

ISSUE

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

FACTUAL HISTORY

On July 18, 2006 appellant, then a 50-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, after attending a seminar for work on July 1, 2006, she sustained multiple fractures when she slipped on food laying on a walkway in San Antonio, Texas. She stopped work on the date of injury. Appellant did not submit any additional evidence in support of her claim.

On the reverse side of the claim form, the employing establishment controverted the claim, contending that appellant's claimed injury was not work related as the injury occurred off of its premises while she was sightseeing.

OWCP, by development letter dated July 25, 2006, notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional medical and factual evidence. Appellant was also provided a questionnaire for her completion regarding the factual circumstances of her injury.

In a separate letter dated July 25, 2006, OWCP requested that the employing establishment respond to several questions regarding such matters as appellant's last performance of official duty, the location of her claimed injury relative to the place she last performed official duty, where she was traveling at the time of injury, the purpose of her trip, when and where she was expected to perform her next official duty, whether she was on the most direct route between the point of her last official duty and next expected official duty, and whether travel expenses were reimbursable.

Neither appellant, nor the employing establishment responded to OWCP's requests for additional factual information.

An Arizona State Workers' and Physicians' Report of Injury and a narrative medical report dated July 6, 2006 from Dr. Edward M. Lucero, a Board-certified orthopedic surgeon, related that, on July 1, 2006, appellant injured her right wrist when she slipped and fell at the River Walk in San Antonio, Texas while attending a convention sponsored by the employing establishment. Dr. Lucero examined her and provided an impression of closed displaced comminuted intra-articular right Colles wrist fracture due to the July 6, 2006 incident. He recommended right wrist surgery and advised that appellant was temporarily totally disabled from July 1, 2016 until further notice.

By decision dated September 14, 2006, OWCP denied appellant's traumatic injury claim, finding that she had not established that she was in the performance of duty at the time of the July 1, 2006 incident. It explained that, while she was on travel status at the time of injury, she had deviated from activities essential or reasonably incidental to her official duties as she engaged in a personal sightseeing activity on the River Walk. OWCP noted that appellant did not respond

to its factual inquiries regarding whether she was performing official duties at the time of the July 1, 2006 incident.

In a memorandum of telephone call on March 2, 2007, OWCP informed appellant that it had not received a request for an oral hearing and that she was beyond the 30-day limitation for requesting such a hearing. It advised her to request reconsideration and addressed the type of evidence she needed to submit in support of the request.

In a July 12, 2016 letter, appellant related that she went to San Antonio for a conference arranged and paid for by the employing establishment. She further related that the conference was over on July 1, 2006 and because there were approximately two hours before her shuttle ride to the airport she had lunch and saw sights behind her hotel on the River Walk. Appellant claimed that while getting on a river taxi, kids ran in front of her and she slipped on food, falling into the river and breaking her right arm, damaging muscles and nerves, hitting her head, and almost drowning. An off-duty paramedic pulled her out of the water by her hair and she was transported to a hospital by ambulance. Appellant noted that she subsequently underwent three surgeries on her dominant right arm followed by physical therapy as a result of the accident. She was also diagnosed with post-traumatic stress disorder and alleged that, after working 26 years as a registered nurse and receiving an outstanding evaluation from her supervisor, she would never be able to physically and mentally work again. Appellant indicated that she medically retired in 2008 and never returned to work. She noted OWCP's denial of her claim and that the employing establishment had advised her that an appeal of the decision was also denied. Appellant suspected that her appeal was lost or shredded and may not have reached OWCP. She sought assistance from her United States senator regarding this matter. In a response to the inquiry, the senator was informed that appellant's records were being reviewed by the employing establishment. However, on June 5, 2015 appellant was informed by the employing establishment that it had never received or reviewed her records which were sent to the U.S. Labor Department when she retired.

In a separate letter dated July 12, 2016, appellant requested a copy of her case file to determine whether an appeal had been filed in her case. By letter dated July 13, 2016, OWCP responded that no appeal request had been received. It resent a copy of its September 14, 2006 decision and advised appellant to pursue her appeal rights attached to that decision.

Appellant, through counsel, in a letter dated August 4, 2017 and received by OWCP on October 24, 2017, requested reconsideration of the September 14, 2006 decision. Counsel cited Board precedent and contended that Dr. Lucero's medical opinion established that appellant's right wrist fracture was caused by the July 6, 2006 incident. She cited additional Board precedent and contended that the evidence of record established that appellant's off-premises injury occurred in the performance of duty. Counsel further asserted that her injury occurred while she was in travel status, during her shift, and while she was engaged in an activity incidental to her employment, eating lunch at a restaurant, which fell under the personal comfort doctrine. Additionally, she maintained that appellant's injury was compensable because appellant used a water taxi on the most direct route to return to her hotel after lunch to avoid getting stuck in traffic around the River Walk. Alternatively, counsel contended that, if it was determined that sightseeing while on a water taxi to a lunch location was an actual deviation from the performance of appellant's work duties, then she still should be found in the performance duty at the time of injury as she was attempting to board a water taxi to her hotel to catch a scheduled shuttle to the airport.

