

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 counsel contends that OWCP applied an incorrect standard in terminating appellant's wage-loss compensation and medical benefits on June 20, 2002. He alleged that OWCP effectively placed the burden on appellant to establish that her accepted conditions continued.

FACTUAL HISTORY

On June 2, 1978 appellant, then a 29-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a right hand condition from working on machines at the employing establishment. OWCP accepted her claim for right carpal tunnel syndrome, and authorized carpal tunnel release on October 30, 1978 and transaxillary resection of the first rib and release of the median nerve at the elbow on October 22, 1979. It also accepted thoracic outlet syndrome, brachial plexus lesions, depressive disorder, and tension headaches. Appellant stopped work at the employing establishment due to her accepted conditions on May 15, 1980 and OWCP paid her compensation on the periodic roll beginning September 22, 1980.

Following its development of the claim, including referral to second opinion physicians of varying specialties on May 14, 2002 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the weight of the medical evidence established that her work-related physical condition had resolved. It afforded her 30 days to provide a response.

On May 23, 2002 Dr. Richard A. Neiman, a Board-certified rheumatologist, noted that appellant had various complaints that were difficult to classify. He listed appellant's surgeries and noted that appellant attributed these to overuse at work. Dr. Neiman diagnosed chronic pain syndrome with periods of total incapacitation. He noted appellant's daily headaches. Dr. Neiman found appellant totally disabled from work. He mentioned depression and anxiety, as well as right arm Raynaud's phenomenon.

Appellant continued to submit emergency room treatment records for chronic pain, neck pain, and headaches.

By decision dated June 20, 2002, OWCP terminated appellant's wage-loss compensation and medical benefits. It found that the weight of the medical evidence established that she had no residuals from her accepted right upper extremity conditions. OWCP further found that appellant's psychological condition was not causally related to her accepted employment injuries, but instead due to her autoimmune disease and chronic opiate analgesic. It also determined that her consequential injury of headaches was not related to her accepted employment injuries.

Appellant requested an oral hearing from OWCP's Branch of Hearings and Review on August 1, 2002. In an October 22, 2002 decision, OWCP denied appellant's request for an oral

hearing as untimely and further found that the issue in her case could equally well be addressed through the reconsideration process.

In a report dated December 19, 2003, Dr. Tracy Willett, a Board-certified family practitioner, listed appellant's symptoms of headaches, diffuse myalgias, transient changes of consciousness, memory changes, gastrointestinal discomfort with nausea, vomiting, and diarrhea. She noted that medical evaluations had not impacted appellant's symptoms. Dr. Willett diagnosed vasculitis, recurrent major depression and somatization disorder, chronic pain syndrome, and transient ischemic attacks, thoracic outlet syndrome, and carpal tunnel syndrome. She opined that appellant was totally disabled.

On May 5, 2004 Dr. Neiman reviewed Dr. Willett's report and also opined that appellant was totally disabled from work. He listed appellant's conditions as headaches, seizures or pseudoseizures, blackout spells, right arm pain, problems with memory, and severe stomach pain. Dr. Neiman diagnosed fibromyalgia with Raynaud's phenomenon.

In a letter dated February 14, 2016, appellant provided her understanding of the history of her claim. She asserted that her claim was accepted for right carpal tunnel syndrome, thoracic outlet syndrome, depression, headaches, shoulder pain, and blackouts. Appellant again described a traumatic injury of falling from a chair and hitting her head as well as her occupational disease of keying on a machine. She also noted that a supervisor pushed a large cart onto her right foot. Appellant alleged that her right lung was punctured during the removal of her first rib in 1979. She also described her injury at the VA in which she was shocked. Appellant attributed her ongoing headaches to high blood pressure.

On July 28, 2016 appellant submitted additional documents through her U.S. Senator. Dr. Neiman completed a note on May 10, 2001 and listed appellant's symptoms and possible diagnoses. He indicated that appellant felt that she might have Bechet's syndrome, fibromyalgia, Raynaud's, and carpal tunnel syndrome. Appellant alleged that she had residual right lung scarring from a puncture wound from her 1979 surgery. On July 19, 2001 Dr. Willett listed appellant's conditions as vasculitis, diffuse myalgias, epigastric pain, transient change of consciousness, memory changes, and gastrointestinal symptoms. She noted that appellant did not have a definitive diagnosis. In a September 5, 2002 note, Dr. Willett listed appellant's symptoms again and noted that she had significant difficulties with concentration and had been unemployed for many years. Appellant also submitted a report dated November 13, 2006 from Dr. Willet. Dr. Willet diagnosed tachycardia of unclear etiology, a pulmonary nodule in the right lower lobe, chronic obstructive pulmonary disease, and chronic pain. She also noted appellant's symptoms of chronic headaches, nausea, vomiting, black outs, and myalgias. Dr. Jennifer L. Morrison, a Board-certified radiologist, conducted a computerized tomography (CT) scan of appellant's chest, abdomen, and pelvis on March 10, 2016 which demonstrated pleural thickening or scarring in the right lung base as well as calcified granuloma in the right lung which was suspected to be the result of chronic granulomatous disease.

