United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 17-1323**
	)	**Issued: January 2, 2018**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Brownsville, TX, Employer	)	

Appearances:
Appellant, pro se
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 May 31, 2017 appellant filed a timely appeal from an April 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated January 14, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.[2]

ISSUE

The issue is whether OWCP properly denied appellant's January 10, 2017 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant filed a timely request for oral argument, pursuant to 20 C.F.R. § 201.5(b). After exercising its discretion the Board, by a November 1, 2017 order, denied her request noting that her arguments on appeal could be adequately addressed in a Board decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1323 (issued November 1, 2017).

FACTUAL HISTORY

OWCP accepted that on or before March 21, 2011 appellant, then a 47-year-old customs and border protection officer, sustained bilateral tibialis tendinitis. Dr. Thomas E. Brooks, III, an attending podiatrist, diagnosed posterior tibial tendon dysfunction on October 8, 2011. He provided work restrictions.

Dr. Raul O. Maldonado, an attending podiatrist, provided October 10, 2011 and May 21, 2012 reports in which he attributed bilateral posterior tibial tendinitis to prolonged standing and walking while at work after appellant had sustained an occupational right ankle sprain in June 2011.

On May 18, 2012 appellant voluntarily accepted a downgrade position she had requested as a reasonable accommodation for the accepted bilateral lower extremity conditions.

On October 25, 2013 appellant filed a claim for wage-loss compensation benefits (Form CA-7) for the period June 11 to October 21, 2011.

In July 9, 2014 reports, Dr. Maldonado restricted appellant to full-time sedentary duty due to a ruptured right ankle tendon, bilateral tibialis tendinitis, and tenosynovitis. He opined that her condition had become chronic and that she would require bilateral ankle braces on a permanent basis.[3]

On October 30, 2014 appellant filed a claim for wage-loss compensation benefits (Form CA-7) for the period June 5, 2012 to November 12, 2013 related to the voluntary downgrade she had accepted on May 18, 2012.

By decision dated December 11, 2014, OWCP denied appellant's claims for wage-loss compensation commencing June 12, 2012, finding that she requested and accepted a new position at a lower salary as part of a reasonable accommodation of the accepted bilateral lower extremity conditions.

In an undated letter, received by OWCP on December 16, 2015, appellant requested that OWCP "reinstate" her claim for wage-loss compensation benefits. She enclosed a June 25, 2012 claim for wage-loss compensation (Form CA-7) for the period June 3, 2012 and continuing. Appellant then continued to submit additional claims for wage-loss compensation.

In a December 6, 2016 letter, OWCP notified appellant that it could not process her claim for wage-loss compensation commencing June 3, 2012 as it had previously denied the claim by its December 11, 2014 decision. It enclosed a copy of its December 11, 2014 decision and suggested that appellant refer to the appeal rights attached. OWCP further found that there was

[3] On September 25, 2014 appellant filed a claim for a schedule award (Form CA-7). Following additional development, by decision dated May 29, 2015 and reissued January 14, 2016, OWCP granted her a schedule award for one percent permanent impairment of the left lower extremity and one percent permanent impairment of the right lower extremity. The period of the award, equivalent to 5.76 weeks, ran from March 26 to May 5, 2015.

no evidence that the employing establishment had "downgraded [her] due to the accepted work[-]related injury on March 21, 2011."

On January 10, 2017 appellant requested reconsideration of OWCP's December 11, 2014 decision which denied her claim for wage-loss compensation commencing June 12, 2012. In support of her request, she submitted a December 27, 2016 letter, contending that she was entitled to wage-loss compensation benefits commencing June 3, 2012 as she requested a downgrade to a less arduous job to accommodate her accepted leg conditions, and she was then terminated due to her inability to perform the essential functions of her date-of-injury position. Appellant also provided an April 16, 2015 earnings and leave statement, a July 10, 2015 letter of removal from the employing establishment, an August 21, 2015 status inquiry letter, April 8, 2016 claims for wage-loss compensation benefits (Form CA-7) for the period June 3, 2012 through April 16, 2016, and a May 20, 2016 employing establishment letter noting that she had been disabled from her date-of-injury position due to bilateral tibialis tendinitis.

In an April 10, 2017 decision, OWCP denied appellant's January 10, 2017 request for reconsideration, finding that her request did not meet any of the requirements for further merit review pursuant to 5 U.S.C. § 8128(a). It determined that the evidence submitted in support of her January 10, 2017 request for reconsideration did not raise a substantive legal question nor include relevant and pertinent new evidence or argument. OWCP further determined that the submitted evidence was cumulative and "thus substantially similar to evidence or documentation that is already contained in the case file and was previously considered."

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[4]

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[5]

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.[6] Timeliness is determined by the document receipt

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (February 2016).

date of the reconsideration request (the received date in the Integrated Federal Employees' Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.[7]

OWCP will consider an untimely application only if the application demonstrates clear evidence of error in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[8]

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[9]

ANALYSIS

The most recent decision reviewing the merits of appellant's case was OWCP's December 11, 2014 decision. As the appeal rights attached to that decision explained, she had one calendar year from the date of that decision, or until December 11, 2015, to ensure receipt by OWCP of any reconsideration request.

OWCP received appellant's reconsideration request on January 10, 2017. As the received date was more than one year after the December 11, 2014 decision, appellant's request must be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, however, OWCP did not determine whether her reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the wrong standard of review to the untimely request for reconsideration, the Board will set aside OWCP's April 10, 2017 decision and remand the case for proper review under the clear evidence of error standard.[10]

CONCLUSION

The Board finds that the case is not in posture for decision.

[7] *Id.*

[8] 20 C.F.R. § 10.607.

[9] *Supra* note 6 at Chapter 2.1602.5.a (October 2011).

[10] *See* 20 C.F.R. § 10.607(b). *W.L.*, Docket No. 15-1842 (issued January 14, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 10, 2017 is set aside and the case is remanded for further action consistent with this decision.

Issued: January 2, 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