In an undated letter, appellant noted that she stayed and attended the conference at the Crowne Plaza Riverwalk and Conference Center, 111 E Pecan Street in San Antonio, Texas. She related that the River Walk where her claimed injury occurred was approximately seven minutes away from the conference site. Appellant maintained that all of the scheduling for the conference trip, including airline tickets, hotel, and shuttle was handled by her employer. She indicated that the shuttle was scheduled to pick her up approximately two hours after the conference ended so that she could pack her suitcase, eat lunch, and be in the hotel lobby to take a shuttle to the airport to return home. Appellant further indicated that she did not extend her stay or change her airline ticket or shuttle departure time. She noted that after she packed her suitcase she went to the River Walk to eat lunch. Appellant then reiterated her history of injury.

Appellant submitted an invoice from the City of San Antonio Emergency Medical Service (EMS) which noted that on July 1, 2006 she was transported from 602 E Commerce Street E to Baptist Medical Center. She also submitted a document which indicated that the conference she attended was held at the Crowne Plaza Riverwalk and Conference Center from June 29 through July 1, 2006. Appellant submitted a San Antonio Cruises combined map which noted the locations of water taxi stops, landmarks, and museums and an additional map which showed that the travel time between 111 E Pecan Street and 602 W Commerce Street was seven minutes.

By decision dated November 8, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ 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).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

³ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁸ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations¹¹ and procedures¹² establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP merit decision. The most recent merit decision was OWCP's September 14, 2006 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. As OWCP did not receive appellant's reconsideration request until October 24, 2017, eleven years later and more than one year after the September 14, 2006 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹³

The Board has reviewed the record and finds that the arguments and evidence submitted in appellant's untimely request for reconsideration do not raise a substantial question as to the correctness of OWCP's last merit decision and are, therefore, insufficient to demonstrate clear evidence of error. In its September 14, 2006 decision, OWCP denied appellant's traumatic injury claim because she had failed to establish that she was in the performance of duty when she slipped and fell injuring her right wrist on July 1, 2006. It found that the factual evidence of record was insufficient to demonstrate that she sustained a right wrist injury as alleged, as she had deviated from activities essential or reasonably incidental to her official duties by engaging in a personal sightseeing activity after the conference she attended in San Antonio had ended. OWCP also found that appellant had not responded to OWCP's factual development questionnaire. The underlying issue in appellant's claim was factual in nature with respect to whether she was in the performance of duty on July 1, 2006.

On reconsideration counsel cited Board precedent and contended that appellant was in the performance of duty on July 1, 2006. Also, on reconsideration, appellant provided responses to

⁸ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹¹ 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹² *Supra* note 5 at Chapter 2.1602.4 (February 2016); see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

OWCP's request for additional factual and medical information. The only factual evidence received by OWCP regarding appellant's injury prior to the denial of her claim on September 14, 2006 was the Form CA-1 dated July 18, 2006. In OWCP's July 25, 2006 development letter, appellant was informed of the information required to establish her claim and provided a questionnaire to complete describing the factual circumstances surrounding her claimed injury. In requesting reconsideration, appellant and counsel submitted statements as to appellant's activity at the time of the eleven-year-old injury. Appellant related in her July 12, 2016 letter to OWCP that she had lunch and then saw sights behind her hotel on the River Walk, and while boarding a river taxi, she slipped and fell into the river. Counsel asserted that appellant was in the performance of duty on July 1, 2006 as her claimed right wrist injury occurred while she was in travel status, during her shift, and while she was engaged in an activity incidental to her employment which involved eating at a restaurant which fell under the personal comfort doctrine. However, counsel also noted that appellant was attempting to board a water taxi after lunch, to return to her hotel and catch a scheduled shuttle to the airport. Appellant also submitted in support of her reconsideration an EMS invoice, hotel conference information, and maps.

The Board finds that appellant did not submit sufficient evidence to demonstrate clear evidence of error in OWCP's denial of her claim. While the arguments and evidence on reconsideration attempt to address that appellant was in the performance of duty on July 1, 2006, they do not demonstrate clear evidence of error on the part of OWCP. As noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence, on its face, must be positive, precise, and explicit that the injury occurred as alleged.

At the time of the 2006 decision there was no evidence of record regarding the issue of performance of duty as appellant had not responded to OWCP's initial inquiries for additional factual and medical evidence. However, the arguments and evidence submitted by appellant on reconsideration do not manifest on their face that OWCP committed error when finding that she was not in the performance of duty on July 1, 2006.¹⁴

On appeal counsel cites Board precedent and contends that evidence submitted in support of appellant's request for reconsideration establishes clear evidence of error in OWCP's decision finding that appellant was not in the performance of duty when she sustained a right wrist condition.

The Board finds that OWCP properly denied appellant's October 24, 2017 request for reconsideration as it 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.

¹⁴ 20 C.F.R. § 10.607(a); *see also* *W.T.*, Docket No. 14-1299 (issued October 8, 2014).

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 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