On January 9, 2017 counsel requested reconsideration of the June 20, 2002 decision. He acknowledged that the request was untimely, but contended that OWCP applied an incorrect burden of proof in terminating appellant's wage-loss compensation and medical benefits. Counsel reviewed the medical reports OWCP relied upon in terminating appellant's benefits, and

asserted that the reports lacked medical reasoning in support of the offered opinions. He concluded that OWCP shifted the burden of proof to appellant to establish that the accepted conditions still existed rather than meeting its burden of proof to establish that the disability and medical residuals from the accepted conditions had ceased such that termination of appellant's wage-loss compensation and medical benefits was warranted.

In a February 2, 2017 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant 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. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must have been filed within one-year of the date of the last merit decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether the claimant has demonstrated clear evidence of error.⁸ OWCP's procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁹

Clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake.¹⁰ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ *Supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

⁸ *Supra* note 4 at 770.

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

¹⁰ *Id.*

¹¹ *Supra* note 4.

OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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 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.¹⁶ The Board must make an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁷

ANALYSIS

By decision dated June 20, 2002, OWCP terminated appellant's wage-loss compensation and medical benefits. On January 9, 2017 appellant, through counsel, requested reconsideration on behalf of appellant and submitted additional medical evidence.

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. Per OWCP's procedures, appellant had one year from OWCP's June 20, 2002 termination decision to request reconsideration.¹⁸ As appellant's request for reconsideration was not received by OWCP until January 9, 2017, more than one year after the June 20, 2002 merit decision, the request was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its termination of her wage-loss compensation and medical benefits.

The Board finds that appellant failed to demonstrate clear evidence of error by OWCP in its June 20, 2002 termination decision. Counsel contended on reconsideration, that OWCP applied an inappropriate legal standard in terminating appellant's wage-loss compensation and medical benefits, asserting that OWCP effectively placed the burden on appellant to establish that her accepted conditions continued. The Board finds that this argument lacks validity and fails to demonstrate clear evidence of error.¹⁹ OWCP developed the claim by referring appellant

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 5 at 968.

¹⁴ *Supra* note 12.

¹⁵ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁷ *Nancy Marciano*, 50 ECAB 110 (1998).

¹⁸ *Supra* note 6.

¹⁹ *D.B.*, Docket No. 16-1405 (issued January 9, 2017).

for orthopedic, neurologic, and psychological consultations. Those second opinion physicians found that appellant no longer had residuals or disability causally related to her accepted conditions. The record also establishes that appellant's attending physician, Dr. Neiman, did not support that appellant had continuing residuals or disability due to her accepted conditions. He further reported that he did not know the cause of her headaches. Therefore, at the time of OWCP's June 20, 2002 decision, the medical evidence of record supported that appellant no longer had residuals or disability causally related to her accepted conditions, and sufficient to justify the termination of her compensation benefits. The Board thus finds that counsel's contentions did not raise a substantial question concerning the correctness of OWCP's 2002 termination decision and, therefore, failed to demonstrate clear evidence of error.

In support of the untimely request for reconsideration, appellant submitted additional medical evidence from her treating physicians. In reports dated July 19, 2001, September 5, 2002, December 19, 2003, and November 13, 2006, Dr. Willett diagnosed vasculitis, recurrent major depression and somatization disorder, chronic pain syndrome, and transient ischemic attacks, thoracic outlet syndrome, and carpal tunnel syndrome. She opined that appellant was totally disabled from work, but also noted that appellant did not have a definitive diagnosis. On May 5, 2004 Dr. Neiman diagnosed fibromyalgia with Raynaud's. Dr. Morrison diagnosed chronic granulomatous disease as demonstrated on the CT scan. The Board finds that these reports are not positive, precise, and explicit and do not manifest on their face that OWCP committed an error in terminating appellant's wage-loss compensation and medical benefits.²⁰

The term clear evidence of error is intended to represent a difficult standard.²¹ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.²² It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²³ Instead, the evidence must shift the weight in appellant's favor.²⁴ Thus the Board finds that appellants reconsideration request failed to demonstrate clear evidence of error.

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.

²⁰ *Supra* note 12.

²¹ *Supra* note 19.

²² *Id.*

²³ *Supra* note 12.

²⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2018
Washington, DC

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

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

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