimely, and accordingly, the standard of review is whether appellant has demonstrated clear evidence of error on the part of OWCP.

The Board has found that the term "clear evidence of error" is intended to represent a difficult standard.[27] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence submitted 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.[28]

The Board finds that appellant has failed to support her reconsideration requests with evidence or argument demonstrating that OWCP's December 6, 2002 decision denying modification of the termination of her wage-loss compensation and medical benefits was clearly erroneous.

CONCLUSION

The Board finds that OWCP properly denied appellant's March 27, 2012, March 20, 2013, and October 16, 2014 requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

[24] *Supra* note 17.

[25] *Supra* note 18.

[26] *Supra* note 17.

[27] *James R. Mirra,* 56 ECAB 738 (2005); *supra* note 13 at Chapter 2.1602.5(a) (October 2011).

[28] *Supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2018
Washington, DC

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

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

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